No. 26-____

IN THE

Supreme Court of the United States

TREVER GUILBEAU,

Petitioner,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act exempts "bona fide executive, administrative, or professional" employees from the Act's guarantee of overtime pay for work in excess of forty hours in a week. 29 U.S.C. § 213(a)(1). To qualify for that exemption, the employee must, among other things, be paid on a "salary basis." 29 C.F.R. §§ 541.600(a), 541.602(a).

The question presented is:

Whether an employee who is guaranteed a predetermined amount of pay is exempt from overtime pay under the salary basis test, regardless of how much of the employee's total compensation for a normal workweek is calculated on a daily, hourly, or per-shift basis.

PARTIES TO THE PROCEEDING

Petitioner Trever Guilbeau was a plaintiff in the district court and appellee in the Fifth Circuit.

Respondent Schlumberger Technology Corporation was the defendant and appellant in the proceedings below. Respondent's ultimate parent company is SLB Limited, a publicly traded company (NYSE: SLB).

Christopher O'Mara is a named plaintiff and Henry Hebert (misspelled as Herbert), Jr. is an opt-in plaintiff in the district court. Both were named as appellees in the Fifth Circuit's caption, but neither has an interest in the outcome of this Petition.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Guilbeau v. Schlumberger Technology Corp.*, No. 25-50594, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 12, 2026.
- *Guilbeau v. Schlumberger Technology Corp.*, No. SA-21-cv-0142, U.S. District Court for the Western District of Texas. Judgment entered Mar. 4, 2024.

There are no other proceedings in state or federal court, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

The Fair Labor Standards Act (FLSA) generally guarantees workers overtime pay for each hour worked beyond a forty-hour workweek. The FLSA exempts from this guarantee, however, workers "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

The Secretary of Labor has issued regulations defining criteria for that exemption. One such criterion is the "salary basis" test. To qualify as being paid on a "salary basis," an employee must be paid a predetermined amount, not subject to variations in the quantity or quality of work performed, on a weekly or less frequent basis. *See* 29 C.F.R. § 541.602(a). This Court has stated that the word "salary" in the "salary basis" test carries its "standard meaning," and that it means "what ordinary people think of as a salary." *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39, 51, 55 n.5 (2023).

Alternatively, employers can pay exempt employees for their normal workweek on an hourly, daily, or per-shift basis while still satisfying the "salary basis" test, but that option is subject to strict conditions. *See* 29 C.F.R. § 541.604(b); *Helix*, 598 U.S. at 55. The employer must guarantee at least the same minimum weekly payment as the employee would receive under the main "salary basis" provision, and the guaranteed minimum must have a "reasonable relationship" to "the amount actually earned." *Id.* In other words, the "weekly guarantee" must be "roughly equivalent to the employee's usual earnings at the assigned hourly, daily, or shift rate for the employee's normal scheduled workweek." *Id.*

Those two options—§ 602(a) and § 604(b)—are the only ways for an employer to satisfy the salary basis test and avoid the need to pay overtime. *See Helix*, 598 U.S. at 56. Employers must either "pay employees a true salary" (under either provision) or "pay them overtime"; there is no alternative. *Id.* at 60. As this Court explained in *Helix*, "the whole point of the salary-basis requirement" is to take any "third option off the table." *Id.*

This case concerns one of many attempts by employers, in the wake of *Helix*, to craft just such a "third option" that avoids both the need to pay a true salary *and* the need to pay overtime.

Petitioner Trever Guilbeau worked as a directional driller providing oilfield drilling services for Schlumberger Technology Corporation. Schlumberger paid Guilbeau a fixed bi-weekly amount, plus a daily "rig day rate" for each day he worked on a rig. It is undisputed that Guilbeau's total pay was nearly six times his guaranteed pay, and that his guaranteed pay never exceeded his daily-rate pay. It is also undisputed that there was not a "reasonable relationship" between Guilbeau's overall earnings and his guaranteed earnings.

Guilbeau sued Schlumberger, alleging that it failed to pay overtime as required by the FLSA. Schlumberger argued that Guilbeau was an exempt salaried employee, even though his daily-rate pay far exceeded his guaranteed pay for a normal workweek. The district court disagreed, but the Fifth Circuit reversed, holding that Guilbeau was paid on a "salary basis" under § 602(a) because he received a "predetermined and 'guaranteed'" bi-weekly payment that was "part of [his] compensation" and "not

dependent on work quantity or quality." Pet App. 9a. Guilbeau's day-rate pay was "immaterial" to the § 602(a) analysis, the court held, because that provision requires courts to "consider *only* the 'predetermined amount' of pay a worker receives," regardless of how much he is paid on an hourly, daily, or per-shift basis for work in his normal workweek. *Id.* at 10a (emphasis added). But the court recognized an exception to that rule when the predetermined amount is calculated with reference to an hourly, daily, or per-shift rate—a situation that, the court held, renders the predetermined amount's status as a salary "illusory." *Id.* at 13a.

That holding, while consistent with a decision of the Tenth Circuit, is inconsistent with decisions of the Fourth and Sixth Circuits. It is also incorrect. This Court should grant certiorari to bring the lower courts into alignment, to clarify the proper interpretation of the "salary basis" test, and to reaffirm *Helix*'s teaching that the word "salary" in the FLSA regulations carries its ordinary meaning of regular pay for a regular week's work.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reproduced in the appendix at 1a–16a and reported at 178 F.4th 922. The Fifth Circuit's denial of the petition for rehearing and rehearing en banc is reproduced in the appendix at 184a–185a.

The district court's opinion and order denying summary judgment and adopting the magistrate judge's report and recommendation is reproduced in the appendix at 86a–141a and reported at 719 F. Supp. 3d 702. The magistrate judge's report and

recommendation is reproduced in the appendix at 142a–183a and included in the reported district court opinion at 719 F. Supp. 3d 702. The district court's opinion and order denying reconsideration is reproduced in the appendix at 57a–85a and is available at 2025 WL 1213026. The district court's opinion and order granting interlocutory appeal is reproduced in the appendix at 17a–56a and is available at 2025 WL 1559612.

JURISDICTION

The Fifth Circuit entered its judgment on June 12, 2026. Pet. App. 1a. The court of appeals denied the timely petition for rehearing and rehearing en banc on July 21, 2026. Pet. App. 184a. On October 7, 2026, Justice Alito granted an application to extend the certiorari deadline to November 18, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix at 186a–189a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The FLSA guarantees employees overtime pay at one and a half times their regular rate if they work more than forty hours in a week. *See* 29 U.S.C. § 207(a)(1). Because Congress aimed to combat "the evil of 'overwork'" for individual employees, and to promote employment throughout the economy by encouraging employers "to spread employment," *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942), "employees are not to be deprived of the

benefits of the Act," including overtime compensation, "simply because they are well paid," *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 167 (1945).

The FLSA exempts various categories of workers from its overtime promise, including professional baseball players, 29 U.S.C. § 213(a)(19), border patrol agents, *id.* § 213(a)(18), and maple-syrup processors, *id.* § 213(b)(15). This case concerns the overtime exemption for "any employee employed in a bona fide executive, administrative, or professional capacity," as those "terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." *Id.* § 213(a)(1).

From the beginning, the Department of Labor has defined the "bona fide executive" exemption with reference to an employee's compensation. In 1938, the exemption was limited to employees earning at least $30 for a workweek. 29 C.F.R. § 541.1 (1938). Since 1940, the "bona fide executive" standard has consisted of three parts: (1) a "salary basis" test, requiring a "'predetermined and fixed salary'" that "does not vary with the precise amount of time [an employee] works," (2) a "salary level" test, specifying the minimum amount of that predetermined salary—$455 per week, at the times relevant to this case—*see* 29 C.F.R. § 541.600(a) (2015); and (3) a "duties" test, "which focuses on the nature of the employee's job responsibilities." *Helix*, 598 U.S. at 45 (quoting 84 Fed. Reg. 51230 (2019)).

The salary basis and level tests apply across the board to all employees. *Id.* at 45–46. But for "highly compensated employees"—defined at the relevant times as those earning at least $100,000 a year in total annual compensation, 29 C.F.R. § 541.601—a "'more

flexible duties standard'" applies, which "leads to more exemptions," *Helix*, 598 U.S. at 46.[1]

The "main salary-basis provision," *id.*, is set out in 29 C.F.R. § 541.602 (hereafter, § 602). Subsection (a) provides:

> An employee will be considered to be paid on a salary basis … if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed.

In general, "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." *Id.* § 602(a)(1). Subsection (b) describes the exceptions to that rule, such as for absences for personal reasons and deductions for violations of safety or workplace conduct rules. And subsection (c) describes how to calculate such deductions.

Another regulation, 29 C.F.R. § 541.604 (hereafter, § 604), governs pay structures involving a "[m]inimum guarantee plus extras." Subsection (a) allows an employer to provide "additional compensation without losing the exemption or violating the salary basis requirement," so long as "the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." *Id.* § 604(a). Thus, "the exemption is not lost if

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[1] Unless otherwise noted, all regulatory citations refer to the 2015 version, which applied throughout the relevant period.

an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek." *Id.* "Such additional compensation may be paid on any basis (e.g. flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off." *Id.*

Subsection (b) provides that:

> An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek."

Employers can thus choose between two means of satisfying the "salary basis" test. First, they can pay "by the week (or longer)" under § 602(a), *Helix*, 598 U.S. at 50, and can provide additional compensation on any basis "for work beyond the normal workweek" under § 604(a). Second, "[d]aily-rate workers" (or workers paid by the hour or by shift) can qualify as "paid on a salary basis," but "only through the test set out in § 604(b)." *Helix*, 598 U.S. at 50. Those options are mutually exclusive. *Id.* at 56.

B. Factual and Procedural Background

Trever Guilbeau worked as a directional driller in the West Texas oilfields for Schlumberger from November 2017 to August 2019. Pet. App. 153a. In that capacity, he "provided oilfield drilling services" and "was generally responsible for executing non-vertical well-drilling projects." Pet. App. 144a.

Guilbeau's compensation consisted of three parts. First, Schlumberger paid Guilbeau $1,826 every two weeks.[2] Pet. App. 153a–154a. That amount did not vary with hours or days worked. Second, Guilbeau earned a "rig day rate" of $525 for each day he worked on a rig. *Id.* Guilbeau worked 12-hour shifts up to seven days a week, *id.* at 3a–4a, earning up to $4,588 per week, of which $913 was the fixed weekly rate and $3,675 was the variable day-rate, *id.* at 4a. Third, Guilbeau sometimes received bonus payments for "circumstances beyond the base work duties," such as being on standby, working with a reduced crew, or working as the lead for a crew. *Id.* at 109a. There is no dispute that those bonus payments constituted "additional compensation" within the meaning of § 604(a). *Id.* Guilbeau's day rate exceeded his guaranteed weekly rate in every week he performed work for Schlumberger. *Id.* at 159a. It is undisputed that Guilbeau's total annual compensation always

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[2] The weekly rate for the fixed portion of Guilbeau's compensation was thus $913, the precise minimum "salary level" specified in the Department of Labor's 2016 rule. *See* 81 Fed. Reg. 32391 (2016). Because enforcement of that rule was enjoined and the rule was subsequently vacated by a federal district court, the Department enforced the $455 per week salary level from the prior version of the regulations at all times relevant to this case. *See* 84 Fed. Reg. at 51230.

exceeded the "highly compensated employee" threshold, and that he satisfied the duties test for the "executive, administrative, or professional" exception. *Id.* at 6a.

Guilbeau brought this case as a putative collective action under the FLSA in the Western District of Texas, seeking to represent other directional drillers paid under the same pay structure. Pet. App. 4a. He moved for notice to other putative collective action members who worked as directional drillers, and Schlumberger moved for partial summary judgment on Guilbeau's claims, arguing that he was a salaried employee ineligible for overtime compensation as a matter of law. *Id.*

The district court denied Schlumberger's motion, concluding that "a hybrid pay structure [that] combines a weekly salary with pay calculated on a day rate for work within the normal workweek" is subject to § 604(b)'s requirement of a "reasonable relationship between the guaranteed amount and the amount actually earned." Pet. App. 102a. The court held that, to the extent such a pay structure includes "a salary component that appears to satisfy § 602(a), the appearance is a ruse—an illusion to cover up the computation of the employee's earnings computed on a daily basis." *Id.* at 123a.[3]

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[3] The district court noted the possibility that daily-rate payments for work "beyond the normal workweek," such as "working night shifts, weekends, or at a different location, etc." could fall within § 604(a)'s authorization for additional compensation and thus avoid triggering § 604(b)'s "reasonable relationship" requirement. Pet. App. 124a. But it found that the record did not demonstrate that Guilbeau's daily-rate

The district court subsequently granted Schlumberger's motion for interlocutory appeal under 28 U.S.C. § 1292(b), citing the "continuing shifting legal landscape" in this area. Pet. App. 19a.

The Fifth Circuit reversed, holding that "Guilbeau's hybrid compensation scheme fits the requirements of Section 602(a), exempting him from overtime pay." *Id.* at 9a. The Fifth Circuit reasoned that the fixed biweekly payment undisputedly "constituted 'part of [Guilbeau's] compensation,'" and that it satisfied § 602(a) because it was "predetermined and 'guaranteed,' not dependent on work quantity or quality." *Id.* The court held that "[i]t is immaterial 'whether the day-rate portion of [Guilbeau's] compensation was part of the base compensation,'" because "[u]nder the plain text of Section 602(a), we consider only the 'predetermined amount' of pay a worker receives (in other words, his salary)." *Id.* at 10a. The court found "corroborat[ion]" for this conclusion in § 604(a), because "[t]hat provision explains that '[a]n employer may provide an exempt employee with additional compensation'—such as Guilbeau's day rates—'without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." *Id.*

The court distinguished an earlier Fifth Circuit case, *Gentry v. Hamilton-Ryker IT Solutions, Inc.*, 102 F.4th 712 (5th Cir. 2024), which held that a similar pay scheme involving fixed and variable components

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compensation was not "simply compensation for the employee's base duties." *Id.*

failed the "salary basis" test. In that case, the plaintiffs were paid by the hour but were guaranteed a weekly minimum payment "equal to 8 hours of pay." *Id.* at 716. Because the fixed portion of the plaintiffs' compensation was "valued at their individual hourly rate times eight hours," the Fifth Circuit held in that case, it "was not a true salary but was illusory." *Id.* at 721. Here, the court of appeals found, the fixed portion of Guilbeau's compensation was not calculated as a multiple of an hourly or daily rate, making it a true rather than "illusory" weekly rate. Pet. App. 13a.

REASONS FOR GRANTING THE WRIT

I. The courts of appeals are divided over the FLSA's application to hybrid compensation structures.

Since this Court's decision in *Helix*, the courts of appeals have split over the proper treatment under the FLSA of compensation structures that contain a mix of fixed and variable elements. The Fifth Circuit's decision aligns with the Tenth Circuit's treatment of a materially identical pay structure, but conflicts with the position of the Sixth Circuit. The Fifth Circuit's carve-out for fixed portions of hybrid pay structures expressed as a multiple of an employee's hourly or daily rate is also irreconcilable with the Fourth Circuit's application of the salary basis test.

To start, the Tenth Circuit in *Wilson v. Schlumberger Tech. Corp.*, 80 F.4th 1170 (10th Cir. 2023), addressed a pay structure for "measurement-while-drilling" operators identical in all material respects to the structure at issue here. *Id.* at 1173. The plaintiff there received portion of his total compensation that was fixed and paid on a bi-weekly frequency, plus an hourly "rig-rate" for time spent on

a drilling rig that, in practice, constituted the majority of his earnings. *Id.* Like the Fifth Circuit here, the Tenth Circuit concluded that the employee satisfied the "salary basis" test, although it reached that conclusion through different reasoning. The Tenth Circuit's analysis focused on how § 604 applied to the plaintiff's variable pay, rather than how § 602 applied to his fixed pay: "The question then is whether § 541.604(b) applies when an employee receives *additional compensation* on an hourly, daily, or shift basis, or if the regulation only applies when an employee receives his *base compensation* on an hourly, daily, or shift basis." *Wilson*, 80 F.4th at 1176. Nonetheless, the court's bottom line was the same: § 604(b) "applies only to employees whose base compensation is computed on an hourly, daily, or shift basis." *Id.* Thus, in the Tenth Circuit as in the Fifth Circuit, an employee necessarily satisfies the "salary basis" test so long as it provides "a fixed based salary above the FLSA minimum," no matter how much of the employee's overall pay is calculated on an hourly or daily basis. *Id.*

The rule in the Sixth Circuit is emphatically to the contrary. There, "[t]o be paid on a weekly basis … an employee must be paid for a regular week's worth of work." *Pickens v. Hamilton-Ryker IT Solutions, LLC*, 133 F.4th 575, 581 (6th Cir. 2025). "[T]he fact that the payment is weekly must not be merely incidental to the payment; the week must serve as the fundamental unit around which the payment is structured." *Id.* "A weekly salary must compensate an employee 'for the general value of services performed' over the week, as opposed to merely serving as a minor auxiliary to an employee's substantial hourly or daily pay." *Id.* (quoting 69 Fed. Reg. 22122, 22177 (2004)). "It is not

enough for an employee to be guaranteed *some* fixed amount weekly, which merely makes up a small subset of his pay." *Id.* Instead, in the Sixth Circuit, "[w]hat makes a salary a salary is that it gives an employee a guarantee of his compensation for all of his regular labor over a given period." *Id.* at 582. Thus, that court concluded, "[i]f ordinary language bears ordinary meaning, a salary that does not compensate an employee for his 'regular work' is not a salary." *Id.* (quoting 9 *Oxford English Dictionary* 48 (1st ed. 1933))).

There can be no doubt that this case would have had a different result in the Sixth Circuit. It is undisputed that Guilbeau's "ratio of total pay to guaranteed pay was 5.9-to-1," Pet. App. 8a, making his so-called "salary" no more than a "minor auxiliary" to the daily rate that provided the overwhelming majority of his compensation for a normal week's work.

The Fifth Circuit's decision is also irreconcilable with a decision of the Fourth Circuit. Below, the Fifth Circuit held that a fixed weekly (or less frequent) payment satisfies § 602(a)—and therefore the employee is exempt from overtime pay if he also satisfies the salary level and duties tests—so long as the payment is not a multiple of an hourly or daily rate of pay, but that the payment becomes an "illusory" salary that "fail[s] to provide a *weekly* rate" if calculated with reference to hourly or daily pay. Pet. App. 13a. In the Fourth Circuit, however, "an hourly rate appearing on a paystub" does not automatically mean that a fixed weekly (or bi-weekly) payment is not a true salary. *Kelly v. City of Alexandria*, 163 F.4th 95, 102 (4th Cir. 2025). "Instead, the question is what role the hourly rate plays in the [plaintiffs'] pay." *Id.*

In *Kelly*, the Fourth Circuit confronted a "convoluted" pay scheme for fire chiefs involving two distinct "hourly rates" (for operational and administrative shifts), and guaranteed payments for either 80 or 106 hours every two-week pay period. *Id.* at 99, 103. Rather than focus on the "hourly rate" label, the court considered "what role the hourly rate plays in the chief's pay." *Id.* at 102. The court concluded, based on the record in that case, that "the chiefs have little in common with the hourly-, daily-, and shift-rate workers that *Helix* described." *Id.* at 102. That inquiry is not permitted under the Fifth Circuit's approach.

As these cases show, hybrid pay structures are prompting inconsistent outcomes in the courts of appeals. This Court's review is needed to resolve the conflict and bring consistency to application of the FLSA.

II. The Fifth Circuit's decision is wrong.

The Department of Labor regulations, the purposes of the FLSA, and this Court's decision in *Helix* all make clear that a weekly salary compensates an employee for a normal week of work, and that a predetermined weekly payment, even if not subject to reduction, is not a true "salary" if it is accounts for only a small portion of an employee's normal weekly earnings. The Fifth Circuit's decision to the contrary should be reversed.

Start with the regulatory text. As this Court has emphasized, "§ 602(a) embodies the standard meaning of the word 'salary,'" and "the salary-basis test just reflects what people ordinarily think being 'salaried' means." *Helix*, 598 U.S. at 51. Thus, "§ 602(a)'s demand that a salaried worker get a preset, fixed

amount 'on a weekly[] or less frequent basis' means that [a salaried worker's] paycheck reflects how many weeks—not days or hours—he has worked." *Id.* at 54. "Or, one might say that an employee is paid on 'a salary basis,' within the regulation's meaning, when he gets what ordinary people think of as a salary." *Id.* at 55 n.5.

The regulations permit an employer to satisfy the "salary basis" test with an hourly, daily, or per-shift pay structure. Nonetheless, where pay is computed on such a basis, the salary basis test applies only if two conditions are met: the employee is guaranteed a minimum weekly payment, and there is a "reasonable relationship" between the guaranteed amount and the "amount actually earned." *Id.* at 47. Only where those two conditions are satisfied does the "compensation system function[] much like a true salary—a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week." *Id.* (quoting § 604(b)).

This Court's explanation of the ordinary meaning of the word "salary," as embodied in § 602(a), leaves no doubt that Guilbeau's compensation did not qualify under the salary basis test. His paycheck for a normal week of work could "be calculated only by counting" how many days he worked "once the week is over—not, as § 602(a) requires, by ignoring that number and paying a predetermined amount." *Id.* at 51.

The Fifth Circuit went astray by focusing on the regulatory language providing that the predetermined amount can constitute "part of the employee's compensation," without considering how that amount relates to the rest of the employee's pay. *See* Pet. App. 9a. But this Court already addressed that language:

"the regulation's 'all or part' reference … makes clear that a worker can be paid on a salary basis even if he additionally gets non-salary compensation, like a bonus. But the employee still must be paid *a salary*." *Helix*, 598 U.S. at 55 n.5. The plaintiff in *Helix* "was not" paid a salary, even though his day rate was "higher than lots of salaries"—and higher than the "salary level" specified in the regulations—"because his [bi-]weekly take-home pay could be as little as $963 or as much as $13,482, depending on how many days he worked." *Id.* So too here, where Guilbeau's weekly take home pay could range from $913 to $4,588, depending on how many days he worked. Pet. App. 4a.

The broader regulatory structure confirms that, to satisfy § 602(a), a "salary" must compensate an employee for a normal workweek. As *Helix* explains, § 604(b) provides a "second route" to satisfy the "salary basis" test, based on "daily, hourly, or shift rates." 598 U.S. at 55. That section "speaks directly to when daily and hourly rates are consistent with the salary basis concept." *Id.* at 56 (cleaned up). Specifically, hourly, daily, or per-shift rates are permissible only so long as "the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily, or shift rate for the employee's normal scheduled workweek." § 604(b).

The Fifth Circuit's rule would render § 604(b) defunct, because "[i]f *any* sum paid weekly qualifies as a salary under § 602(a), § 604(b) 'would be left with no work to perform, its terms dead letters all.'" *Pickens*, 133 F.4th at 582 (quoting *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698 (2022)). The "reasonable relationship" test's "strict conditions" on counting

hourly or daily pay as a "salary" would serve no purpose. *Helix*, 598 U.S. at 56.

Section 604(a) underscores what sections 602(a) and 604(b) already make clear: The guiding light of the "salary basis" test is the guarantee of reliable weekly pay that reflects a normal week of work. That provision allows "additional compensation based on hours worked" on "any basis," but only for "work beyond the normal workweek." § 604(a). All relevant regulatory provisions thus place the "normal workweek" at centerstage, and each requires employers wishing to avoid overtime liability to guarantee pay for a full normal workweek before resorting to hourly, daily, or per-shift compensation.

Thus, as this Court explained, employers like the defendant in *Helix* (or like Schlumberger here) can "come into compliance with the salary-basis requirement … in either of two ways." *Helix*, 598 U.S. at 60. They can "add to [an employee's] per-day rate a weekly guarantee that satisfies § 604(b)'s conditions," or they can "convert [the employee's] compensation to a straight weekly salary for time he spends on the rig." *Id.* This Court "left no room for a secret third option," *Pickens*, 133 F.4th at 585, that would allow employers "*neither* to pay employees a true salary *nor* to pay them overtime," *Helix*, 598 U.S. at 60. Indeed, "the whole point of the salary-basis requirement is to take that third option off the table." *Id.*

The Fifth Circuit's approach to hybrid pay structures also risks real-world consequences that are "difficult, if not impossible, to reconcile with the FLSA's design." *Id.* at 61. Because the "salary basis" test is the same for both "highly compensated employees" like Guilbeau and lower-earning

employees in executive, administrative, or professional roles, the Fifth Circuit's approach threatens to "depriv[e] even workers at the heartland of the FLSA's protection—those making less than $100,000 annually—of overtime pay." *Id.*[4] As this Court warned in *Helix*, "nurses working on a per-day or per-shift basis," as one of "many examples," "are likely to meet the general rule's duties test; and their employers would assure them $455 per week in a heartbeat if doing so eliminated the need to pay overtime." *Id.*[5] That is precisely the kind of gamesmanship with the FLSA's rules that the Fifth Circuit's decision, which "consider[s] only the 'predetermined amount'," greenlights. Pet. App. 10a.

In short, when it comes to the regulatory text and structure, as well as the FLSA's overall purposes, "hybrid" pay structure cases like this one are on all fours with *Helix*. Or as Chief Judge Sutton put it, "[t]his case could be captioned *Helix II*." *Pickens*, 133 F.4th at 583.

Proper application of *Helix*'s guidance on the "salary basis" test's requirements would also resolve the circuit conflict over how to analyze guaranteed weekly payments calculated with reference to hourly, daily, or per-shift rates. As the Fourth Circuit recognized, the "salary basis" test should not turn on the particularities of the employer's payroll accounting system, but rather the underlying economic realities of the employer's pay structure. *See Kelly*, 163 F.4th at 102. The ultimate question is

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[4] The current amount is $107,432. *See* 29 C.F.R. § 541.601(a)(1).

[5] The current amount is $684 per week. *See* 29 C.F.R. § 541.600(a).

whether the guaranteed weekly payment constitutes a true "salary" in the ordinary meaning of that word, that is, whether it guarantees regular weekly payment for a regular week of work. With that clarification, courts need not get bogged down in side disputes about the particular variables used to calculate the amount of the guaranteed payment.

III. The question presented is important, and this case presents it cleanly.

The proper application of the FLSA's "salary basis" test is an important and recurring issue that continues to generate confusion in the lower courts. As the Fourth Circuit said just last year, when it comes to deciding whether § 602(a) or § 604(b) applies to a given pay structure, "the issue is clear as mud." *Kelly*, 163 F.4th at 101.

If allowed to stand, the Fifth Circuit's decision would allow employers to sidestep the "salary basis" test with ease, by slapping the "salary" label on the first $684 of compensation for an employee who satisfies the applicable duties test. With that sleight of hand, employees' right to overtime pay would vanish, even for those who earn as little as $36,000 per year. Employers need only take care not to pick a "salary" figure that does not expressly relate to their employees' hourly or daily rates. The FLSA, and this Court's decision in *Helix*, should not be so easily evaded.

This case is an ideal vehicle for restoring uniformity to the interpretation of the "salary basis" test. There are no factual disputes, and the only disputed legal issue is the application of the "salary basis" test.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 12, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-50594

TREVER GUILBEAU, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; CHRISTOPHER O'MARA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; HENRY HERBERT, JR.,

Plaintiffs-Appellees,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant-Appellant.

Filed June 12, 2026

OPINION

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-142

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges.*

Appendix A

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

This is a collective action case[1] about eligibility for overtime pay under the Fair Labor Standards Act ("FLSA"). The FLSA requires overtime for covered employees paid by the day, but not for salaried employees.[2] Some pay arrangements, however, have elements of both. Schlumberger gave these plaintiffs "hybrid" pay that was part salary and part day rate. This appeal turns on whether that hybrid scheme is "salary-basis" and exempt from overtime pay under the FLSA and related regulations.

We hold that Guilbeau was paid on a salary basis and hence ineligible for overtime compensation. We REVERSE and order summary judgment for Schlumberger rejecting Guilbeau's claims, and REMAND for further proceedings consistent with this opinion.

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1. A "collective action" is similar, but not identical, to a typical class action. "Traditional class actions under Federal Rule of Civil Procedure 23 . . . proceed under well-established procedural safeguards to ensure that the named plaintiffs are appropriate class representatives. But so-called 'collective actions' under the Fair Labor Standards Act proceed . . . differently." *Swales v. KLLM Transp. Servs.*, 985 F.3d 430, 433 (5th Cir. 2021). FLSA collective actions employ an "*opt-in* mechanism," while standard Rule 23 class "members are bound by the judgment or settlement unless they affirmatively *opt out*." *Id.* at 435 (emphases added).

2. 29 U.S.C. § 207(a); 29 C.F.R. §§ 541.602(a), 541.604.

Appendix A

I.

A.

The named plaintiffs were Schlumberger employees. Trever Guilbeau was a Directional Driller ("DD") who "provided oilfield drilling services to Schlumberger and was generally responsible for executing non-vertical well-drilling projects." Christopher O'Mara was a Measuring While Drilling employee ("MWD"), "an engineering position involving collecting, monitoring, and reporting data collected from various tools and sensors on directional drilling rigs regarding drilling operations."

Schlumberger paid both DDs and MWDs with a "hybrid" system whose mechanics are undisputed.[3] First, there was fixed pay. Every two weeks, Schlumberger paid Guilbeau $1,826 and O'Mara $2,538.46, amounts which did not vary with hours or days worked. Then there was variable pay. Guilbeau earned a "rig day rate" of $525 for each day he actually worked on a rig and a "standby day rate" of $262.50 for each day he waited on-site, and O'Mara earned $160 for each day he worked on a rig. Guilbeau also received other bonuses "for exemplary or extra work," like when he was "the most experienced member of a crew" or working "on a short-staffed crew." Variable pay comprised a substantial part—often a majority—of DDs' and MWDs' total compensation. For example, "Guilbeau would work for seven days straight," "would earn his 'rig day rate' for

3. The district court itself observed that "the parties identify no material factual dispute."

each of those days of work," and would consequently "earn $913.00 [salary] plus $3,675.00 (7 days * $525.00 rig day rate), totaling $4,588.00" in one week.

B.

The plaintiffs "routinely worked in excess of 40 hours per workweek" without overtime pay. Guilbeau and O'Mara sued Schlumberger under the FLSA seeking overtime pay for themselves and other DDs and MWDs "paid partially on a 'salary' basis . . . and partially on a day rate basis." The plaintiffs soon moved to issue notice to potential DD and MWD collective members, and Schlumberger moved for partial summary judgment on Guilbeau's claims, arguing he was ineligible for overtime compensation as a matter of law because he was a salaried employee.

The district court denied Schlumberger's motion for partial summary judgment. It authorized notice to the proposed DD collective but denied notice to the MWDs. Later, the district court granted Schlumberger's motion for interlocutory appeal under 28 U.S.C. § 1292(b), citing the "continuing shifting legal landscape" in this area. This appeal followed.

II.

On interlocutory appeal from the denial of summary judgment, we review de novo.[4] We also "review the district

4. *Smith v. Ochsner Health Sys.*, 956 F.3d 681, 683 (5th Cir. 2020).

court's interpretation of the applicable Labor Department regulations de novo."[5]

III.

A.

"Congress has authorized the Secretary [of Labor] to promulgate regulations exempting 'bona fide executive, administrative, [and] professional' employees from overtime."[6] "Under that authority, the Secretary has exempted 'highly compensated' as well as more modestly paid 'executive,' 'administrative,' and 'professional' employees."[7]

These exemptions have three prerequisites. "First, the employee must meet certain criteria concerning the performance of executive, administrative, and professional duties."[8] "Second, the employee must meet certain minimum income thresholds."[9] "Finally, the employee must be paid on a 'salary basis.'"[10] "Whether an employee

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5. *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289, 293 (5th Cir. 2021) (en banc), *aff'd*, 598 U.S. 39, 143 S.Ct. 677, 214 L.Ed.2d 409 (2023).

6. *Helix*, 15 F.4th at 290 (quoting 29 U.S.C. § 213(a)(1)).

7. *Id.* (citations omitted).

8. *Id.*

9. *Id.*

10. *Id.*

is within an exemption is a question of law, but how an employee spends his working time is a question of fact."[11] "The employer has the burden of proof on a claimed exemption."[12]

The parties dispute only the "highly compensated employee" ("HCE") exemption—specifically, whether Schlumberger paid Guilbeau on a salary basis.[13] The relevant regulations provide two ways to show exempt salary-basis compensation.[14] We must decide which, if any, covers Guilbeau's pay scheme.

The first path, under 29 C.F.R. § 541.602(a) ("Section 602(a)"), applies to employees whose guaranteed compensation is "paid by the week (or longer)."[15] The

11. *Smith*, 956 F.3d at 684 (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986)).

12. *Id.* (citing *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 523 (5th Cir. 1999)).

13. HCEs "(1) [are] annually compensated at least $100,000; (2) 'customarily and regularly perform[ ] . . . the exempt duties or responsibilities of an executive, administrative or professional employee'; and (3) ha[ve] within [their] primary duties the performing of office or non-manual work." *Id.* (cleaned up).

14. *See* 29 C.F.R. §§ 541.602(a), 541.604.

15. *Helix*, 598 U.S. at 50, 143 S.Ct. 677; *see* 29 C.F.R. § 541.602(a) ("An employee will be considered to be paid on a 'salary basis' within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.").

"'predetermined sum' [must be] *calculated*, not merely provided, by the week."[16] 29 C.F.R. § 541.604(a) ("Section 604(a)") adds nuance. It explains that "[a]n employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis."[17]

The second path, under 29 U.S.C. § 541.604(b) ("Section 604(b)"), "focuses on workers whose compensation is 'computed on an hourly, a daily or a shift basis,' rather than a weekly or less frequent one."[18] These employees, despite being paid per unit of time worked, are still compensated on a salary basis if "the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and

16. *Gentry v. Hamilton-Ryker IT Sols., L.L.C.*, 102 F.4th 712, 720 (5th Cir. 2024) (emphasis in original); *see also Helix*, 598 U.S. at 53, 143 S.Ct. 677 ("[A] 'basis' of payment typically refers to the unit or method for calculating pay, not the frequency of its distribution.").

17. Section 604(a) further explains that under Section 602(a), an otherwise "exempt employee . . . may also receive additional compensation of a one percent commission on sales . . . a percentage of the sales or profits of the employer . . . [or other] additional compensation based on hours worked for work beyond the normal workweek." 29 C.F.R. § 541.604(a).

18. *Helix*, 598 U.S. at 46, 143 S.Ct. 677 (quoting 29 C.F.R. § 541.604(b)).

the amount actually earned."[19] The idea is to capture "[w]hen daily and hourly rates are consistent with the salary basis concept."[20] To that end, as long as total pay does not exceed 1.5 times the amount of guaranteed pay, we have found a "reasonable relationship" between the two that is "consistent with the salary basis concept."[21]

Which pathway applies is key here. If Guilbeau's "compensation [was] 'computed on an hourly, a daily or a shift basis,' rather than a weekly or less frequent one,"[22] then Section 604(b)—and its reasonable-relationship test—would govern. Under that section, Guilbeau's pay would not be salary-basis, as his ratio of total pay to guaranteed pay was 5.9-to-1 (far beyond the "reasonable relationship" cutoff). But if Guilbeau's "'predetermined sum' [was] calculated . . . by the week" (or some longer basis),[23] then Section 602(a) would apply. That section lacks the "reasonable relationship" requirement, so

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19. 29 C.F.R. § 541.604(b).

20. *Helix*, 598 U.S. at 56, 143 S.Ct. 677.

21. *Id.*; *see Gentry*, 102 F.4th at 723-24 ("The reasonable relationship test is satisfied so long as the 'weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek.' Department of Labor opinion letters advise that a 1.5 to 1 ratio of actual earnings to a guaranteed weekly salary satisfies this test." (citations omitted)).

22. *Helix*, 598 U.S. at 46, 143 S.Ct. 677 (quoting 29 C.F.R. § 541.604(b)).

23. *Gentry*, 102 F.4th at 720 (emphasis removed).

Guilbeau's pay scheme would qualify as salary-basis, and Schlumberger would not owe overtime pay.

B.

Guilbeau's hybrid compensation scheme fits the requirements of Section 602(a), exempting him from overtime pay and entitling Schlumberger to partial summary judgment. We ground our analysis in the plain text of the regulation, supplemented by recent caselaw.

1.

We start with the text of Section 602(a). The regulation requires only that Guilbeau "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of [his] compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." There is no dispute that Guilbeau's salary fits these requirements.

Schlumberger provided Guilbeau "a biweekly lump payment [of] $1,826.00." This amount was above the then-applicable salary minimum in 29 C.F.R. § 541.600(a) and constituted "part of [Guilbeau's] compensation."[24] And the amount was predetermined and "guaranteed," not dependent on work quantity or quality. That means Guilbeau was paid on a salary basis under Section 602(a). The parties agree Guilbeau meets the other exemption requirements. Accordingly, Guilbeau is exempt from

24. 29 C.F.R. § 541.602(a).

overtime pay as a qualifying HCE, so Schlumberger is entitled to summary judgment on his claim.

It is immaterial "whether the day-rate portion of Plaintiffs' compensation was part of the base compensation." Under the plain text of Section 602(a), we consider only the "predetermined amount" of pay a worker receives (in other words, his salary). Section 604(a) corroborates this, reiterating that our lodestar is the nature of the salary, not the nature of the variable pay. That provision explains that "[a]n employer may provide an exempt employee with additional compensation"—such as Guilbeau's day rates—"without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis."[25]

2.

We and our sister circuits[26] have taken this same approach.

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25. 29 C.F.R. § 541.604(a).

26. Considering this very same pay system in *Wilson v. Schlumberger Tech. Corp.*, 80 F.4th 1170, 1176 (10th Cir. 2023), a collective action by Schlumberger MWDs, the Tenth Circuit held Schlumberger's hybrid compensation was an overtime-exempt, salary-basis scheme controlled by Section 602(a)—not Section 604(b). The Eleventh Circuit, in a case with "a guaranteed weekly salary" plus "additional incentive compensation . . . paid at a straight-time . . . rate[,]" rejected plaintiffs' argument "that they were not paid on a salary basis because the amount of their bonuses

Venable v. Smith International is illustrative.[27] As here, *Venable* presented a nigh identical "bifurcated" pay structure for oil rig workers with both "an annual salary and daily-rate" pay.[28] The salary "was paid bi-weekly and was not subject to reduction based on the quality or quantity of work performed,"[29] while the plaintiffs also received day rates "if they provided services to . . . customers on their drilling rigs." The *Venable* plaintiffs argued Section 604(b) should apply because they were daily workers.[30] We rejected that position, concluding that an employee is on a salary basis under Section 602(a) as long as his salary (1) does not depend on time worked,

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fluctuated based on the cumulative number of hours worked." *Bell v. Callaway Partners, LLC*, 394 F. App'x 632, 633-34 (11th Cir. 2010) (unpublished). That court explained that "as long as there is a non-deductible minimum, [then] additional compensation on top of the non-deductible salary is permissible" without violating the salary basis requirements. *Id.* (quoting *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004)). And the Third Circuit has held that establishing salary-basis classification "requires only that the employee receive a predetermined amount of money each pay period that is 'part of the employee's compensation[.]'" *Higgins v. Bayada Home Health Care, Inc.*, 62 F.4th 755, 761 (3d Cir. 2023) (quoting 29 C.F.R. § 541.602(a) (emphasis added by court)). "So long as the employer does not dock that pre-determined part of the employee's compensation," said the Third Circuit, then "the employer has satisfied the salary basis test." *Id.*

27. 117 F.4th 295 (5th Cir. 2024).

28. *Id.* at 298.

29. *Id.*

30. *Id.* at 299.

(2) "satisfies the requisite guaranteed minimum weekly salary requirement," and (3) is calculated on a weekly or longer "basis."[31]

Venable dictates the outcome here. Guilbeau concedes Schlumberger "guaranteed" him a salary, which exceeded the weekly minimum and was paid "on a 'salary' basis" as "a biweekly lump payment." As Guilbeau meets all the other exemption requirements, Section 602(a) applies in this case too. "[T]he additional compensation at the daily rate does not defeat [his] . . . exemption" from overtime rates.[32] We reject Guilbeau's argument that his "actual pay was based on time worked" because his day rates "represent[ed] compensation for ordinary work." *Venable* reaffirmed that the nature of the guaranteed salary pay determines salary basis classification, not the nature of the day rate or how often it is paid.[33]

Gentry v. Hamilton-Ryker IT Sols., L.L.C. is the other side of the same coin.[34] Like *Venable, Gentry* stands for

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31. *Id.* at 299-300.

32. *Id.* at 300.

33. We have embraced this logic in other recent cases, too, like *Hebert v. FMC Techs., Inc.*, No. 22-20562, 2023 WL 4105427, at *2 (5th Cir. June 21, 2023) (unpublished). The plaintiff there was an oil rig worker paid with a similar hybrid scheme. As the plaintiff "admit[ted] that he received a bi-weekly salary without regard to the number of hours or days he worked," and he met all the other exemption requirements, we held "[t]hat salary plainly satisfies the definition of 'salary basis'" in Section 602(a).

34. 102 F.4th 712 (5th Cir. 2024).

the proposition that "the 'basis' of an employee's purported *salary* determines which regulatory test governs a particular compensation scheme."[35] But given different facts, that principle led *Gentry* to a different result. The plaintiffs were paid hourly, but they received eight hours of guaranteed wages per week at their standard hourly rate. Our court held it would be "illusory" to call the eight-hour backstop a "salary" because it "failed to provide a *weekly* rate" as the regulations required.[36] As the plaintiffs' "guaranteed weekly salaries were valued at their individual hourly rate times eight hours,"[37] meaning the "'salary' was paid on an hourly basis and not by the week as § 602(a) requires,"[38] *Gentry* proceeded through Section 602(b) instead. Guilbeau's case is the opposite; Section 602(a) governs because his "predetermined sum" was "calculated . . . by the week[.]"[39]

* * *

35. *Id.* at 720 (emphasis added).

36. *Id.* at 721 (emphasis added).

37. *Id.* at 720-21 (cleaned up); *see also id.* at 716 ("During the relevant time period, both [plaintiffs] were paid on a two-tiered system. First, a 'Guaranteed Weekly Salary equal to 8 hours of pay.' The 'weekly salary' only compensated [the plaintiffs] for, at most, one eight-hour workday. Then, for any hour they worked beyond their eighth hour, Plaintiffs were paid at their hourly rates, including any hours worked over 40." (cleaned up)).

38. *Id.* at 721.

39. *Id.* at 720 (emphasis removed).

Schlumberger is entitled to summary judgment on Guilbeau's claims. The district court erred in ruling otherwise.

IV.

But Guilbeau is not the only plaintiff. The district court also authorized notice to other potential members of the DD collective, and thirty-one people opted in before the close of the notice period. Schlumberger argues that it is "entitled to summary judgment . . . as to the entire DD collective as they all share the same common traits." We disagree.

We draw from the wisdom of the district court in *Boudreaux v. Schlumberger Tech. Corp.*[40] There, on all but identical facts, the court faced certified collectives of Schlumberger DDs and MWDs that lost their named plaintiffs upon summary judgment. Noting "factual disparities" among remaining collective members that "would make it difficult, if not impossible, to coherently manage the class in a manner that will not prejudice any party, a situation that is all the more evident given that there is no representative plaintiff[,]" the district court decertified the collectives.[41]

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40. No. 6:14-cv-2267, 2022 WL 17422103 (W.D. La. Nov. 14, 2022), *report and recommendation adopted*, 2022 WL 17417265 (W.D. La. Dec. 5, 2022).

41. *Boudreaux*, 2022 WL 17422103, at *9.

Here, Schlumberger moved for partial summary judgment on Guilbeau's claims before the collective was certified. Even if Schlumberger paid the rest of the DDs with the same salary-basis hybrid structure, the record does not show whether those individuals also meet the *other* exemption criteria. As in *Boudreaux*, we do not know the other DDs' location-specific job duties,[42] what each DD's total compensation was,[43] or whether their biweekly salaries met the exempt threshold,[44] all of which bear on individual employees' exempt status.

For that reason, we pass no judgment on the other collective members in this case. Now that Guilbeau's claims will be dismissed, the continued viability of the collective—and whether Schlumberger should receive summary judgment on their claims—is a fact-bound question we return to the district court.

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42. *See id.* at *7 ("The different assignments, equipment used, and locations of the DDs would require the Court to engage in highly fact-specific analyses to determine whether [or] which exemption applies to each individual plaintiff. The job duties of the plaintiffs are not homogenous and do not lend themselves to a collective action.").

43. *See id.* ("In the instant matter [Boudreaux], [Schlumberger] has set forth significant evidence that the three exemptions at issue in this case – the administrative exemption, the executive exemption, and the HCE exemption – differ by plaintiff, and can actually change over time with respect to an individual plaintiff as that plaintiff's compensation level and duties change over time.").

44. *See id.*

V.

Finally, we decline to reach Schlumberger's contentions addressing estoppel and the collective notice process. Although we have jurisdiction over issues fairly raised by the orders on appeal,[45] the parties and the district court all presented exemption as the issue apt for immediate review. We limit ourselves to that question alone.

VI.

We REVERSE and order partial summary judgment for Schlumberger on Guilbeau's claims. We REMAND for further proceedings consistent with this opinion.

45. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 398-99 (5th Cir. 2010) (en banc).

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, FILED JUNE 2, 2025

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Case No. SA-21-CV-0142-JKP-ESC

TREVER GUILBEAU, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND CHRISTOPHER O'MARA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant.

Filed June 2, 2025

MEMORANDUM OPINION AND ORDER GRANTING INTERLOCUOTORY APPEAL

Before the Court are two motions filed by Defendant Schlumberger Technology Corporation: (1) Motion to

Certify an Interlocutory Appeal (ECF No. 146) and (2) Motion to Stay (ECF No. 147). Plaintiffs have filed a combined response (ECF No. 151) to the motions and Defendant has filed a combined reply (ECF No. 153). The Court previously granted a motion to expedite ruling on these motions. *See* ECF No. 150.

This is the second attempt by Defendant to obtain an interlocutory appeal. *See* ECF No. 102. Defendant previously sought to appeal a Memorandum Opinion and Order Accepting Report and Recommendation ("R&R") of United States Magistrate Judge (ECF No. 101). In accepting the R&R, the Court, among other things, denied Defendant's Partial Motion for Summary Judgment. *See Guilbeau v. Schlumberger Tech. Corp.*, 719 F. Supp. 3d 702, 731 (W.D. Tex. 2024), *reconsideration denied*, No. SA-21-CV-0142-JKP-ESC, 2025 WL 1213026 (W.D. Tex. Apr. 25, 2025). Defendant now seeks to appeal the Memorandum Opinion and Order (ECF No. 144) that denied reconsideration of the prior summary judgment ruling. Based upon *Venable v. Smith International, Inc.*, 117 F.4th 295 (5th Cir. 2024), Defendant moved for reconsideration of the Court's denial of summary judgment and other orders. *See Guilbeau v. Schlumberger Tech. Corp.*, No. SA-21-CV-0142-JKP-ESC, 2025 WL 1213026, at *1 (W.D. Tex. Apr. 25, 2025).

Defendant contends that *Venable* provides the definitive answer to resolve this case fully in its favor. This Court, however, declined to apply *Venable* over another intervening Fifth Circuit opinion, *Gentry v. Hamilton-Ryker IT Sols., LLC [hereinafter Gentry II]*,

102 F.4th 712 (5th Cir. 2024), which the Court viewed as "fully supportive of this Court's prior denial of summary judgment." *Guilbeau*, 2025 WL 1213026, at *5. Given both intervening decisions of the Fifth Circuit, coupled with *Gentry II* (May 24, 2024) arriving before *Venable* (September 4, 2024), the Court did not view *Venable* as definitive enough to warrant reconsideration or granting summary judgment for Defendant. *See, generally, Guilbeau*, 2025 WL 1213026, at *4–10. This does not mean that the Court lacked all concern as to how *Venable* fits with *Gentry II*. To the contrary, even with the denial of reconsideration, the Court harbored some concern that *Venable* could be construed in a manner that provides a pathway to successful summary judgment for Defendant. It considered sua sponte certifying the matter for interlocutory appeal but in the end decided that if such appeal should be forthcoming under the circumstances of this case, it should come through full briefing from both sides upon a request of Defendant—a party that has shown no hesitancy in presenting matters to the appellate court.

Predictably, Defendant has sought interlocutory appellate review. For the reasons stated herein, the Court finds that the continuing shifting legal landscape warrants granting leave for Defendant to file an interlocutory appeal. Because granting such leave is ultimately within its sound discretion, the Court will not belabor the standard for obtaining such leave. It did not reach this conclusion lightly and found encouragement in multiple principles of law. First, "[t]he propriety of interlocutory appeal may be valid even if the court is 'confident in its decision.'" *Greinstein v. Granite Servs. Int'l, Inc.*, No.

2:18-CV-208-Z-BR, 2023 WL 5167606, at *3 (N.D. Tex. June 28, 2023) (quoting *Hopkins v. Cornerstone Am.*, No. 4:05-CV-332-Y, 2007 WL 9772306 (N.D. Tex. Aug. 1, 2007)). Second, granting leave for an interlocutory appeal merely provides the appellate court with the discretionary opportunity to permit the appeal. *See* 28 U.S.C. § 1292(b). Should the Fifth Circuit decline to take up the appeal, its reasoning for declining to do so could itself be enlightening to the parties, other litigants, and the courts. Third, the Court's delineation of issues or questions for appeal do not limit the scope of appeal—the appellate court's discretion is to accept the order deemed worthy of interlocutory appeal and such discretion is not constrained by issues the district court deems worthy of early review. *See Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 398 (5th Cir. 2010) (en banc). The appellate court may consider any material issue in the certified order, even if omitted from a list of certified questions. *Id.* The issues or questions reviewed must only be material to the certified order. *Id.*

Before delving into specific issues that warrant interlocutory appeal in this case, the Court sets the backdrop for its various rulings and attempts to elucidate the reasons for its chosen path. This is not done to show whether the path is right or wrong. At the end of the day, that determination lies within the capable hands of the Fifth Circuit whether it examines the issues through interlocutory appeal now or through a later appeal at the conclusion of this case.

Appendix B

A. Background and Shifting Legal Landscape

As readily apparent from decisions of the last few years, the legal landscape has been shifting in this case nearly since Plaintiffs' initial filing in February 2021. The first monumental shift occurred in September 2021 when the Fifth Circuit issued an en banc decision, that was later affirmed by the Supreme Court in 2023. *See Hewitt v. Helix Energy Sols. Grp., Inc. [hereinafter Hewitt]*, 15 F.4th 289 (5th Cir. 2021), *aff'd*, 598 U.S. 39 (2023). The Supreme Court aptly summarized the matters leading to its affirmance:

> Hewitt filed this action under the FLSA to recover overtime pay. Helix asserted in response that Hewitt was exempt from the FLSA because he qualified as a bona fide executive. The dispute on that issue turned solely on whether Hewitt was paid on a salary basis; Hewitt conceded that his employment met the exemption's other requirements (the salary-level and duties tests). The District Court agreed with Helix's view that Hewitt was compensated on a salary basis, and accordingly granted the company summary judgment.
>
> The Court of Appeals for the Fifth Circuit, sitting en banc, reversed that judgment, deciding that Hewitt was not paid on a salary basis and therefore could claim the FLSA's protections. The 12-judge majority first held that a daily-rate employee (like Hewitt) does

> not fall within § 602(a) of the Secretary's regulations. That section, the court reasoned, covers only employees whose compensation is paid on a weekly or less frequent basis, without regard to the number of days or hours worked—the very opposite of a paid-by-the-day employee. Such daily-rate workers, the court continued, can qualify as salaried only through the special rule of § 604(b). But Hewitt's compensation did not satisfy § 604(b)'s conditions; indeed, the court noted, Helix does not even purport to have met them. The court thus concluded that Hewitt, although highly paid, was not exempt from the FLSA. Six judges dissented in two opinions. The more expansive dissent argued that Hewitt's compensation satisfied the salary basis test of § 602(a). It further concluded that § 604(b) is not applicable at all to high-income employees—i.e., those falling within the HCE rule because they earn over $100,000.
>
> We granted certiorari, and now affirm.

Helix Energy Sols. Grp., Inc. v. Hewitt [hereinafter Helix], 598 U.S. 39, 48 (2023) (citations and internal brackets and quotation marks omitted).

To the extent their reasoning transcends the facts of the case, these cases remain the most pertinent to the issues before this Court. While neither case is directly on point, this Court has found that the factual differences do "not make *Helix* distinguishable in all respects" and even

though "nothing in *Helix* . . . directly addresses the type of hybrid compensation structure at issue in this case . . . [t]hat factual distinction does not eliminate the reasoning of the Supreme Court, especially given the en banc statements of the Fifth Circuit that were under review." *Guilbeau*, 719 F. Supp. 3d at 717. The Court similarly found the *Hewitt* "reasoning transcends the particular factual differences" between this case and that one. *Id.*

Faced with an uncertain area of law, the Magistrate Judge found a Southern District of Texas case particularly persuasive. *See* R&R at 15-16 & n.3 (recommendation of Mag. J. relying on *Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 3:19-CV-00320, 2022 WL 658768 (S.D. Tex. Mar. 4, 2022) *adopted by* 2022 WL 889276 (S.D. Tex. Mar. 25, 2022)). The Magistrate Judge even recognized that an appeal in *Gentry* "could be potentially dispositive" of the issues before this Court. *Id.* at 15 n.3. Nevertheless, as of July 2023, the Magistrate Judge viewed the district court *Gentry* opinion the most persuasive of the non-binding cases before the Court.

Seventeen days after the R&R in this case, "the Fifth Circuit affirmed the judgment of the [*Gentry*] district court 'essentially for the reasons stated in the magistrate judge's thorough and exhaustive report, adopted by the district court as its opinion.'" *Guilbeau*, 719 F. Supp. 3d at 720– 21 (quoting *Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 22-40219, 2023 WL 4704115, at *1 (5th Cir. July 24, 2023) (per curiam)). In accepting the R&R in this case, this Court noted that, "had the Fifth Circuit not withdrawn that affirmance, the review of the R&R may

have been much simpler." *Id.* at 722. But when this Court accepted the R&R on de novo review, it "remain[ed] in essentially the same circumstances that existed before the Magistrate Judge," i.e., lack of a definitive appellate ruling on the *Gentry* appeal. *See id.* This Court still found the district court *Gentry* decision persuasive when it accepted the R&R in early March 2024 after an exhaustive de novo review. *See id.* In doing so, it considered various other cases that Defendant presented as supporting a contrary outcome.

The next month, the Court denied Defendant's first motion for interlocutory appeal. *See Guilbeau v. Schlumberger Tech. Corp.*, No. SA-21-CV-0142-JKP-ESC, 2024 WL 1953142, at *4 (W.D. Tex. Apr. 16, 2024) (found at ECF No. 109). It did so for several interrelated reasons. First, Plaintiffs exhibited "a better understanding of the nuances of the recommendation of the Magistrate Judge and the Court's acceptance of the recommendation." *Id.* at *2. Two, "the order sought to be certified d[id] not concern a simple or pure question of law"; instead summary judgment was denied "because Defendant had not carried its burden to show that Plaintiffs are exempt employees as a matter of law." *Id.* Three, despite its steadfast "disagreement with this Court's rulings," Defendant had "not convinced the Court to certify the order for interlocutory appeal." *Id.* Four, although Defendant presented two more recently decided nonbinding cases that it contended supported its position on the regulatory interpretation at issue in this case, the cases "provide[d] no support for granting an interlocutory appeal." *Id.* As noted at that time:

> This Court understands the complexities of the regulatory interpretation and respects that reasonable minds may differ on the proper interpretation. But as thoroughly discussed in the order accepting the recommendation of the Magistrate Judge through de novo review, this Court's interpretation does not render any regulatory language superfluous while simultaneously remaining consistent with Supreme Court and Fifth Circuit precedent.

Id. The Court also noted that, although "additional Fifth Circuit guidance on the regulatory interpretation would be helpful, multiple appeals are already pending before the Circuit that could shed valuable light on the matter. Providing another case upon which the Fifth Circuit can weigh in on the subject does not appear warranted." *Id.* At that time, the Fifth Circuit had issued neither of the appellate decisions now vying for supremacy in the context of this case.

Three days after this Court denied the first request for interlocutory appeal, the Fifth Circuit denied a petition for mandamus relief as premature. *See* ECF No. 112 (copy of judgment issued as the mandate denying mandamus). The Fifth Circuit explained that the mandamus "filings are premature and based on a misunderstanding of the district court's order." *Id.* at 2. The Circuit recognized that this Court's order required "Plaintiffs to inform the district court whether they desire to move forward with, and incur the potentially significant expense of, issuing notice, or whether they prefer to wait until [the Fifth

Circuit] decides pending cases that may directly impact the merits of the Plaintiffs' claims." *Id.* at 3.

In early May 2024, Plaintiffs notified the Court of their intent to proceed with notice. *See* ECF No. 114. This prompted the Court to return the case to the Magistrate Judge who thereafter reopened the case, authorized notice, and stayed discovery. *See* ECF No. 118. Two days after the order of the Magistrate Judge, on May 24, 2024, the Fifth Circuit issued *Gentry II*. *See* 102 F.4th 712. As previously noted, this Court has viewed that decision as "fully supportive" of the path forged in this case. *Guilbeau*, 2025 WL 1213026, at *5. At the time the Circuit decided *Gentry II* there was no *Venable* appellate decision to consider. Thus, at that time, *Gentry II*, in conjunction with the reasoning in *Hewitt* and *Helix*, still provided the most persuasive avenue for interpreting the complicated regulatory provisions and applying the law to the facts of this case, as viewed in the light most favorable to the Plaintiffs. In fact, as a published decision of the Fifth Circuit, the case was binding authority absent some basis it did not apply.

On June 5, 2024, the Fifth Circuit temporarily stayed the order of the Magistrate Judge pending further order regarding a second petition for writ of mandamus. *See* ECF No. 126 (copy of order). By unpublished order dated June 13, 2024, the Fifth Circuit denied mandamus because Defendant had established no "clear and indisputable" right to the writ. *See* ECF No. 128 at 2 (copy of order). The Fifth Circuit went on to note that "Schlumberger's petition—and, it appears, this entire case—hinges on

which of two alternative regulations applies to determine whether employees like Guilbeau are with the HCE [(highly compensated employees)] exemption." *Id.* at 3 (citing *Gentry II* as describing the two alternative routes). It identified the parties' competing arguments as whether Plaintiffs were "paid 'on a weekly, or less frequent basis' and therefore 29 C.F.R. §§ 561.602(a) and 541.604(a) apply" or whether they were "paid 'on an hourly, a daily or a shift basis" and therefore 29 C.F.R. § 541.604(b) governs." *Id.* The Fifth Circuit found that "the answer to this dispositive question is far from clear or indisputable." *Id.*

While recognizing that Defendant's "position may ultimately prove to be the correct one," the Fifth Circuit found "the dispositive question in this case is still up for debate." *Id.* (citing conflicting opinions of *Wilson v. Schlumberger Tech. Corp.*, 80 F.4th 1170, 1176 (10th Cir. 2023) and *Hebert v. FMC Techs., Inc.*, No. 22-20562, 2023 WL 4105427 (5th Cir. June 21, 2023) (unpublished opinion), *cert. denied*, 144 S. Ct. 820 (2024) on one side versus *Gentry II* on the other side). In mentioning *Gentry II*, the Fifth Circuit recognized that it was "factually dissimilar" to the *Wilson* decision. *See id.* Additionally, it noted that "the same question presented in this case is at issue in two other cases pending before our court on plenary review." *Id.* (citing *Venable* and another case). Finally, the Fifth Circuit included a cautionary footnote as to a motion to stay pending in this Court. *See id.* at 3 n.2.

This Court took appropriate recognition of the cautionary footnote when it stayed this case the same day the Fifth Circuit denied mandamus. *See Guilbeau v.*

Schlumberger Tech. Corp., No. SA-21-CV-0142-JKP-ESC, 2024 WL 4251341, at *1 (W.D. Tex. June 13, 2024) (found at ECF No. 130). This Court recognized that it had not yet considered *Gentry II* "in the context of this case," but it had "fully considered the underlying *Gentry* decision that the Circuit affirmed in all relevant respects pertinent to this case." *Id.* It further noted that, like *Gentry II*, it had "also found *Wilson* and *Hebert* distinguishable," while also distinguishing the underlying *Venable* decision to a lesser extent. *Id.* Although *Gentry II* appeared supportive of the path forged in this case, this Court proceeded prudently and cautiously by staying the case pending further order as it considered objections and the interactions of various cited cases. *See id.* This would include the predicted more definitive answer in the coming *Venable* appellate decision.

On September 4, 2024, the Fifth Circuit issued the *Venable* decision that Defendant maintains requires this Court to grant summary judgment in its favor. In October 2024, the parties filed notices that the two cases pending at the Fifth Circuit had been resolved. *See* ECF Nos. 135 and 136. Before the Court issued a written order on the matters then pending in this case, Defendant moved for reconsideration in November 2024. *See* ECF No. 137. The motion became ripe just before the New Year. *See* ECF No. 141 (reply filed December 30, 2024).

Relying on the cautionary footnote in part, Defendant argued that this case is the same as *Venable.* In denying reconsideration, this Court found:

> But Defendant reads too much into the mandamus denial. The same question does not necessarily receive the same answer under different facts or circumstances, i.e., the procedural posture of a case. And the unpublished order does not control this Court's determination as to whether the later *Venable* opinion considers the same legal question under the same or similar facts in the same procedural posture. At this point, this Court is in the best position to gauge the similarities and dissimilar-ities between this case and the now rendered *Venable* decision.

Guilbeau, 2025 WL 1213026, at *2. Although the "Circuit has now added to the body of FLSA caselaw by issuing *Venable* . . . that case does not necessarily displace" *Gentry II*, which may still provide appropriate guidance." *Id.*

B. Uncertainty in wake of *Venable*

While Defendant views *Venable* as the definitive answer in this case as suggested in the denial of the second petition for mandamus, the *Venable* decision leaves some uncertainty by not distinguishing the earlier *Gentry II* decision as it affirmed the granting of a motion for summary judgment on the facts presented in the case before it. *Gentry II* unquestionably has some factual distinctions from the case now before the Court. But its underlying principles and rationales have resonated as lights upon this Court's chosen path from the district court's decision through the Fifth Circuit affirmance.

With each shift of the legal landscape, the *Gentry* district and appellate cases remained the guiding light. However, the possibility still existed that *Venable* would enlighten the path even further—perhaps providing a definitive answer as to Defendant, because of its affiliation with the defendant in *Venable* and a pay structure that has been characterized as identical. But while this Court waited for a beacon of enlightenment as to hybrid pay structures through *Venable*, the published decision left questions as to how it applies in this case given the prior decision in *Gentry II*.

Venable includes scant details as to comparing the facts of the two cases. The *Venable* plaintiffs are reamers, who supervise drillers. 117 F.4th at 298. Plaintiffs here are the supervised drillers, which might be a factual distinction depending on their compensation schemes. The *Venable* "compensation scheme for reamers was bifurcated—an annual salary and daily-rate job bonuses." *Id.* That sounds a lot like the compensation scheme here—although here, the Court has recognized a genuine dispute of material fact as to whether Plaintiffs were paid bonuses for work beyond the normal workweek or whether the non-salary compensation was part of their base compensation calculated on a daily rate. Further, courts need more than apparent similarities between compensation plans when addressing whether an employer has carried its summary judgment burden to establish its affirmative defense that the employee plaintiffs are exempt.

If the compensation plan here is the same or substantially like the one in *Venable*, then a question left

unanswered is how *Venable* fits with *Gentry II*'s focus on the employer paying "a true weekly rate," which it defined as a rate that "compensates employees for all work performed that week." *See* 102 F.4th at 720 (second quote), 724 (first quote). Further, Defendant has contended that this case is like *Wilson*, but *Gentry II* explained that, to the extent its "interpretation is in tension with" *Wilson*, it viewed the Tenth Circuit as "overlook[ing] a key aspect of *Helix*," i.e., "whether the salary, regardless of the frequency with which it was distributed, provided a true weekly rate." *Id.* at 724 (first and second quotes), 725 (third quote). And it noted that "the Tenth Circuit's reasoning is near-identical to the dissent in *Helix*." *Id.* at 725 n.69. *Venable* neither discussed *Wilson* nor shed further light on that opinion's persuasiveness or lack thereof.

Gentry II also explained that "it is irrelevant that the guaranteed sum satisfied the salary level test if [the employer] nonetheless failed to provide payment on a salary basis." *Id.* at 721. It found such an "argument echoes the *Helix* dissent." *Id.* This argument also echoes the dissent in the en banc Fifth Circuit decision affirmed by *Helix*. *See Hewitt*, 15 F.4th at 307 (Jones, J., dissenting). In discussing the salary basis test, *Venable* similarly notes that "Plaintiffs are paid an annual salary which is not subject to reduction regardless of the number of hours or days worked and that salary more than satisfies the requisite guaranteed minimum weekly salary requirement." 117 F.4th at 299–300 (internal quotation marks omitted).

Naturally, binding majority opinions guide the lower courts. The preceding paragraphs create reasonable hesitancy for applying *Venable* as the definitive answer favoring Defendant.

C. Misstatements and Arguments of the Parties

In their response, Plaintiffs make a statement that might be misconstrued. They state that this "Court also noted that *Venable* was decided before *Gentry II* and so did not explore the issue of whether the presumed bonuses were for work within or beyond the normal workweek." *See* ECF No. 151 at 6–7. To be clear, this Court was noting that the district court decision in *Venable v. Schlumberger Ltd.*, No. 6:16-CV-00241 LEAD, 2022 WL 895447 (W.D. La. Mar. 25, 2022) was decided before *Gentry II*, not that the Fifth Circuit decided its *Venable* decision before deciding *Gentry II.* While this clarification is likely unnecessary and seems to have no impact on Plaintiffs' arguments, the Court prefers to have a clear record should this case ultimately reach an appeal.

It is also sensible for the Court to address two notable misstatements by Defendant in its current motion for leave to appeal. First, Defendant contends: "The Court determined that the Magistrate Judge's finding that Plaintiffs were paid on a day rate basis was a factual finding subject to clearly erroneous review, and the Court could not say that the conclusion was clearly erroneous." *See* ECF No. 146 at 2. It submits "that this is actually a conclusion of law subject to de novo review." *Id.* at 2 n.2.

Appendix B

As already recited in this order, the Court accepted the summary judgment R&R after conducting a de novo review. In accepting the recommendation of the Magistrate Judge, the Court clearly articulated that its review was de novo as to the recommended disposition of the dispositive summary judgment motion, whereas its review was for clear error or contrary to law for nondispositive matters. ECF No. 102 at 2–6. Because the Magistrate Judge addressed both dispositive and nondispositive matters in one filing, the undersigned's acceptance applied differing standards of review depending on the matter addressed. When considering objections to the recommendation, the Court conducted a de novo review. *See id.* at 8–9, 17, 22. It recognized that the parties' disagreement as to "whether the second component [of the hybrid pay structure] is payment as part of the employees' base compensation or whether it is for duties outside the normal workweek." *Id.* at 13. As required for purposes of summary judgment, the Court viewed the summary judgment evidence in the light most favorable to Plaintiffs and found a genuine dispute of material fact that precluded entry of summary judgment on Defendant's affirmative defense that Plaintiffs were exempt employees.

The Court described the dispute multiple times. *See id.* at 7 ("The dispute in this case is whether Defendant's pay structure includes a salary plus a bonus or a salary plus a day rate."); 7– 8 ("the parties' dispute essentially boils down to whether the day-rate component of the relevant pay structure comprises part of Plaintiffs' base compensation for work during the normal work-week. If it does, then the compensation does not qualify as additional

compensation in the form of a bonus."); 13 ("This case involves a hybrid pay structure that has an undisputed salary component along with a second component that may or may not relate to the Plaintiffs' base compensation—the parties simply disagree whether the second component is payment as part of the employees' base compensation or whether it is for duties outside the normal workweek."); 24 ("There remains a dispute as to whether the day-rate portion of Plaintiffs' compensation was part of the base compensation or constituted additional compensation within the scope of § 604(a) and thus outside the purview of § 604(b)."); 24 ("Defendant simply wants to disregard the dispute as to whether the daily rate it paid to Plaintiffs was part of the employees' base compensation and thus calculated under § 604(b) or whether it was instead additional compensation falling under § 604(a)."); 26 ("A dispute remains as to whether Defendant's relevant pay structure is a hybrid salary plus bonus, which would not invoke § 604(b), or a hybrid salary plus a daily rate used to calculate the combined base compensation for a normal workweek for Plaintiffs."). This Court has made no determination as a matter of law regarding the salary basis element of Defendant's affirmative defense. It instead has found:

> Defendant has not carried its burden to establish its affirmative defense. Viewing the facts in the light most favorable to Plaintiffs, a reasonable finder of fact could return a verdict for Plaintiffs despite the asserted affirmative defense. Defendant has not shown that it is entitled to judgment as a matter of law on

> its affirmative defense. Through the lens of summary judgment, the facts do not show that Defendant paid Plaintiffs on a salary basis as required for them to be exempt employees.

Id. at 34.

Notably, "the 'determination as to whether an employee is exempt under the [FLSA] is primarily a question of fact' typically better suited for summary judgment." *White v. U.S. Corr., LLC*, 996 F.3d 302, 310 (5th Cir. 2021). (quoting *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1224 (5th Cir. 1990)). This Court considered the exemption issue through summary judgment but found a factual dispute that precluded summary judgment in favor of Defendant.

While Defendant labels part of Plaintiffs' compensation package as a bonus, Plaintiffs provide evidence that the compensation package includes a salary plus a day rate. Although the nature of a payment for purposes of FLSA exemptions "is a question of law that relies on how a payment works in practice, rather than what it is called," *Taylor v. HD & Assocs., LLC*, 45 F.4th 833, 839 (5th Cir. 2022) (per curiam), there may be underlying questions of fact that must be determined before making a conclusion as a matter of law. And that appears to be the situation in this case. The question of fact is whether the non-salary portion of Plaintiffs' compensation package is part of the employees' base compensation subject to § 604(b) or additional compensation within the meaning of § 604(a). As framed thus far in this case, this underlying factual

dispute must be resolved before the Court can determine as a matter of law whether Plaintiffs are properly considered as exempt from the overtime pay provisions of the FLSA.

Even with the foregoing factual dispute, Defendant maintains that the facts are undisputed. *See* ECF No. 146 at 4. It contends that "Guilbeau admits receiving both a bi-weekly salary plus job bonuses that accrued for each day billable to a customer." *Id.* However, the underlying nature of these "bonuses" as labeled by Defendant appear very much in dispute.

Defendant also quarrels that this Court's analysis differs from other cases. *Id.* at 7. Analysis often differs based on the facts before a particular court. The Court has recognized and addressed each of the other cases that Defendant urges the Court to follow. It has declined to do so under the summary judgment evidence before it. While reasonable minds may certainly differ in their analysis of the complex issues presented in this case, as Plaintiffs point out, this Court has attempted to harmonize "all relevant appellate opinions," *see* ECF No. 151 at 2. Indeed, the Court has engaged an analytical framework that avoids making regulatory language superfluous and unnecessary. *See Guilbeau*, 719 F. Supp. 3d at 719–20; *Guilbeau*, 2024 WL 1953142, at *2.

For all this Court's efforts to harmonize various cases, *Venable* presents a new challenge as a published, binding opinion that Defendant contends involves an identical pay structure to the case now before this Court. Although

this Court found the case insufficient to reconsider its prior acceptance of the summary judgment denial, the case involves such a closely related issue that appellate review may materially advance the ultimate termination of this litigation.

In its reply, Defendant states the relevant question for this case as:

> The relevant question here is if an individual, who is paid a salary that complies in all respects with 29 C.F.R. § 541.602(a), can be paid additional compensation on any basis as allowed by 29 C.F.R. § 541.604(a) and the reasonable relationship test does not apply, as the Fifth Circuit held in *Venable*, or if that additional compensation must satisfy 29 C.F.R. § 541.604(b)'s reasonable relationship test if the amount of the additional pay is calculated on an hourly, daily, or shift basis (unless it is for work outside the regular workweek), as the Fifth Circuit held in *Gentry II*. This question of which decision controls is a question of law and not one of fact.

Reply at 2–3.

Notably, "any basis allowed" by § 604(a) seems to exclude additional compensation for work within the normal workweek, *see Guilbeau*, 719 F. Supp. 3d at 715–19, and *Venable* does not address that apparent exclusion even though it recognizes that "§ 604(a) expressly contemplates

hourly compensation for work beyond the normal work week," 117 F.4th at 300. *Gentry II*, on the other hand, dealt extensively with the concepts of within or beyond the normal workweek. *See* 102 F.4th at 720–23. And, while one could distinguish *Gentry II* "on grounds that it involved a predetermined sum (salary) calculated on an hourly, rather than weekly, rate, such distinction ignores the important recognition and discussion of 'beyond the normal workweek' and its requirement that 'a weekly rate compensates employees for all work performed that week.'" *See Guilbeau*, 2025 WL 1213026, at *7 (quoting *Gentry II*, 102 F.4th at 719–20). As stated previously, "*Gentry II*'s applicability appears to go well beyond circumstances where the employee's salary is calculated on an hourly, rather than weekly basis." *Id.* In any event, despite the noted factual dispute, this Court agrees that this case involves a potentially controlling issue of law depending on the interpretation of *Venable* versus *Gentry II*.

Defendant, furthermore, has adamantly argued that § 604(b) only applies when an employee is paid solely on an hourly, daily, or shift basis; otherwise, the section is simply immaterial. *See Guilbeau*, 719 F. Supp. 3d at 715 (addressing argument). Defendant has also consistently argued that § 602(a) applies when the employee is paid through a hybrid compensation structure that includes a guaranteed/preset salary (which cannot be reduced) with the opportunity to earn additional income on top of the guaranteed salary. *See id.* at 715–16 (same). In accepting the summary judgment R&R, this Court stated:

> Absent binding precedent directly on point, the Court flatly rejects Defendant's position that § 604(b) applies only when an employee's compensation consists of a day rate and a day rate only. Similarly, it rejects the notion that § 602(a) alone controls the salary basis issue of this case. This case does not involve a salary only pay structure that necessarily invokes § 602(a). Nor does it involve a day-rate pay structure that necessarily invokes § 604(b). This case involves a hybrid pay structure that has an undisputed salary component along with a second component that may or may not relate to the Plaintiffs' base compensation—the parties simply disagree whether the second component is payment as part of the employees' base compensation or whether it is for duties outside the normal workweek. And viewing the facts in the light most favorable to Plaintiffs, § 604(b) applies.

Id. Standing alone, *Venable* could support Defendant's arguments. In other words, standing alone, *Venable* could be the missing binding precedent that is directly on point.

However, because *Venable* does not stand in isolation, this Court did not view it as sufficient of itself to grant reconsideration given potential differences in the evidence presented by the respective defendants—one carrying its burden on its affirmative defense, versus Defendant here who did not. Still, this Court recognized the potential of Defendant carrying its burden through a second summary

judgment motion should Defendant present a basis for the Court granting leave for a second motion. The legal landscape has changed since the denial of summary judgment in this case. Has it changed enough to alter course is the crucial question. Although this Court may be in a better position to answer that question than the panel of the Fifth Circuit that denied the second mandamus petition, an interlocutory appeal would provide the best position for gauging the similarities and dissimilarities between this case and the now rendered *Venable* decision.

D. Interlocutory Appeal

Section 1292(b) of Title 28 of the United States Code permits a district court to certify an order for interlocutory appeal when the Court is "of the opinion that [its] order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although this Court has found that a genuine dispute of material fact precluded entry of judgment as a matter of law for Defendant, *Venable* has now presented a potential interpretation of the § 602(a) and § 604(b) dichotomy that could render the factual dispute immaterial.

If *Venable* indeed stands for the proposition that § 602(a), either alone or in conjunction with § 604(a), provides the relevant regulatory provision when a hybrid pay structure combines a weekly salary with pay calculated on a day rate for work even if that pay is for work within the normal workweek, then the factual dispute in this case

falls aside. This appears contrary to the Supreme Court's finding that § 604(b) "confirms the plain-text, weekly-rate only reading of § 602(a)." *See Guilbeau*, 719 F. Supp. 3d at 715 (quoting *Helix*, 598 U.S. at 57). It also seems to make language in § 604(a)—"beyond the normal workweek"—superfluous and unnecessary. *See id.* at 719. But these are legal issues that can be addressed on interlocutory appeal should the Fifth Circuit deem it warranted.

If *Venable* indeed stands for the proposition that § 604(b) is simply immaterial when an employer utilizes a pay structure like the one used in this case, then the factual dispute in this case does not matter. The factual dispute here concerns whether the compensation provided above the guaranteed salary qualifies as a bonus under § 604(a) or additional base compensation calculated under § 604(b).

Regardless of the timing of any future appeal, this Court is confident that the Fifth Circuit will shed valuable light on the difficult issues of this case, including whether this Court is right or wrong on its focus on the regulatory language appearing to require that additional compensation be for work "beyond the normal workweek." But at this point, the Court finds all requirements of 28 U.S.C. § 1292(b) satisfied. While a factual dispute appears to exist, this case still involves a controlling question of law presented through *Venable*'s potential interpretation of the relevant regulations. One could interpret *Venable* in a way that renders the factual dispute immaterial. Further, although hotly disputed by the parties, given the numerous decisions in this case, as well as the

shifting legal landscape, there is a substantial ground for difference of opinion. This Court has strived to weave an interpretive path of the regulations in a manner that holds true to their text while not rendering text as superfluous. In this complicated area, reasonable minds may differ on the proper interpretation.

An immediate appeal, furthermore, will materially advance the ultimate termination of this litigation. If, on interlocutory appeal, the Fifth Circuit agrees that *Gentry II* provides the proper path despite its own factual differences from this case, then the parties can proceed with full understanding of the legal implications of such agreement. As stated by a sister court:

> Furthermore, although an order affirming this Court's decision would not terminate the litigation, it would provide certainty to the parties. The parties would be proceeding with phase two of this litigation knowing for certain that Plaintiffs' [ex-empt] status . . . is the law of this case. That undoubtedly would assist in the resolution of the remainder of issues in this case and may assist in settlement negotiations between the parties.

Hopkins v. Cornerstone Am., No. 4:05-CV-332-Y, 2007 WL 9772306, at *3 (N.D. Tex. Aug. 1, 2007)). And should the Fifth Circuit interpret *Venable* as providing a non-distinguishable definitive path to grant summary judgment for Defendant, then this case will be effectively over.

Defendant asks the Court to certify its order denying reconsideration for interlocutory appeal. While an appeal of that order might provide the needed clarity, appealing a denial of reconsideration differs from a denial of summary judgment. To provide the Fifth Circuit the opportunity to provide the most comprehensive clarification of the legal issues in this case, the Court hereby certifies both orders (ECF Nos. 101 and 144) for interlocutory appeal. While that certification satisfies § 1292(b), the Court will later identify specific legal questions that it views as proper for review on interlocutory appeal—knowing full-well that the Fifth Circuit is not constrained by any certified question.

E. Stay

Defendant also moves for a stay of this case pending the interlocutory appeal. While the district courts may certify an order for interlocutory appeal under § 1292(b), the statute also specifically provides: "That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." One manifest purpose of § 1292(b) is "to assist in the speedy conclusion of litigation." *Hopkins*, 2007 WL 9772306, at *6. While in general, "allowing for the piecemeal appeal of each and every interlocutory order from a trial court would be counter-productive to that goal," the statute "recognizes that in certain exceptional circumstances allowing an appeal from an interlocutory order will promote the speedy resolution of a case." *Id.* In essence, the statute has an apparent "bias against staying a case pending an interlocutory appeal, and a court should only stay a case

while an interlocutory appeal is being taken in limited and exceptional circumstances." *Id.*

Courts "consider four factors in deciding whether to grant a stay pending appeal." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (listing four factors identified in *Nken v. Holder*, 556 U.S. 418, 425–26 (2009)). The Supreme Court identified four factors as "the 'traditional' standard for a stay" and held that they "govern a request for a stay pending judicial review." *Nken*, 556 U.S. at 425–26. The traditional four factors are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 426. Courts have applied these factors in the context of staying a case pending an interlocutory appeal under § 1292(b). *See, e.g., Hunt, Gather LLC v. Andreasik*, No. 1:23-CV-627-RP, 2023 WL 4853400, at *6 (W.D. Tex. July 27, 2023). Both parties rely on these four factors in this case. *See* ECF No. 147 at 7; ECF No. 151 at 8-9.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433. "Whether to grant a stay is committed to [the Court's] discretion." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020). And courts recognize that "[t]he

first two factors are the most critical." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 228 (5th Cir. 2020) (quoting *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (per curiam)). "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

Defendant seeks a stay to avoid providing a list of putative collective action members and the issuance of notice. *See* ECF No. 147 at 1. It compares providing such a list to be the same as "the cat is out of the bag" and "cannot be placed back in it." *Id.* It argues that in such scenarios, courts issue stays pending the outcome of review. *Id.* at 1 & n.1 (citing cases involving privileged documents, a deposition transcript, and production of documents). None of its cited cases involve the FLSA or § 1292(b). Furthermore, production of privileged documents or work product differs materially from the circumstances here. Permitting notice to move forward is not a case of letting the cat out of the bag.

Defendant again broadly characterizes the issue of notice as violative of *Swales v. KLLM Transport Servs., LLC*, 985 F.3d 430 (5th Cir. 2021). But this Court again disagrees. *See Guilbeau v. Schlumberger Tech. Corp.*, No. SA-21-CV-0142-JKP-ESC, 2024 WL 1953142, at *3 (W.D. Tex. Apr. 16, 2024) (rejecting Defendant's argument based on *Swales*). The Court has already determined that putative members of the collective action are similarly situated. Following *Swales*, the Court "rigorously scrutinize[d] the realm of 'similarly situated' workers," and did "so from the outset of the case, not after a lenient,

step-one 'conditional certification.'" *See Swales*, 985 F.3d at 434 (imposing that early role of the district courts). As recognized in *Swales*, such procedure provides the district courts the basis "to determine whether the requested opt-in notice will go to those who are actually similar to the named plaintiffs." *Id.* Although "[t]hese bedrock rules . . . define and delimit the district court's discretion," *see id.*, this Court followed *Swales* and permitted certain similarly situated individuals to proceed as a collective action. It did so while "avoid[ing] endorsing the merits of the case." *See id.* at 440. And it retained its judicial neutrality in doing so. *See id.* at 436.

Finding that the employer defendant has not carried its burden on its affirmative defense does not endorse the merits of the case. It merely shows that the employer is not entitled to summary judgment. This case does not present a situation where the court appears to endorse the merits of the litigation by means of facilitating notice. The Court has not broadly defined the collective action to include workers who are not similarly situated to the named Plaintiffs in that some may not be potential participants in the defined collective action. Both the named Plaintiffs and the putative members of the collective action stand or fall on the same basis. That "notice can only go to potential participants," *see id.* at 441 (citation and internal quotation marks omitted), is not violated when all members of the collective action, both named Plaintiffs and putative members, may be merely potential participants in that an affirmative defense may at some future time preclude the collective action as a whole from having a viable claim. The Court did not refuse to consider evidence regarding

Defendant's affirmative defense—Defendant simply did not carry its burden. This is not a case where "alerting those who cannot ultimately participate in the collective merely stirs up litigation." *See id.* This is so, because all noticed putative members can participate in the collective but their participation, like those of the named Plaintiffs and every putative member, may be contingent on surviving the employer's affirmative defense. This is not a case where the Court ignored any evidence of an asserted threshold matter. *Swales* stated the distinction succinctly:

> Considering, early in the case, whether merits questions can be answered collectively has nothing to do with endorsing the merits. Rather, addressing these issues from the outset aids the district court in deciding whether notice is necessary. And it ensures that any notice sent is proper in scope—that is, sent only to potential plaintiffs. When a district court ignores that it can decide merits issues when considering the scope of a collective, it ignores the "similarly situated" analysis and is likely to send notice to employees who are not potential plaintiffs. In that circumstance, the district court risks crossing the line from using notice as a case-management tool to using notice as a claims-solicitation tool.

985 F.3d at 442. In the context here, the putative members' similar situations may ultimately mean that collectively they have no claim for overtime as exempt employees

or that they collectively have a claim for overtime pay because Defendant improperly classified them as exempt employees.

Even if the Fifth Circuit ultimately agrees with Defendant as to the legal interpretations of the relevant regulatory provisions, Defendant has not shown that it will be prejudiced by the issuance of notice. It essentially argues prejudice because it believes the interlocutory appeal will terminate this case and it is a waste of time and money to continue with the case in the interim.

> That's a risk, however, inherent in any litigation. The district courts are routinely called upon to issue rulings on motions that involve questions of law that could result in the setting aside of a judgment if reversed on appeal. The fact that the court of appeals may reverse this Court is not a sufficient reason to delay the litigation of this case under section 1292(b).

Hopkins, 2007 WL 9772306, at *6. Continued litigation of this case merely places Defendant in the same position it would be in without an interlocutory appeal. It has not shown that it would be irreparably injured without a stay. If either side is prejudiced by the stay, Plaintiffs have the better argument that they would suffer greater harm by a stay. Whether such harm rises to the level of substantial injury is unclear. But Defendant "is willing to continue to toll the statute of limitations for any putative collective action plaintiffs during the pendency of any additional stay the Court would impose." ECF No. 147 at 12–13.

This willingness eliminates some, but not all, potential prejudice to Plaintiffs.

Defendant argues that the public interests support a stay. It premises the argument on maintaining "judicial neutrality" as it relates to issuing notice to putative collective action members and avoidance of "stirring up litigation," as mentioned in *Swales.* The Court is not swayed by these arguments for the reasons already stated. Plaintiffs, on the other hand, argue that allowing the case to proceed promotes the public interest in prompt resolution of civil cases. Given the substantial delays and stays to date, the Court might find that the public interests lie with denying another stay. The public interests otherwise appear neutral as to staying this case pending interlocutory appeal.

With prejudice and public interests perhaps slightly favoring Plaintiffs' position, the balance of the four factors depends on the strength of Defendant's showing that it is likely to succeed on the merits. As this is one of the two most critical factors, this factor could be the tipping point for granting or denying a stay. If *Venable* is interpreted as Defendant interprets it, then Defendant's appeal has a stronger likelihood of success. Prejudice to Defendant, furthermore, is greater the more likely it is that Defendant will succeed on the merits, albeit still not reaching a level of irreparable injury. At this point, it is difficult for the Court to say that Defendant has made a strong showing that it will likely succeed on its appeal. The Court sees the potential in Defendant's argument while also seeing a path fully supported by *Gentry II.* If *Venable* were

the only intervening Fifth Circuit case, the likelihood of success would be increased. But *Gentry II* also arrived on the scene, and it arrived before *Venable.* While there is possible success on the merits, the balance of factors does not tilt in favor of a stay. Of course, the Fifth Circuit may view the prospects for success on appeal more favorably to Defendant and such a difference could tilt the balance in favor of staying this case. Moreover, § 1292(b) specifically recognizes that a stay may be entered by the Fifth Circuit. That might be the better avenue under these circumstances.

The Court also finds the following matters relevant to whether to stay this action entirely pending the interlocutory appeal. Plaintiffs filed this case more than four years ago. They are about to embark on sending notice for this collective action. The Magistrate Judge has already informed the parties that the Court will "wait until after the close of the opt-in period to enter a scheduling order" to control the remainder of this case. *See* ECF No. 152 at 1. Defendant has a June 9, 2025 deadline to disclose contact information for putative collective action members. *See id.* at 2. The only other current deadline concerning Defendant is one set for October 6, 2025, where the parties jointly need to file proposed scheduling recommendations, including deadlines for experts, discovery, dispositive motions, and mediation. *See id.* at 3. Further, as recognized in *Hopkins*:

> While a reversal of this Court's [denial of summary judgment] would eliminate the vast bulk of the litigation in this case, a stay

> would operate to delay the termination of this litigation if the Court's order is affirmed. An interlocutory appeal will take some time to complete, and while that appeal is pending, the parties could continue to prepare and litigate this case in light of the Court's order. Should the court of appeals affirm this Court, valuable time would not have been wasted while awaiting a decision from that court. Although it would seem that resources would have been wasted should the court of appeals reverse, as mentioned above, that's a risk inherent in all litigation and not a reason to stay this case.

2007 WL 9772306, at *7. This Court also recognizes that potential conflict between *Venable* and *Gentry II* may necessitate en banc review to fully address and clarify the interpretation of the relevant regulations.

At this point, the Court sees no reason why the parties cannot continue to litigate this case at least through the end of September 2025. Defendant should already have the list of putative collective action members and their contact information. Providing such information to Plaintiffs for the issuance of notice does not constitute irreparable injury. Plaintiffs bear the cost of notice and oppose the current requested stay even though there may be some possibility of reversal on interlocutory appeal. The Court is open to revisiting the issue of a stay should the parties jointly agree that a stay is warranted. Defendant is of course able to seek a stay directly through the court of appeals. If the Fifth Circuit issues a stay, then there will

be no need to revisit the matter. And if the Fifth Circuit denies a requested stay, such denial would be pertinent to any attempt to revisit the matter in this Court.

F. Conclusion

For these reasons, the Court **GRANTS** the Motion to Certify an Interlocutory Appeal (ECF No. 146) but **DENIES** the Motion to Stay (ECF No. 147) without prejudice to Defendant filing a similar motion with the Fifth Circuit or later in this case. The Magistrate Judge's recent order (ECF No. 152) setting various deadlines starting with the June 9, 2025 deadline for disclosure of information of putative collective action members continues to control this case unless modified by further order of the Court.

As previously stated, the Court certifies both orders (ECF Nos. 101 and 144) for interlocutory appeal. As phrased by Defendant, the pertinent question is

> whether, under the applicable federal regulations, a pay practice that is comprised of a salary that meets the minimum compensation and frequency requirements of 29 C.F.R. § 541.602(a), that does not vary based on the quantity or quality of work, and in addition to which the employee receives additional compensation in the form of a bonus that accrues when he/she worked at a customer's location and was charged to a customer (in other words, revenue generating), satisfies the

> white collar salary exemption test pursuant to 29 C.F.R. §§ 541.602(a) and 604(a) or whether that practice must satisfy the reasonable relationship test of 29 C.F.R. § 541.604(b).

ECF No. 146 at 11. Restated, Defendant states: "The legal question is whether or not the reasonable relationship test applies to a compensation practice that includes a true salary plus additional compensation." *Id.* As already discussed, however, these characterizations ignore potentially important elements discussed at length in *Gentry II*. The Court, therefore, views the following interrelated legal questions as proper for review on interlocutory appeal:

> (1) Does an employer pay a true salary if the salary does not constitute a true weekly rate, defined by *Gentry II* as a rate that compensates employees for all work performed that week?
>
> (2) Does compensation qualify as additional compensation within the meaning of 29 C.F.R. § 561.604(a) when it is for work within the normal workweek?
>
> (3) If the compensation identified in question 2 does not qualify as additional compensation, does 29 C.F.R. § 561.604(b) control the salary basis issue in this case?
>
> (4) Is § 604(b) only applicable to employees paid solely on an hourly, daily, or shift basis?

In other words, is § 604(b) limited only to circumstances when all earnings of an employee are computed on an hourly, daily, or shift basis? If so, how does that fit with the "weekly-rate-only reading of § 602(a) espoused in *Helix*?

(5) Does 29 C.F.R. § 561.602(a) alone control the salary basis issue in this case?

(5) Because there is no overlap between § 602(a) and § 604(b), as held in *Helix*, does § 604(b) provide the regulatory path for determining salary basis when a hybrid pay structure combines a weekly salary with pay calculated on a day rate for work within the normal workweek?

(6) Assuming that the compensation plan in this case is the same or substantially like the one in *Venable*, then how does *Venable* fit with *Gentry II*'s focus on the employer paying a true weekly rate, as defined above.

(7) Does *Venable* or *Gentry II* govern this case?

(8) Did this Court err in denying reconsideration?

(9) Did this Court err in denying summary judgment?

(10) Were Plaintiffs paid on a salary basis in this case?

(11) Is the distinction between *Venable* and *Gentry II* crystalized in the fact that the salary component in *Gentry II* was exactly equal to eight hours of pay followed by hourly pay for all additional hours? If that distinction is adequate to distinguish *Gentry II*, is its analysis of beyond and within a normal workweek immaterial to this case?

(12) Why would *Gentry II*'s focus on employers paying a true weekly rate not apply in this case?

(13) Does an employer fail § 604(a) when additional monetary compensation is for work in the normal workweek; thus, requiring consideration of § 604(b) and its reasonable relationship test?

(14) Is the dispositive question in this case (a) whether Defendant paid Plaintiffs "on a weekly, or less frequent basis," thus making 29 C.F.R. §§ 561.602(a) and 541.604(a) controlling or (b) whether Defendant paid them on an hourly, daily, or shift basis, thus making 29 C.F.R. § 541.604(b) controlling?

(15) As a matter of law, does it matter that the hybrid pay structure in this case consists of an undisputed salary component along with

a second component that may or may not relate to the Plaintiffs' base compensation?

As already mentioned, listing these potentially pertinent legal questions does not constrain the Fifth Circuit should it accept the interlocutory appeal. The Court lists them to provide various matters that may need additional clarification on appeal.

IT IS SO ORDERED this 2nd day of June 2025.

/s/ Jason Pulliam
Jason Pulliam
United States District Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, FILED APRIL 25, 2025

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Case No. SA-21-CV-0142-JKP-ESC

TREVER GUILBEAU, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant.

Filed April 25, 2025

MEMORANDUM OPINION AND ORDER

Before the Court are two related matters. First, the Court has under consideration Defendant's Objections (ECF No. 120), Plaintiffs' response to the objections (ECF No. 127), and filings related to potentially relevant caselaw (ECF Nos. 119, 135-36). Second, the Court

considers Defendant's Motion to Lift Stay and Motion for Reconsideration (ECF No. 137), Plaintiffs' response to those motions (ECF No. 140), Defendant's reply (ECF No. 141), a recently filed notice (ECF No. 142) regarding another potentially relevant case decision, and Defendant's response (ECF No. 143) to the latest notice. There is substantial overlap between the formal motion briefing and the prior filings. Given the matters presented, the Court first considers the formal motions by Defendant before addressing the objections to the non-dispositive ruling of the Magistrate Judge.

I. MOTION TO LIFT STAY

Plaintiffs do not oppose the motion to lift the stay. *See* ECF No. 140 at 1. The Court agrees that there is no reason to retain the stay and thus grants the motion to lift stay.

II. MOTION FOR RECONSIDERATION

Defendant Schlumberger Technology Corporation ("STC") asks the Court to reconsider its Memorandum Opinion and Order Accepting the Report and Recommendation of United States Magistrate Judge (ECF No. 101). In light of *Venable v. Smith International, Inc.*, 117 F.4th 295 (5th Cir. 2024), it contends that the Court should reconsider its prior summary judgment ruling as well as the decision to allow this case to proceed as a collective action. ECF No. 137 at 2. Stated succinctly in its reply, Defendant asserts: "Reconsideration of the Court's prior orders is warranted, and the Court should withdraw its previous orders, grant STC's Motion for

Partial summary judgment, and deny Plaintiffs' Motion for Notice under *Swales*." ECF No. 141 at 2. Plaintiffs unsurprisingly disagree with any reconsideration. *See* ECF No. 140.

A. Applicable Reconsideration Standard

Defendant invokes Fed. R. Civ. P. 54(b), which applies when a party seeks reconsideration of an interlocutory order. *See McClendon v. United States*, 892 F.3d 775, 781 (5th Cir. 2018) (recognizing the applicability of Rule 54(b)); *Austin v. Kroger Tex., LP*, 864 F.3d 326, 336 (5th Cir. 2017) (per curiam) (clarifying relationship between Rule 54(b) and 59(e)).

Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all of the claims." Through "Rule 54(b), the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Austin*, 864 F.3d at 336 (citation and internal quotation marks omitted). Applying "the more flexible Rule 54(b)" standard, provides broader discretion for the courts to reconsider their interlocutory orders. *Id.* at 337. The more flexible approach reflects the "inherent power" of the "court to afford such relief from interlocutory judgments as justice requires." *Id.* (quoting *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015)).

So long as courts "recognize that they have the discretion to grant reconsideration even in the absence of any such showing," the flexible approach permits them to "require a showing of one of the following factors to justify reconsideration: an intervening change in law; availability of previously unavailable new evidence; or a need to correct a clear legal error or to prevent manifest injustice." *S.L.V. v. Rosen*, No. SA-21-CV-0017-JKP, 2021 WL 243442, at *5 (W.D. Tex. Jan. 25, 2021) (second quote from *Gonzalez ex rel. E.G. v. Bond*, No. 1:16-CV-0068-BL, 2017 WL 3493124, at *7 (N.D. Tex. June 29, 2017) (recommendation of Mag. J.) *adopted by* 2017 WL 3491853 (N.D. Tex. Aug. 14, 2017)). In many circumstances, the absence of such showing would exhibit no injustice to denying reconsideration. But in all cases, the critical consideration for reconsidering an interlocutory order under Rule 54(b) is whether justice requires relief from such order. *See Austin*, 864 F.3d at 337.

B. Mandamus Petition

Given a cautionary footnote when the Fifth Circuit denied Defendant's mandamus petition, *see In re Schlumberger Tech. Corp.*, No. 24-50446, unpub. ord. at 5 n.2 (5th Cir. June 13, 2024) (found at ECF No. 128), the Court stayed this action pending further order of the Court as it considered Defendant's objections and the interactions of various cited cases. Defendant relies on that mandamus denial for arguing that *Venable* is dispositive of the matters in this case. ECF No. 137 at 2 (noting that the Fifth Circuit had stated that "the same question presented in this case is at issue in two other

cases pending before our court on plenary review—No. 22-30227, *Venable v. Smith International, Inc.* and No. 22-30819, *Boudreaux v. Schlumberger Technology Corp.*" and that "the question at issue here is already being considered by other panels of this court"). Defendant later stresses that "the issue in *Venable* is 'the same question presented in this case.'" *Id.* at 8.

But Defendant reads too much into the mandamus denial. The same question does not necessarily receive the same answer under different facts or circumstances, i.e., the procedural posture of a case. And the unpublished order does not control this Court's determination as to whether the later *Venable* opinion considers the same legal question under the same or similar facts in the same procedural posture. At this point, this Court is in the best position to gauge the similarities and dissimilarities between this case and the now rendered *Venable* decision.

When ruling on the then pending motion to stay, this Court, as suggested by the mandamus panel, took note of the "two impending decisions" of the Fifth Circuit while also "giv[ing] close consideration to [the] published *Gentry* decision—including the key 'factual[ ] dissmilarit[ities]" that distinguished the compensation scheme at issue in that case from the schemes at issue in *Wilson* and *Hebert*." *See In re Schlumberger Tech. Corp.*, unpub. ord. at 5 n.2. The Fifth Circuit has now added to the body of FLSA caselaw by issuing *Venable.* However, that case does not necessarily displace the published *Gentry* decision (*Gentry II*). The latter decision may still provide appropriate guidance as will be discussed in more detail.

Appendix C

C. *Venable* and *Gentry II*

In response to Plaintiff's notice (ECF No. 135) that the Fifth Circuit dismissed the *Boudreaux* appeal for lack of jurisdiction, Defendant informed the Court of the Fifth Circuit's published *Venable* decision. *See* ECF No. 136 at 1–1. It therein submitted that *Venable* is the "definitive ruling on the pay practice at issue in this case." *Id.* at 1–2. It submitted that "[t]he compensation structure for the plaintiffs in *Venable* is the same as STC's compensation for the Plaintiffs in this action" and "[t]he issues in *Venable* are identical to this case." *Id.* at 2. It argued that *Venable* "clearly calls for dismissal of Plaintiffs' claims based solely on the reasonable relationship test." *Id.* Through its motion to reconsider, it makes the same or similar arguments. *See* ECF No. 137 at 2, 7–11.

This is not the first time that Defendant has perceived a definitive ruling that it contends dictates a result here. And the Court again does not see the same clarity as Defendant. Sure, all things being the same, *Venable* could be definitive authority for the same result here. And as an affiliated entity to the defendant in *Venable, see* ECF No. 141 at 1, Defendant may be in an advantageous position to gauge the similarities of the two entities and perhaps the cases themselves. But, as explained later, there are material differences between the facts presented in this case and those presumably presented in *Venable* to secure the granting of the motion for summary judgment in that case. Whether those differences actually exist is a matter to be determined through trial, or a second motion for summary judgment if Defendant can make a

proper showing that such a motion is warranted. Before identifying material differences, however, it appears prudent to first reflect upon what has occurred in this case and how the new cases may apply.

The Fifth Circuit did not decide *Venable* in a vacuum. As this Court previously discussed, many recent cases provide insights into the issues before it. *See Guilbeau v. Schlumberger Tech. Corp.*, 719 F. Supp. 3d 702, 713–22 (W.D. Tex. 2024) (discussing, *inter alia, Helix Energy Sols. Grp., Inc. v. Hewitt [hereinafter Helix]*, 598 U.S. 39 (2023); *Hewitt v. Helix Energy Sols. Grp., Inc. [hereinafter Hewitt]*, 15 F.4th 289 (5th Cir. 2021), *aff'd*, 598 U.S. 39 (2023); *Hebert v. FMC Techs., Inc.*, No. 22-20562, 2023 WL 4105427 (5th Cir. June 21, 2023) (unpublished opinion), *cert. denied*, 144 S. Ct. 820 (2024); *Gentry v. Hamilton-Ryker IT Sols., LLC [hereinafter Gentry I]*, No. 3:19-CV-00320, 2022 WL 658768 (S.D. Tex. Mar. 4, 2022) (recommendation of Mag. J.) *adopted by* 2022 WL 889276 (S.D. Tex. Mar. 25, 2022), *aff'd*, No. 22-40219, 2023 WL 4704115 (5th Cir. July 24, 2023), *reh'g granted, op. withdrawn*, 95 F.4th 219 (5th Cir. 2024), and *aff'd in part, vacated in part, remanded*, 102 F.4th 712 (5th Cir. 2024)). The interplay of 29 C.F.R. §§ 541.602(a), 541.604(a), and 541.604(b) also play a major role in resolving the issues in this case. *See id.* at 714–19. The Court's prior de novo review "reveal[ed] a complex issue with no definitive answer based upon binding precedent alone." *See id.* at 713.

At that time, despite Defendant's insistence that the Magistrate Judge had clearly erred in various respects

regarding Defendant's motion for summary judgment, the Court reached a contrary conclusion on its review and acceptance of the recommendation. After setting out applicable legal principles from *Helix* and *Hewitt*, the Court declined to follow the underlying *Venable* district court decision and a similar decision out of the same district court, because "the Court's de novo review support[ed] an analytical framework that does not follow the results in the non-binding decisions of the Western District of Louisiana." *Id.* at 718 (not following *Venable v. Schlumberger Ltd.*, No. 6:16-CV-00241 LEAD, 2022 WL 895447 (W.D. La. Mar. 25, 2022) and *Boudreaux v. Schlumberger Tech. Corp.*, No. 6:14-cv-02267, 2022 WL 992670 (W.D. La. Mar. 30, 2022)). It then distinguished *Hebert*, before analyzing and finding *Gentry I* "persuasive and supported by this Court's own interpretation of both *Helix* and *Hewitt*." *Id.* at 719–21. And it stated: "If the Fifth Circuit issues a binding decision to the contrary, the Court may of course revisit this matter upon proper motion raising the new opinion." *Id.* at 721. The Court did not lightly decide to follow *Gentry I*.

Before finalizing its acceptance of the Magistrate Judge's recommendation, the Court also addressed and distinguished a case not presented to the Magistrate Judge, *Wilson v. Schlumberger Tech. Corp.*, 80 F.4th 1170 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 2630 (2024). *See id.* at 722–23. It found the instant case "more similar to *Gentry* than to *Hebert*," and found it difficult "to say that the logic of *Wilson* or *Hebert* bears on this case." *Id.* at 723.

With this background in mind, the Court now turns to whether either *Venable* or *Gentry v. Hamilton-Ryker IT Sols., LLC [hereinafter Gentry II]*, 102 F.4th 712 (5th Cir. 2024) provides a binding definitive answer to the issues before the Court. Defendant contends that *Venable* provides that answer. Of course, to the extent applicable, Supreme Court decisions, such as *Helix*, and the en banc decision of *Hewitt* remain the most precedential. Panel decisions such as *Venable* and *Gentry II* simply cannot override applicable Supreme Court or en banc precedents. Through *Gentry II*, the Fifth Circuit affirmed *Gentry I* in all material respects as it relates to this case. *See* 102 F.4th at 717–25. The features that this Court found persuasive are now binding to the extent the case is not distinguishable. The appellate *Venable* decision is likewise binding to the extent it applies. Because this Court viewed *Gentry I* as persuasive while distinguishing the underlying *Venable* decision, the question is now whether the new appellate decisions alter that view.

An intervening change in law may provide a basis for courts to reconsider prior rulings. Whether *Venable* or any other recent Fifth Circuit opinion qualifies as such an intervening change is properly considered on Defendant's motion to reconsider. But reconsideration is not a given outcome for changed appellate decisions. *See Richardson v. NES Glob., LLC*, No. CV H-20-223, 2024 WL 3852258, at *3 (S.D. Tex. Aug. 16, 2024) (denying reconsideration urged due to the withdrawal of the earlier *Gentry* opinion among other reasons).

Here, through its objections and motion for reconsideration, Defendant essentially seeks review of *Venable* and *Gentry II* to ascertain whether its position is so clear as to justify a change in direction in this case. And the Court did delay this case for further consideration of the new Fifth Circuit decisions. The Court thus considers whether *Venable* justifies a change of course.

In large part, this Court's analysis to date is premised on the underlying district court opinion in *Gentry I* as supported by *Helix* and *Hewitt.* The effort and consideration of the issues by the district court in *Gentry I* is undeniable. *See* 2022 WL 658768, at *5 (indicating that judge had "dedicated a considerable amount of time to understanding the distinction between the latter part of § 541.604(a) and § 541.604(b)" and based on that reading, found a subtle distinction). That court found "confusion surrounding the salary-basis test understandable" given that the regulations and "many of the cases interpreting the regulations" are "somewhat confusing." *See id.* at *3. This Court has likewise expended considerable time and effort in deciphering the various regulations and cases.

Gentry I recognized a subtle distinction in the regulations based upon whether additional compensation is provided for work beyond the normal workweek or for work within such a week. *Id.* at *5–6. On appeal, the Fifth Circuit noted:

> Together, sections 602(a) and 604(a) allow employers to pay a true weekly salary, a salary paid on a weekly or less frequent

> basis, plus additional compensation in the form of commissions, profit-sharing, or hourly wages for hours worked beyond the normal workweek. Section 602(a) provides a stable and predictable source of income while § 604(a) allows performance incentives for work beyond the regular workweek.

Gentry II, 102 F.4th at 719.

To fall under § 602(a), the salaried employee must be paid on a weekly basis. *Id.* at 720. Focusing on the "weekly basis" aspect, it held that an employee is not paid on a "weekly basis" as required by § 602(a) unless the predetermined sum, i.e., salary, "is *calculated*, not merely provided, by the week." *Id.* In other words, to be paid on a "weekly basis" requires the employer to pay the employee a weekly rate. *Id.* And, importantly, weekly rates encompass payment "for all work performed that week." *Id. Gentry II* did not materialize these requirements without support; instead, it gleaned the requirements from the Supreme Court's *Helix* decision. *See id.* at 720 & nn. 30–33. Section 602(a) requires more than "that employees receive a preset and non-reducible sum each weekly pay period." *Id.* at 720 n.33 (citing *Helix*, 598 U.S. at 52-53).

Because the pay for employees was calculated by the hour, they were not paid "by the week as § 602(a) requires." *Id.* at 721. Moreover, the employer could not "reasonably argue that eight hours of pay constitutes a 'weekly rate,' because that "'guaranteed weekly salary' typically accounted for less than 20% of their total paychecks." *Id.*

A "guaranteed weekly salary" fails "to provide a weekly rate," when the compensation is "not a true salary but [i]s illusory." *Id.* Further, "language in § 602(a) regarding 'all or part' of an employee's compensation does not absolve employers from paying a weekly rate; it only references additional compensation under § 604(a)." *Id.* at 722.

"A straight-forward reading of the text makes clear that § 604(a) does not envision hourly pay for work within the normal workweek." *Id.* The same is true for daily pay. Compensation "for work performed during the workweek [is] impermissible under § 604(a)." *See id.* Stated differently, "pay was for work performed during the workweek, render[s] § 604(a) inapplicable." *Id.* at 723. The Fifth Circuit agreed that "it would be nonsensical for the Department [of Labor] to qualify the example of additional pay for hours worked—limiting it to time beyond the normal workweek—if pay for all or most of an employee's hours within the normal workweek could also constitute additional compensation under 604(a)." *Id.* at 722 (internal quotation marks omitted). *Gentry II* clearly recognized that "*Helix* and sections 602(a), 604(a), and 604(b) require courts to take a hard look at whether a purported 'salary' truly compensates employees for a week's worth of work or, instead, provides an artificial distinction between a salary and additional compensation." *Id.* at 725.

In accepting the recommendation in this case, this Court took that hard look and concluded that based on the summary judgment evidence viewed in the light most favorable to Plaintiffs, a genuine dispute exists as to

whether the purported weekly salary truly compensated the employees for a week's work making § 604(a) applicable or whether the salary was also for base pay for work within the normal workweek. *Guilbeau*, 719 F. Supp. 3d at 724. While the facts of *Gentry I* and *Gentry II* are not entirely on all fours with the instant case, their analysis parallels well with the facts of this case. Plaintiff Guillbeau's guaranteed weekly salary was $913 with a day rate of $625. His weekly guarantee was less than a day and a half calculated from his day rate. For a full week of work, the guaranteed amount is about 22.6% of the total paycheck. Although this case involves a day rate rather than hourly rate, the guarantee still appears illusory rather than a true salary at a weekly rate. And a review of *Gentry II* reveals an appellate decision fully supportive of this Court's prior denial of summary judgment. It is certainly not a binding decision contrary to the Court's prior ruling.

Gentry II, furthermore, specifically agreed with *Wilson* that the two cases were "factually dissimilar." 102 F.4th at 725 & n.66 (noting that "*Gentry* is wholly concerned with a compensation scheme where the employee received a guaranteed weekly salary equal to 8 hours of pay in any week in which the employee performed any work—i.e., it was computed on an hourly basis"). Whether similar or not, *Gentry II* viewed any "tension with" *Wilson* as resulting from that court "overlook[ing] a key aspect of *Helix*." *Id.* at 724. As it explained, "the Tenth Circuit found that a measurement-while-drilling operator was paid on a salary basis when he was guaranteed a fixed, biweekly salary in addition to extra compensation for time spent on a drilling rig" and "held that the employee was paid on a salary basis

because he received the 'same salary every week' which was 'not based upon his hours, days, or shifts of work.'" *Id.* at 725 (quoting *Wilson*, 80 F.4th at 1177). The *Gentry II* panel viewed *Wilson* as "overlook[ing] the 'antecedent' question in *Helix*: whether the salary, regardless of the frequency with which it was distributed, provided a true weekly rate." *Id.* (quoting *Helix*, 598 U.S. at 50 n.3). It also compared *Wilson*'s reasoning as nearly identical "to the dissent in *Helix*." *Id.* 725 n.69. It further noted that "[t]o the extent that [its] decision is inconsistent with *Litz v. Saint Consulting Grp., Inc.*, 772 F.3d 1 (1st Cir. 2014), another pre-*Helix* decision out of the First Circuit, *Litz* also relied on the same flawed rationale rejected in *Helix*." *Id.* 725 n.70. The Fifth Circuit's approach to *Wilson* is comparable to this Court's consideration. *See Guilbeau*, 719 F. Supp. 3d at 722–23.

Venable neither discussed *Wilson* nor shed further light on that opinion's persuasiveness or lack thereof. It did, however, recognize that employees are exempt from overtime wages when they are a "bona fide executive," which in general requires satisfying three criteria or tests—salary basis, salary level, and job duties. *See* 117 F.4th at 299. As for the first criterion, *Venable* states that "the salary basis test requires that an employee 'receives a 'predetermined and fixed salary'—one that does not vary with the precise amount of time he works.'" *Id.* (quoting *Helix*, 598 U.S. at 45). And the quoted language does provide "[t]he basic idea." *See Helix*, 598 U.S. at 45. As *Helix* states, employees cannot be a bona fide executive unless they receive such a predetermined and fixed salary. *Id.* But, as discussed at length in *Gentry II*, receipt of

such a salary is insufficient of itself to satisfy the salary basis test. 102 F.4th at 720 & n.33 (discussing weekly basis, weekly rate, and recognizing that *Helix* rejected the contention that "§ 602(a) requires only that employees receive a preset and non-reducible sum each weekly pay period"). *Helix* itself followed that basic idea with "greater detail and disputation." *See* 598 U.S. at 45.

Venable did not address "weekly basis" or "weekly rate," as *Gentry II* had done. Instead, it simply recognized that the employees were "paid under a hybrid compensation structure," and were "not paid on an hourly, a daily, or a shift basis," thus finding § 604(b) inapplicable. 117 F.4th at 299. In doing so, it rejected an argument that because the employees "were paid in part on a weekly salary basis and in part on a daily basis, the salary basis did not meet § 604(b)." *Id.* It held that the employees "misinterpret the weekly salary basis to be a *payment in part*" when they are paid "a *guaranteed* annual salary" with an "opportunity to make additional compensation." *Id.* at 300.

Nevertheless, quoting *Gentry II, Venable* recognized that "§ 604(a) expressly contemplates hourly compensation for work beyond the normal work week, while § 604(b) concerns hourly compensation within the employee's normal scheduled workweek." *See id.* (quoting 102 F.4th at 723). While it made that recognition as it noted two essential differences between § 604(a) and (b), it did not develop the issue as it pertained to the case before it. *See id.* It never says that a claimed bonus necessarily falls within § 604(a). It appears to accept as fact that the plaintiffs there were paid "daily-rate job bonuses . . . if

they provided services to [the defendant's] customers on their drilling rigs." *Id.* at 298. But as this Court previously noted, the label used by employers, i.e., bonus versus day rate "is not determinative." *Guilbeau*, 719 F. Supp. 3d at 712 (citing *Taylor v. HD & Assocs., LLC*, 45 F.4th 833, 839 (5th Cir. 2022) (per curiam); *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. Unit A 1981) (recognizing that a label in the FLSA context "is dispositive only to the degree that it mirrors the economic reality of the relationship")); *accord Pickens v. Hamilton-Ryker IT Sols., LLC*, — F.4th —, —, No. 24-5407, 2025 WL 972526, at *6 (6th Cir. Apr. 1, 2025) (discussing labels and economic realities under the FLSA).

The district court in *Venable* had "conditionally certified the action as a collective action under 29 U.S.C. § 216(b)," the parties later filed cross-motions for summary judgment after discovery, and the district court found on the summary judgment record that the employees were exempt from the overtime-pay guarantee protections of the FLSA. 117 F.4th at 298. Through its de novo review, the Fifth Circuit affirmed the district court's finding that the defendant was entitled to summary judgment based on the applicability of the bone fide executive exemption. *See id.* at 298–301. Thus, based on the summary judgment record, it agreed with the district court that the exemption applied and compelled summary judgment in favor of the defendant. Tellingly, it explained that "[b]ecause there is no genuine dispute of material fact, the district court appropriately granted Smith's motion for summary judgment." *Id.* at 301.

Citing to summary judgment evidence, the *Venable* district court found that "Venable received job bonuses for days he provided services to Smith's customers on their drilling rigs." *See* 2022 WL 895447, at *3 & n.27. But having been decided prior to *Gentry II*, the district court did not explore whether the compensation at issue was within or beyond the normal workweek. Similarly, in affirming the grant of summary judgment, the Fifth Circuit does not appear to explore that issue either. While Plaintiffs expressly raised the issue in their petition for en banc review, *see*, *Venable v. Smith Int'l, Inc.*, No. 22-30227 (5th Cir. Oct. 2, 2024) (Pls.-Appellants' Pet. for En Banc Rehearing (doc. 149)), the panel treated the petition as one for a panel rehearing and denied it "[b]ecause no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc," *id.* (5th Cir. Oct. 16, 2024) (order denying petition (doc. 151)). This Court will not view the denial of rehearing as altering its view of the underlying appellate *Venable* decision. Nor will it view the denial of en banc review as foreclosing Plaintiffs from arguing here that *Gentry II*, rather than *Venable*, is the appropriate guiding precedent.

Even though *Gentry II* supports Plaintiffs' reasoning, Defendant would have this Court find that the Fifth Circuit has specifically rejected the arguments advanced by Plaintiffs in this case. *See* ECF No. 141 at 2–3. Based upon the published *Venable* decision and the facts and circumstances of the case now before it, the Court cannot make such finding. The Court will not speculate as to why the Fifth Circuit did not further address the within-beyond normal workweek distinction. It did not attempt to

distinguish *Gentry II* but instead cited it with approval for recognizing "'essential differences' between § 604(a) and § 604(b)." *Venable*, 117 F.4th at 300. Defendant essentially wants to preclude further litigation of an issue that does not appear to have been actually litigated in *Venable.* Plaintiffs provide solid reasons not to apply such issue-preclusion. *See* ECF No. 140 at 6–7.

While the Court sees that *Gentry II* could be distinguished on grounds that it involved a predetermined sum (salary) calculated on an hourly, rather than weekly, rate, such distinction ignores the important recognition and discussion of "beyond the normal workweek" and its requirement that "a weekly rate compensates employees for all work performed that week." *See* 102 F.4th at 719–20. *Gentry II*'s applicability appears to go well beyond circumstances where the employee's salary is calculated on an hourly, rather than weekly basis.

In any event, Defendant's position that *Venable* dictates a result in this case ignores the procedural posture of this case compared to that case. The district court in *Venable* granted the employer's motion for summary judgment and denied the partial motion for summary judgment filed by the plaintiffs. *See* 117 F.4th at 297. The district court had found that the employer had carried its burden to show that the plaintiffs were exempt employees. The Fifth Circuit affirmed because it agreed that there was no genuine dispute of material fact. *Id.* at 301.

Here, on the other hand, as emphasized in both the report and recommendation (ECF No. 86) and the order accepting that recommendation (ECF No. 101), Defendant has not carried its burden as a factual matter. Stated succinctly in that order:

> As the Magistrate Judge found in this case, Defendant has not carried its burden to support its claimed exemption because it has not shown as a matter of law that it paid Plaintiffs on a salary basis. There remains a dispute as to whether the day-rate portion of Plaintiffs' compensation was part of the base compensation or constituted additional compensation within the scope of § 604(a) and thus outside the purview of § 604(b). Accepting the findings of the Magistrate Judge, the Court finds that Defendant has failed to carry its burden to establish its affirmative defense by failing to establish as a matter of law that § 604(b)'s reasonable relationship requirement does not apply under the facts construed in the light most favorable to Plaintiffs.

Guilbeau, 719 F. Supp. 3d at 722 (citing R&R at 12-19). Defendant argues that the Court denied summary judgment "on the legal conclusion that Guilbeau was not paid on a salary basis because his compensation did not satisfy the reasonable relationship test." ECF No. 137 at 8–9. Defendant's argument ignores the factual underpinnings for the summary judgment denial as stated in the quoted text above.

While discussing *Wilson*, the Court further stated: "Defendant simply wants to disregard the dispute as to whether the daily rate it paid to Plaintiffs was part of the employees' base compensation and thus calculated under § 604(b) or whether it was instead additional compensation falling under § 604(a)." *Guilbeau*, 719 F. Supp. 3d at 722–23. And it noted: "While Defendant may ultimately provide evidence to carry its burden on its affirmative defense, it has not done so yet—particularly when the Court must view the evidence in the light most favorable to Plaintiffs." *Id.* at 723. This Court, furthermore, recognized "a valid interpretive basis for limiting 'additional compensation' under § 604(a) to circumstances where the compensation is actually additional to payment required for the normal workweek." *Id.*

Not only does *Venable* appear distinguishable based on its procedural posture but it also has potentially distinguishing facts. The employees in *Venable* were "reamers" who "supervised drillers" and received a salary with "job bonuses if they provided services to Smith's customers on their drilling rigs." *See* 117 F.4th at 298. This collective action involves directional drillers that Defendant contends receive similar bonuses. "The dispute in this case is whether Defendant's pay structure includes a salary plus a bonus or a salary plus a day rate." *Guilbeau*, 719 F. Supp. 3d at 712. But Defendant has not carried its summary judgment burden to show the compensation was a bonus under § 604(a) or instead part of the drillers' base pay calculated under § 604(b). *Id.* at 722. And through its motion to reconsider, it does not point to any basis to alter that summary judgment view.

Appendix C

Viewing the facts of this case in the light most favorable to Plaintiffs, the economic realities are that Defendant paid Plaintiffs a salary to be "on-call 24/7," while receiving a day rate as part of the base compensation for doing their job. *See id.* (summarizing facts). Other than "attending training classes," the only work performed by Plaintiffs was at the "customer's well site," thus obtaining the day rate compensation for essentially the only work performed. *Id.* The guaranteed salary thus covered being on-call and attending training classes. But the work to be done during the normal workweek was performed on the customer's well site, which would prompt compensation at a day rate. As a practical matter, employers do not pay employees solely to be on call and to attend training classes. Performing normal work on a customer's well site hardly equates to a performance incentive under § 604(a). Such work does not appear to be beyond the normal workweek as contemplated by § 604(a), thus relegating the compensation to § 604(b), if paid by the hour, shift, or day.

The critical, unanswered question on summary judgment in this case was whether Plaintiffs were paid on a salary basis. Defendant contends that "*Venable* answers that question and the answer is yes." ECF No. 137 at 10. But Defendant does not appropriately factor *Gentry II* into the equation. Defendant also ignores that the *Venable* district court granted the employer's summary judgment on the record submitted to it, and then on appeal, the Fifth Circuit affirmed that ruling on the summary judgment record before it. The summary judgment record before this Court apparently differs because the record here left a genuine dispute of material fact as to whether the

day-rate compensation paid to Plaintiffs was a bonus constituting additional compensation under § 604(a) or part of the pay for their normal workweek calculated under § 604(b). Plaintiffs recognize "the central factual dispute: whether the day rates paid to Plaintiffs were ordinary wages or bonuses constituting permissible 'additional compensation.'" ECF No. 140 at 1.

With the information before it, the Court does not see that *Venable* alters the factual dispute that led to the denial of summary judgment in this case. The procedural posture differs in this case, i.e., denial of summary judgment based on the presence of a genuine dispute of material fact as to whether the pay structure includes a bonus which avoids § 604(b). Despite Defendant's insistence otherwise, *Venable* does not provide the definitive answer that it seeks.

In reply, Defendant bluntly states: "The defendant in *Venable* is an affiliated company with STC that utilized the same compensation plan (a bi-weekly salary and a job bonus for days when the employee worked at the employer's customer's drilling rig) and, as a result, that decision is factually indistinguishable from the facts here." ECF No. 141 at 1–2. But as this Court has stressed, this case presents a factual dispute as to whether the day rate was a bonus. Because "the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof," *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974), the district court in *Venable* necessarily found that the defendant had carried its burden to establish

that defense when it granted the defendant's motion for summary judgment and found that the plaintiffs were exempt employees under the FLSA. Indeed, the *Venable* district court recognized that the employer had the burden to prove that its employee fell within the claimed exempted category. *See Venable*, 2022 WL 895447, at *2. In this case, Defendant did not carry that burden on summary judgment and has provided nothing in its motion to reconsider to carry that burden.

Defendant seeks to rely on a purported change in law after the Fifth Circuit has issued two subsequent opinions, one which affirms an underlying district court opinion relied upon by this Court and one which affirms an underlying district court opinion that this Court distinguished and otherwise found unpersuasive. In some respects, the two decisions seem to simply place this Court in the same position, except now it must decide between two binding (or at least potentially binding) appellate decisions. The Court does not view such unusual circumstances as warranting reconsideration. The law has changed with the intervening decisions in *Venable* and *Gentry II*. But their combined effect supports finding that justice does not require reconsideration. Defendant, furthermore, has not provided any previously unavailable evidence to support its claimed exemption. Nor does it argue or show any need to correct a clear legal error or to prevent manifest injustice. The above analysis of *Venable* and *Gentry II* highlights the lack of clarity as to the state of the law. For these reasons, reconsideration of the summary judgment ruling is not warranted.

Appendix C

Defendant argues that *Gentry II* is fundamentally different from this case because "the defendant's pay scheme in *Gentry* was truly a 'scheme,' or in other words, an artifice to skirt the FLSA's salary requirement." ECF No. 137 at 9 n.54. Whereas here, as in *Venable*, the employees were paid a "true salary, calculated on a weekly basis." *Id.* But as already discussed in detail and held in *Gentry II*, "payment on a 'weekly basis' requires that an employee be paid a 'weekly rate," and a "weekly rate compensates employees for all work performed that week." 102 F.4th at 720. As mentioned earlier, when a "guaranteed weekly salary" fails "to provide a weekly rate, it [is] not a true salary but [is] illusory." *Id.* at 721.

In reply, Defendant also argues that "[a] legally indistinguishable decision of [the Fifth Circuit] must be followed by other panels of [the Fifth Circuit] and district courts unless overruled en banc or by the United States Supreme Court." ECF No. 141 at 2 (ultimately quoting *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 n.8 (5th Cir. 1992)). This is a restatement of the Fifth Circuit's rule of orderliness: "It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). This Court has no disagreement with that legal principle. *See, e.g., Silo Rest. Inc. v. Allied Prop. & Cas. Ins. Co.*, 420 F. Supp. 3d 562, 575–76 (W.D. Tex. 2019) (discussing rule of orderliness).

Appendix C

As should be clear from this Memorandum Opinion and Order, this Court does not view *Venable* as legally indistinguishable. There are both procedural and factual differences. Defendant seeks to invoke the rule of orderliness to compel this Court to follow *Venable* but does not consider whether *Venable* itself complied with the rule of orderliness. The fact that *Gentry II* appears applicable even on the factual differences between that case and this one presents the potential procedural nuance that *Gentry II* provides the guiding precedent under the rule of orderliness because the Fifth Circuit "adheres strictly to the maxim that one panel of the court cannot overturn another, even if it disagrees with the prior panel's holding." *Macktal v. U.S. Dep't of Lab.*, 171 F.3d 323, 328 (5th Cir. 1999). At this juncture, this case is both procedurally and factually distinguishable from *Venable.* Consequently, the Court has no reason to further explore the impact of the rule of orderliness on the matters before it.

But to be clear, even if the Court were considering *Venable* in the context of whether to grant Defendant summary judgment in the first instance, rather than on reconsideration, the Court finds the earlier *Gentry II* decision controlling. That decision, furthermore "is consistent with *Helix*, the regulatory text, and decisions from [other] circuits" that uphold salaries that "paid employees a weekly rate." 102 F.4th at 725. In the complex regulatory scheme of §§ 602(a), 604(a), and 604(b), the importance of a weekly rate that compensates the employee for all work performed that week cannot be overstated.

For all these reasons, the Court finds no legitimate reason to reconsider the summary judgment denial.

D. Reconsideration of Certification

In its motion to reconsider, Defendant urges the Court to reconsider the order partially granting certification in this case. It contends that the Fifth Circuit has now rejected the salary basis argument relied upon by Plaintiffs thus dissolving the only glue holding together the collective action. For the reasons stated above, the Court does not view that rejection to be so clear on the record of this case. Accordingly, the Court finds no basis to reconsider the order partially granting certification in this case.

II. OBEJECTIONS TO NON-DISPOSITIVE RULING

Defendant objects to an Order Administratively Reopening Case, Authorizing Notice & Staying Discovery (ECF No. 142) issued by the Magistrate Judge on May 22, 2024. More particularly, it asserts that the Magistrate Judge abused her discretion by (1) ordering the issuance of notice to putative collective action members before the Fifth Circuit has issued rulings on pending appeals in other cases with related issues; (2) allowing notice to be issued via text message in addition to mail and email; and (3) permitting a reminder notice and a ninety-day opt-in period.

The Court has reviewed the objections under the standard of review previously set out in this case in

detail. *See Guilbeau v. Schlumberger Tech. Corp.*, 719 F. Supp. 3d 702, 709–11 (W.D. Tex. 2024) (applying standards of 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a)). "When a party appeals a magistrate judge's order, [it] must demonstrate how the order is reversible under the applicable standard of review—*de novo* for error of law, clear error for fact findings, or abuse of discretion for discretionary matters." *Orthoflex, Inc. v. ThermoTek, Inc.*, 990 F. Supp. 2d 675, 683 (N.D. Tex. 2013) (quoting *Jefferson-Pilot Life Ins. Co. v. Bellows*, No. 3:02-CV-1992-D, 2003 WL 21501904, at *1 (N.D. Tex. June 24, 2003)); *accord Guilbeau*, 719 F. Supp. 3d at 709–11. Whether to permit "an FLSA case to proceed as a collective action" is reviewed "for abuse of discretion." *Loy v. Rehab Synergies, LLC*, 71 F.4th 329, 335 (5th Cir. 2023). Nondispositive, pretrial matters concerning notice to a collective action lie within "the trial court's discretion" and "[t]he bottom line is that the district court has broad, litigation-management discretion" over such matters. *See Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 436, 443 (5th Cir. 2021).

Upon reviewing the entirety of the objections and related briefing, the Court has no definite and firm conviction that the Magistrate Judge committed any mistake. It finds no clear error with respect to any fact finding. A de novo review of the legal conclusions shows no reason to reverse or alter the order of the Magistrate Judge. And, for all matters within the discretion of the Magistrate Judge, the Court finds no abuse of discretion. For these reasons, the Court overrules each asserted objection. As for the first asserted objection, there is

no reason to further elaborate. Even though the Court stayed this action in an abundance of caution so as to fully consider the interactions of various cases, there is no general basis to withhold notice pending appellate rulings on potentially relevant cases. Besides, not only has the Fifth Circuit now issued rulings on the cases prompting the first objection, but this Court has also fully addressed asserted ramifications from those rulings.

At the outset, Court recognizes Plaintiffs' argument that Defendant waived legal arguments as to the particulars of notice by not raising them when it initially opposed issuance of notice. While Plaintiffs may have a solid basis for that argument, *see Freeman v. Cnty. of Bexar*, 142 F.3d 848, 851 (5th Cir. 1998) (recognizing precedent for finding that an objecting party "waives legal arguments not made in the first instance before the magistrate judge"), the Court finds no need to rely on waiver to overrule Defendant's objections. Waiver aside, Defendant's objections lack merit. With respect to the particulars of notice, i.e., notice via text, reminder notices, and a ninety-day opt-in period, the Court recognizes that Defendant cites nonbinding cases that have proceeded differently. But none of these cases support finding that the Magistrate Judge committed any legal error. That other cases have proceeded differently does not mean that the Magistrate Judge abused her discretion with respect to any of these particular aspects of notice. Plaintiffs provide cases supporting the Magistrate Judge's notice particulars. Deciding between approaches utilized in nonbinding cases is within the discretion of magistrate judges.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the Motion to Lift Stay and Motion for Reconsideration (ECF No. 137). It grants the motion to lift stay and denies the motion for reconsideration. Accordingly, the Court **LIFTS** the stay imposed in this case, *see* ECF No. 130. In addition, the Court **OVERRULES** Defendant's Objections (ECF No. 120).

Because this case is ready for continued pretrial management by the assigned Magistrate Judge, the Court hereby returns it to the Magistrate Judge for continued pretrial management as reflected in the Referral Order (ECF No. 4).

It is so ORDERED this 25th day of April 2025.

/s/ Jason Pulliam
Jason Pulliam
United States District Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, FILED MARCH 5, 2024

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Case No. SA-21-CV-0142-JKP-ESC

TREVER GUILBEAU, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant.

Filed March 5, 2024

MEMORANDUM OPINION AND ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the Court is a *Report and Recommendation and Order of United States Magistrate Judge* (ECF No. 86) ("R&R" for the report and recommendation,

but collectively, "R&R and Order"). Applying the well-established standards under Fed. R. Civ. P. 56, the Magistrate Judge recommended that the Court deny the motion for partial summary judgment (ECF No. 73) filed by Defendant Schlumberger Technology Corporation ("STC"). Within that same filing, the Magistrate Judge granted in part and denied in part a motion for notice/certification (ECF No. 62) filed by Plaintiffs and denied a motion to defer notice (ECF No. 74) filed by Defendant. She issued the order component pursuant to 28 U.S.C. § 636(b)(1)(A) and a Referral Order (ECF No. 4) for case management. She issued the recommendation under authority of 28 U.S.C. § 636(b)(1)(B), and a specific referral (ECF No. 75) for report and recommendation. Defendant timely filed objections to the R&R and Order, *see* ECF No. 88, with an appendix of specific objections by section and page, *see* ECF No. 88-1. Plaintiffs timely filed a limited objection (ECF No. 91), and Defendant filed a response (ECF No. 92) to that limited objection.

The parties have also made several other filings: notice of supplemental authority (ECF No. 90); notice of supplemental authority (ECF No. 93); response to notice of supplemental authority (ECF No. 94); opposed motion to strike or alternative motion for leave to file reply (ECF No. 95); response to motion to strike (ECF No. 96); reply to motion to strike (ECF No. 97); notice of supplemental authority (ECF No. 98); and notice of supplemental authority (ECF No. 100). The Court will address these filings as needed. It will address the objections in accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72.

Appendix D

I. AUTHORITY OF MAGISTRATE JUDGE AND STANDARD OF REVIEW

Through referral under 28 U.S.C. § 636(b)(1), magistrate judges have authority to consider and handle both non-dispositive and dispositive pretrial matters, subject to different standards of review by the presiding district court judge. Section 636(b)(1)(A) permits district judges to "designate a magistrate judge to hear and determine any pretrial matter pending before the court," except for

> a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

Subparagraph (A) further provides that the district judge "may reconsider" any pretrial matter decided by a magistrate judge when "it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

"Section 636(b)(1)(B) permits district judges to refer dispositive matters to a magistrate judge for issuance of proposed findings of fact and recommendations for disposition." *Brown v. Bridges*, No. 12-CV-4947-P, 2015

WL 410062, at *1 (N.D. Tex. Jan. 30, 2015). Section 636(b)(1) further provides:

> Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Asserted objections "serve[ ] to narrow the dispute" and "enables the district judge to focus attention on those issues – factual and legal – that are at the heart of the parties' dispute." *Thomas v. Arn*, 474 U.S. 140, 147 & n.6, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Section 636(b)(1) "does not on its face require any review at all . . . of any issue that is not the subject of an objection." *Id.* at 149, 106 S.Ct. 466. Nevertheless, "while the statute does not require the judge to review an issue de novo if no objections are filed, it does not preclude further review by the district judge, sua sponte or at the request of a party, under a de novo or any other standard." *Id.* at 154, 106 S.Ct. 466.

"Like § 636(b)(1), Fed. R. Civ. P. 72 recognizes that the authority of magistrate judges and the corresponding review by the district court ultimately depend on whether the referred matter is properly characterized as dispositive or non-dispositive." *Brown*, 2015 WL 410062, at *2; *accord Flores v. AT&T Corp.*, No. EP-17-CV-00318-DB, 2018 WL 6588586, at *3 (W.D. Tex. Nov. 8, 2018) (quoting *Brown* for same proposition). Rule 72 addresses review of both nondispositive matters (Rule 72(a)) and dispositive motions (Rule 72(b)) handled on referral to a magistrate judge.[1] Both provisions give parties fourteen days to object.

For nondispositive matters, district judges "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." *See* Fed. R. Civ. P. 72(a). On the other hand, for dispositive matters, Rule 72(b)(3) mandates that district judges "determine de novo any part of the magistrate judge's disposition that has been properly objected to." This rule, like the statute, provides the district court with discretionary authority to "receive further evidence." On its face, Rule 72(b) does not mandate any review absent a specific objection. Nevertheless, following its 1983 adoption, the advisory committee notes state: "When no timely objection is filed, the court need only satisfy itself

1. Rule 72 was amended effective December 1, 2023. Because the amendment modified only the last sentence of Rule 72(b)(1) regarding mailing (now serving) a copy of a recommendation to (now on) each party (now "as provided in Rule 5(b)"), the amendment has no effect on the matters currently before the Court.

that there is no clear error on the face of the record in order to accept the recommendation."

With respect to nondispositive matters, the statute (§ 636(b)(1)(A)) and Rule 72(a), set out a "highly deferential standard [that] requires the court to affirm the decision of the magistrate judge unless 'on the entire evidence [the court] is left with a definite and firm conviction that a mistake has been committed.'" *Baylor Health Care Sys. v. Equitable Plan Servs., Inc.*, 955 F. Supp. 2d 678, 689 (N.D. Tex. 2013) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)); *accord Gomez v. Ford Motor Co.*, No. 5:15-CV-866-DAE, 2017 WL 5201797, at *2 (W.D. Tex. Apr. 27, 2017) (same). With respect to reviewing a nondispositive order of a magistrate judge, the following principles apply:

> The clearly erroneous standard applies to the factual components of the magistrate judge's decision. The district court may not disturb a factual finding of the magistrate judge unless, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. If a magistrate judge's account of the evidence is plausible in light of the record viewed in its entirety, a district judge may not reverse it. The legal conclusions of the magistrate judge are reviewable de novo, and the district judge reverses if the magistrate judge erred in some respect in [his or her] legal conclusions. [T]he abuse of discretion standard governs review

> of that vast area of choice that remains to the [magistrate judge] who has properly applied the law to fact findings that are not clearly erroneous.

Baylor Health Care Sys., 955 F. Supp. 2d at 689 (citations and internal quotation marks omitted); *accord Moore v. Ford Motor Co.*, 755 F.3d 802, 806 (5th Cir. 2014) (recognizing that a review of a non-dispositive ruling of a magistrate judge entails reviewing "'factual findings under a clearly erroneous standard,' while 'legal conclusions are reviewed de novo'"); *Sparling v. Doyle*, No. EP-13-CV-00323-DCG, 2016 WL 236266, at *2 (W.D. Tex. Jan. 20, 2016).

The clearly erroneous standard of review "does not entitle the court to reverse or reconsider the order simply because it would or could decide the matter differently." *Gomez*, 2017 WL 5201797, at *2 (citing *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015)). To the contrary, "the great deference owed to the [magistrate] judge's findings compels the conclusion that [w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Guzman*, 808 F.3d at 1036 (citations and internal quotation marks omitted).

In accordance with § 636(b)(1)(B), the Court referred the summary judgment motion for recommendation. *See* ECF No. 75. It had previously referred this case to the Magistrate Judge for disposition of all non-dispositive

matters in accordance with § 636(b)(1)(A). *See* Referral Order (ECF No. 4). The Magistrate Judge's order disposes of non-dispositive matters filed by the parties. No party contends that it was improper for the Magistrate Judge to rule on the motions for notice/certification or to defer notice through an order. Because motions for notice and to defer notice "involve procedural, case-management rulings, a magistrate judge may hear and determine such motions" under 28 U.S.C. § 636(b)(1)(A).[2] *Repass v. TNT Crane & Rigging, Inc.*, No. MO:18-CV-00107-DC, 2022 WL 18356715, at *1 (W.D. Tex. Feb. 24, 2022) (addressing motion to decertify). These non-dispositive, pretrial matters are within "the trial court's discretion" and that "[t]he bottom line is that the district court has broad, litigation-management discretion here." *See Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 436, 443 (5th Cir. 2021).

Consistent with § 636(b)(1) and Rule 72, the Court reviews the R&R and Order entered by the Magistrate Judge and the objections thereto. But the Court recognizes that it has the discretion to accept or reject new evidence to the extent objections refer to new evidence and arguments not presented to the Magistrate Judge. A party who objects to a recommendation of a magistrate judge "waives legal arguments not made in the first instance before the magistrate judge." *Freeman v. Cnty. of Bexar*, 142 F.3d

2. The § 636(b)(1) exception for motions "to dismiss or permit maintenance of a class action" does not apply because "collective actions under the FLSA are not Rule 23 class actions." *Repass v. TNT Crane & Rigging, Inc.*, No. MO:18-CV-00107-DC, 2022 WL 18356715, at *1 n.1 (W.D. Tex. Feb. 24, 2022).

848, 851 (5th Cir. 1998) (citing *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994)). Nevertheless, district courts have "wide discretion to consider and reconsider the magistrate judge's recommendation." *Id.* at 852. While the district courts are obliged "to review *de novo* the actual evidence on objected-to findings," they "should not be compelled to ignore that the parties had a full and fair opportunity to present their best evidence to the magistrate judge." *Id.* Similarly, while "performing its open-ended review, the district court need not reject newly-proffered evidence simply because it was not presented to the magistrate judge." *Id.* Its discretion both permits the district court to accept the new evidence through 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), or to reject it. *Id.* One reason to reject new evidence is to assure that litigants simply do not "use the magistrate judge as a mere sounding-board for the sufficiency of the evidence." *Id.*

II. ANALYSIS AND CONCLUSIONS

Defendant asserts objections to the R&R, *see* ECF No. 88 at 1-3, 8-17; ECF No. 88-1 at 3-10, as well as to the Magistrate Judge's order regarding the motions for notice and to defer notice, *see* ECF No. 88 at 4-6, 17-21; ECF No. 88-1 at 10-11. It also asserts various objections to three other sections of the R&R and Order (titled "Introduction"; "Background"; and "Conclusion, Order, and Recommendation"). *See* ECF No. 88-1 at 1-2, 12. Plaintiffs have filed a limited objection to the Magistrate Judge's order. *See* ECF No. 91.

Appendix D

Defendant moved for partial summary judgment regarding claims asserted by Plaintiff Trever Guilbeau whether asserted individually or as a class. *See, generally*, ECF No. 73. The Magistrate Judge appropriately approached the motion as seeking "summary judgment on all claims asserted by Guilbeau on behalf of himself and all other DDs [(directional drilling employees)]." R&R at 5. At times this Court may refer to the DDs plaintiffs, including Guilbeau, generically as Plaintiffs for ease of reference. Such references do not alter the scope of the summary judgment motion. As summarized by the Magistrate Judge:

> Plaintiffs Trever Guilbeau and Christopher O'Mara bring this action on behalf of themselves, and all others similarly situated against their former employer, Defendant Schlumberger Technology Corporation ("Schlumberger"), an oilfield services company, seeking unpaid overtime compensation. Guilbeau worked as a directional drilling employee ("DD") in connection with Schlumberger's oilfield drilling operations, meaning he provided oilfield drilling services to Schlumberger and was generally responsible for executing non-vertical well-drilling projects. O'Mara worked as a measuring while drilling employee ("MWD"), an engineering position involving collecting, monitoring, and reporting data collected from various tools and sensors on directional drilling rigs regarding drilling operations.

Id. at 2 (citations to the record omitted).

Appendix D

The dispute in this case is whether Defendant's pay structure includes a salary plus a bonus or a salary plus a day rate. And the label used by the employer is not determinative. *Cf. Taylor v. HD & Assocs., LLC*, 45 F.4th 833, 839 (5th Cir. 2022) (per curiam) (holding that the nature of a payment for purposes of FLSA exemptions "is a question of law that relies on how a payment works in practice, rather than what it is called"); *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. Unit A 1981) (recognizing that a label in the FLSA context "is dispositive only to the degree that it mirrors the economic reality of the relationship").

Upon reviewing the entire evidence; the briefing of the parties, including the objections asserted, and the R&R and Order of the Magistrate Judge, the Court is not left with any definite and firm conviction that any factual mistake has been committed. Indeed, the parties identify no material factual dispute. *Compare* Def.'s Partial Mot. Summ. J. (ECF No. 73) at 2 (asserting "no disputed issues of fact") *with* Pls.' Resp. Partial Mot. Summ. J. (ECF No. 78) at 5-6 (conceding that facts are "largely uncontested"). Nevertheless, as will be discussed in more detail, the parties' dispute essentially boils down to whether the day-rate component of the relevant pay structure comprises part of Plaintiffs' base compensation for work during the normal workweek. If it does, then the compensation does not qualify as additional compensation in the form of a bonus.

In addition, upon a de novo review of the legal conclusions of the Magistrate Judge, the Court finds no

legal error. And for that vast area of choice that remains to the Magistrate Judge who has properly applied the law to fact findings that are not clearly erroneous, the Court finds no abuse of discretion. The Court has considered all asserted objections and hereby overrules them all. Below, it will provide additional comments or discussion on objections that warrant it.

A. Objections to R&R

Defendant objects that the R&R is directly contrary Fifth Circuit and Supreme Court precedent directly on point. ECF No. 88 at 3. It argues that the Magistrate Judge committed plain error in summarily disregarding relevant Fifth Circuit precedent (*Hebert v. FMC Techs., Inc.*, No. 22-20562, 2023 WL 4105427 (5th Cir. June 21, 2023) (unpublished opinion), *cert. filed*, (U.S. Dec. 29, 2023)), while denying summary judgment. *Id.* at 8-9. It argues that the Magistrate Judge committed clear error by misconstruing *Helix Energy Solutions Group., Inc. v. Hewitt [hereinafter Helix]*, 598 U.S. 39, 143 S.Ct. 677, 214 L.Ed.2d 409 (2023). *Id.* at 9-12. It also argues that the Magistrate Judge committed clear error by relying on inapposite caselaw (*Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 3:19-CV-00320, 2022 WL 658768 (S.D. Tex. Mar. 4, 2022) (recommendation of Mag. J.) *adopted by* 2022 WL 889276 (S.D. Tex. Mar. 25, 2022)) while ignoring on-point authority (numerous cited cases from other jurisdictions). *Id.* at 13-17.

Despite Defendant's certainty that the Magistrate Judge has erred, the Court's de novo review reveals

a complex issue with no definitive answer based upon binding precedent alone. Defendant sees certainty through its interpretation of caselaw and regulatory text. "But, although such simplicity and clarity may be apparent to an advocate for a desired position, it is neither simple nor clear to a court tasked to consider whether it should dismiss" an action on an affirmative defense "when no binding precedent exists to compel a particular ruling." *See Hurst v. Equifax Info. Servs., LLC*, No. SA-20-CV-1366-JKP-ESC, 2021 WL 5926125, at *3 (W.D. Tex. Dec. 15, 2021). Defendant appears to obtain its "clear vantage point by considering caselaw out of context and failing to recognize legal and factual nuances between their cited cases and the case now before the Court." *See id.* As this Court has noted before, "legal issues are more clear cut from the eyes of an advocate than they are from the view of a neutral arbiter who must consider the positions of all the various parties." *S.LV. v. Rosen*, No. SA-21-CV-0017-JKP, 2021 WL 243442, at *7 (W.D. Tex. Jan. 25, 2021).

This case requires interpretation of interrelated regulatory provisions. It is thus paramount to understand the regulations as interpreted through binding caselaw. The Magistrate Judge thoroughly addressed these matters and properly supported the R&R. The Court finds no error in her conclusions, findings, analysis, or interpretation. Still, given the importance of the R&R interpretation and the Court's duty to conduct a de novo review of these matters, the Court separately discusses and analyzes the caselaw and regulatory interpretation.

Appendix D

"The Fair Labor Standards Act of 1938 (FLSA) guarantees that covered employees receive overtime pay when they work more than 40 hours a week." *Helix*, 598 U.S. at 43, 143 S.Ct. 677. The FLSA is intended to address employers overworking covered employees without adequate compensation for their work. While numerous exemptions exist, "courts are to give FLSA exemptions 'a fair reading,' as opposed to the narrow interpretation previously espoused by [the Fifth Circuit] and other circuits." *Carley v. Crest Pumping Tech., LLC*, 890 F.3d 575, 579 (5th Cir. 2018) (quoting *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88-90, 138 S. Ct. 1134, 1142, 200 L.Ed.2d 433 (2018)). As recognized by the Supreme Court, "an employee is not covered, and so is not entitled to overtime compensation, if he works 'in a bona fide executive, administrative, or professional capacity,' as those 'terms are defined' by agency regulations." *Helix*, 598 U.S. at 43, 143 S.Ct. 677 (quoting 29 U.S.C. § 213(a)(1)).

Resolution of the summary judgment motion requires the Court to consider whether Plaintiffs are exempt from the overtime provisions as highly compensated employees ("HCE") under 29 C.F.R. § 541.601, which requires (1) a minimum total annual compensation (2) for specific duties (3) that includes a minimum weekly payment on a "salary or fee basis." *See* 29 C.F.R. § 541.601(a) and (b). The only element at issue here is whether Defendant paid Guilbeau and other DDs on a salary basis.

The "basic idea" for the salary basis test "is that an employee can be [exempt] only if he receives a 'predetermined and fixed salary'—one that does not vary

with the precise amount of time he works." *Helix*, 598 U.S. at 45, 143 S.Ct. 677 (addressing exemption as a bona fide executive). An added "layer of complexity" attaches to that description, however, because the Secretary of Labor has implemented the exemption "through separate and slightly different rules, one applying to lower-income employees [(29 C.F.R. § 541.100)] and the other to higher-income ones [(29 C.F.R. § 541.601(a), (b)(1))]." *Id.* Both rules have three requirements—compensation on a salary-basis, at a minimum rate per week, for specified duties—each with their own respective test. *Id.* The tests for both rules only differ with respect to the duties test. *Id.* The other two tests are identical in form for both rules. *Id.* at 46, 143 S.Ct. 677. This is important because an interpretation of the salary-basis test applies to both rules equally. *Id.* at 57, 143 S.Ct. 677.

Two other regulations, 29 C.F.R. §§ 541.602(a) and 541.604(b) [often referred to as § 602(a) and § 604(b)] "give context to the salary-basis test." *Id.* at 46, 143 S.Ct. 677. Section 602(a) sets out what it takes to "be considered to be paid on a 'salary basis'" and "ensures that the employee will get at least part of his compensation through a preset weekly (or less frequent) salary, not subject to reduction because of exactly how many days he worked." *Id.* (quoting regulation for first part).[3]

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3. In full, the general rule of § 602(a) states:

> An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting

Section 604(b), on the other hand, "focuses on workers whose compensation is 'computed on an hourly, a daily or a shift basis,' rather than a weekly or less frequent one." *Id.* (quoting regulation). This regulation permits employers to "base an employee's pay on an hourly, daily, or shift rate without 'violating the salary basis requirement' or 'losing the . . . exemption' so long as two conditions are met." *Id.* at 46-47, 143 S.Ct. 677 (quoting regulation). Not only must the employer guarantee the minimum weekly salary level "regardless of the number of hours, days or shifts worked," but "that promised amount must bear a 'reasonable relationship' to the 'amount actually earned' in a typical week—more specifically, must be 'roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek.'" *Id.* at 47, 143 S.Ct. 677 (same). These conditions ensure consistency between the salary basis concept and hourly or daily pay. *Id.* (relying on 69 Fed. Reg. 22184).

The Supreme Court further elaborated on how the structure as well as the text of the regulations support the decision. *See id.* at 54-58 & n.5. It found that "§ 604(b) lays out a second path—apart from § 602(a)—enabling a compensation scheme to meet the salary-basis

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all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

While this general rule is subject to numerous exceptions to the prohibition against deductions from pay, *see* 29 C.F.R. § 541.602(b), no such exceptions are at issue in this case.

requirement." *Id.* at 55. It recognizes that this "second route is all about daily, hourly, or shift rates" versus § 602(a), which "addresses payments on 'a weekly[ ] or less frequent basis." *Id.* These two regulations "offer non-overlapping paths to satisfy the salary-basis requirement, with § 604(b) taking over where § 602(a) leaves off." *Id.* at 56. It found that § 604(b) "confirms the plain-text, weekly-rate-only reading of § 602(a)." *Id.* at 57.

The pay structure in this case is a combination of a weekly salary that appears to satisfy the salary basis requirement as set out in § 602(a), in addition to pay calculated on a day rate. Because there is no overlap between § 602(a) and § 604(b), the latter provision provides the path when a hybrid pay structure combines a weekly salary with pay calculated on a day rate for work within the normal workweek. As discussed more later, if an employer pays an employee a day rate for work beyond the normal workweek, either temporally in the sense that the work exceeds the normal forty-hour workweek, or because the work exceeds the typical scope of work contemplated by the employee's regular schedule, the additional compensation may be properly disregarded for purposes of § 602(a) as it invokes § 604(a) rather than § 604(b).

Defendant interprets the dual paths just the opposite—arguing that § 604(b) is only applicable to employees "paid solely on an hourly, daily, or shift basis." *See* ECF No. 88 at 9. This interpretation, however, appears contrary to the "weekly-rate-only reading of § 602(a)" espoused in *Helix.* To be sure, *Helix* defines a daily-rate worker as one who

"is paid for each day he works and no others," *see* 598 U.S. at 51, 143 S.Ct. 677, but that does not exclude other workers from receiving earnings computed on a daily basis. *Helix* did not consider a worker paid on a hybrid pay structure like the Plaintiffs in this case. While such a hybrid worker may not be a daily-rate worker as defined by the Supreme Court as it discussed a straight-day-rate pay structure, workers subject to such a hybrid pay structure nevertheless receive earning computed on a daily basis. Perhaps they could be called hybrid-daily-rate workers, hybrid-day-rate workers, or simply day-rate workers, but regardless, the label does not control applicability of the pertinent regulations. Instead, the pay structure and how payments actually work in practice affect the applicability of certain regulations. Courts may pierce the label to ascertain exactly what is happening in practice.

The *Helix* definition does not mean that a day rate worker receives only a day rate and no other compensation as argued by Defendant, *see* ECF No. 88 at 9. Nor does it exclude § 604(b) from applying in other situations when pay is computed on a daily basis. Absent binding precedent directly on point, the Court flatly rejects Defendant's position that § 604(b) applies only when an employee's compensation consists of a day rate and a day rate only. Similarly, it rejects the notion that § 602(a) alone controls the salary basis issue of this case. This case does not involve a salary only pay structure that necessarily invokes § 602(a). Nor does it involve a day-rate pay structure that necessarily invokes § 604(b). This case involves a hybrid pay structure that has an undisputed salary component along with a second component that may

or may not relate to the Plaintiffs' base compensation—the parties simply disagree whether the second component is payment as part of the employees' base compensation or whether it is for duties outside the normal workweek. And viewing the facts in the light most favorable to Plaintiffs, § 604(b) applies.

The Supreme Court made clear that these provisions—§ 602(a) and § 604(b)—provide content to the salary basis requirement in that they both "serve to define" what the HCE requires. 598 U.S. at 57, 143 S.Ct. 677. "And § 604(b)'s focus on daily and hourly workers confirms that § 602(a)—as its own text shows—pertains only to employees paid by the week (or longer)." *Id.* at 58, 143 S.Ct. 677. It does not identify any other provision that would provide content to the salary basis requirement.

Furthermore, while rejecting asserted policy consequences, including the employer's "operational and cost-based objections," the Supreme Court recognized that the employer "could come into compliance with the salary-basis requirement . . . in either of two ways": (1) adding to the employee's per-day rate a weekly guarantee that satisfies § 604(b)'s conditions" or (2) converting the employee's "compensation to a straight weekly salary for time he spends on the rig." *Id.* at 60, 143 S.Ct. 677. As the Supreme Court stated, "the whole point of the salary-basis requirement is to" eliminate the option for employers to both avoid paying "employees a true salary" and to avoid paying them overtime. *Id.* The Supreme Court does not identify other ways for the employer to comply with the salary-basis requirement.

Appendix D

Framing the question as "whether a high-earning employee is compensated on a 'salary basis' when his paycheck is based solely on a daily rate," the Supreme Court held "that such an employee is not paid on a salary basis, and thus is entitled to overtime pay." *Id.* at 43, 143 S.Ct. 677. In making that holding, it made two important conclusions: (1) § 602(a) "applies solely to employees paid by the week (or longer); it is not met when an employer pays an employee by the day" and (2) "Dailyrate workers, of whatever income level, are paid on a salary basis only through the test set out in § 604(b)." *Id.* at 50, 143 S.Ct. 677. The Supreme Court further noted that, not only do these "conclusions follow from both the text and the structure of the regulations," but the various asserted "policy claims cannot justify departing from what the rules say." *Id.* In a footnote, the Supreme Court emphasized that "[i]n setting out the pertinent regulatory structure, [it shows] that § 602(a) and § 604(b) are independent routes for satisfying the HCE rule's salary-basis component." *Id.* at 50, 143 S.Ct. 677 n.3. Thus, "a pay scheme meeting § 602(a) and the HCE rule's other requirements does not also have to meet § 604(b) to make a worker exempt." *Id.*

The Magistrate Judge interpreted footnote 3 as "establish[ing] that where a worker is paid on a purely salary basis (on a weekly or less frequent basis), Section 604(b) is not triggered." R&R at 17. That is a reasonable and fair interpretation supported by various pertinent caselaw. The Magistrate Judge also found such scenario was not present in this case because "Guilbeau's base compensation for his work as a DD at oilrig sites is comprised not just of a weekly salary but also a day rate."

Id. Viewing the summary judgment evidence in the light most favorable to Plaintiffs, the Court agrees with that finding. Furthermore, nothing in *Helix*, including footnote 3, directly addresses the type of hybrid compensation structure at issue in this case. *See* 598 U.S. at 45-57, 143 S.Ct. 677. Obviously, Defendant neither paid Plaintiffs solely on a daily rate nor solely with a salary. But that does not make *Helix* distinguishable in all respects. That factual distinction does not eliminate the reasoning of the Supreme Court, especially given the en banc statements of the Fifth Circuit that were under review.

The *Helix* decision arose from an en banc Fifth Circuit decision that remains binding to the extent not inconsistent with *Helix. See Hewitt v. Helix Energy Sols. Grp., Inc. [hereinafter Hewitt]*, 15 F.4th 289 (5th Cir. 2021), *aff'd*, 598 U.S. 39, 143 S.Ct. 677, 214 L.Ed.2d 409 (2023). In *Hewitt*, the Fifth Circuit held "that, when it comes to daily-rate employees" the employer "must comply with § 541.604(b)." 15 F.4th at 292. Because Plaintiffs here have a hybrid payment structure, one might distinguish *Hewitt* on grounds that they are not daily rate employees subject to that provision. But the hybrid pay structure certainly does not render the en banc decision irrelevant to this case. Its reasoning transcends the particular factual differences. Importantly, *Hewitt* recognized that "respect for text forbids [courts] from ignoring text." *Id.*

Hewitt also recognized persuasive authority from the Sixth and Eighth Circuits, as well as the Secretary of Labor. *Id.* at 294 (finding persuasive *Hughes v. Gulf Interstate Field Servs. Inc.*, 878 F.3d 183 (6th Cir. 2017);

Coates v. Dassault Falcon Jet Corp., 961 F.3d 1039, 1042 (8th Cir. 2020); and *U.S. Dep't of Labor, Wage & Hour Div., Op. Letter* FLSA2020-13, 2020 WL 5367070, *1 (Aug. 31, 2020)). It found *Hughes* notable in recognizing that "[t]he text of § 541.602(a) does not tell us what to do when an employee's salary is *not* clearly calculated 'on a weekly, or less frequent basis.'" *Id.* at 295 (quoting 878 F.3d at 189). It found *Coates* notable in its conclusion "that the 'general definition' of salary basis as set forth in § 541.0602(a) is 'subject to numerous interpretative rules,' including § 541.604(b)." *Id.* (quoting *Coates*, 961 F.3d at 1042). Consistent with *Coates* and *Hewitt*, one could read § 602(a) as effectively subject to an "exception" when an exempt employee's earnings are computed on an hourly, daily, or shift basis through 29 C.F.R. § 541.604(b). *See Helix,* 598 U.S. at 46-47, 55-57, 143 S.Ct. 677.

Hewitt also analyzed § 604(b) in depth. It recognized that to avoid losing the exemption or violating the salary basis requirement, two conditions must be satisfied when an employer computes an employee's earnings on a daily basis—a minimum weekly guarantee and a reasonable relationship between that guaranteed amount and the amount earned. 15 F.4th at 293-94. These conditions serve to protect employees. *Id.* at 294. "First, the 'minimum weekly' guarantee ensures that a daily-rate employee still receives a guaranteed amount each week 'regardless of the number of hours, days or shifts worked.'" *Id.* (quoting regulation). This "sets a floor for how much the employee can expect to earn, 'regardless' of how many hours, days, or shifts the employee works." *Id.* (same).

> Second, the reasonable-relationship test ensures that the minimum weekly guarantee is not a charade—it sets a ceiling on how much the employee can expect to work in exchange for his normal paycheck, by preventing the employer from purporting to pay a stable weekly amount without regard to hours worked, while in reality routinely overworking the employee far in excess of the time the weekly guarantee contemplates.

Id. In a nutshell, the en banc Fifth Circuit held that it is explicit from § 541.604(b) "that an otherwise 'exempt' employee who is paid a daily rate 'los[es] the exemption' and 'violat[es] the salary basis requirement' unless the employer complies with § 541.604(b)." *Id.* at 297.

Hewitt also addressed an argument that the Fifth Circuit's "understanding of the salary-basis test conflicts with *Litz v. Saint Consulting Group, Inc.*, 772 F.3d 1 (1st Cir. 2014), and *Anani v. CVS RX Services, Inc.*, 730 F.3d 146 (2nd Cir. 2013)." *See* 15 F.4th at 297. The Fifth Circuit began by recognizing "stray language in *Anani* that appears to be in tension with" its opinion. *Id.* (parenthetically noting *Anani*, 730 F.3d at 149 ("We perceive no cogent reason why the requirements of C.F.R. § 541.604 must be met by an employee meeting the requirements of C.F.R. § 541.601."); *see also Litz*, 772 F.3d at 5 (quoting *Anani* but noting that "[p]laintiffs 'do not take a position on this issue'")). But despite that stray language, it found "no actual conflict" for the "simple reason" that those cases both involved pay structures

not invoking § 604(b). *Id.* In doing so, it expressly agreed with *Hughes* distinguishing those cases "precisely on this textual ground." *Id.* Consequently, the Fifth Circuit expressly stated that "[t]here are both textual and precedent-based grounds for distinguishing [its] case from *Litz* and *Anani*." *Id.*

Neither *Helix* nor *Hewitt* discuss § 541.604(a) and provide no basis to consider it as another exception to the salary basis dichotomy. Rather, by its terms, it applies when an employer provides an exempt employee with additional compensation, such as a commission, a percentage of sales or profits, or for "hours worked for work beyond the normal workweek." 29 C.F.R. § 541.604(a). The latter type of "additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off." *Id.*

As found by the Magistrate Judge, § 604(a) applies to bonus payments for being on standby, working with a reduced crew, working as the lead for a crew, or using certain required technologies or tools in performing work duties. *See* R&R at 14. No one objects to this finding. Indeed, Defendant specifically agrees with this finding. *See* ECF No. 88 at 12. And the Court accepts such finding. These bonuses are for circumstances beyond the base work duties.

The Magistrate Judge further found that Defendant has not advanced a persuasive argument for similarly categorizing Plaintiffs' day rate. *See* R&R at 14. In doing

so, the Magistrate Judge expressly distinguished cases from the Western District of Louisiana that did not have the benefit of the *Helix* decision and relied on circuit cases (*Litz* and *Anani*) that have been rejected at least in part by *Helix*. *See id.* at 14-15 n.2 (disagreeing and distinguishing *Venable v. Schlumberger Ltd.*, No. 6:16-CV-00241 LEAD, 2022 WL 895447 (W.D. La. Mar. 25, 2022) and *Boudreaux v. Schlumberger Tech. Corp.*, No. 6:14-cv-02267, 2022 WL 992670 (W.D. La. Mar. 30, 2022)). While Defendant asserts objections to distinguishing these cases, the Court's de novo review supports an analytical framework that does not follow the results in the non-binding decisions of the Western District of Louisiana in *Venable* and *Boudreaux*.

The Magistrate Judge ultimately concluded that, for Plaintiffs' day rate payments to fall within § 604(a), the extra compensation must be for work beyond the normal workweek. *Id.* at 13. The Magistrate Judge aptly defined, "beyond the normal workweek," as "additional work not typically contemplated by the employee's regular schedule or hours worked in excess of 40 hours per week." *Id.* at 12. The Court agrees that § 604(a) excludes compensation received for the normal workweek as "additional compensation." This is so for at least two reasons.

First, if the provision was intended to apply to additional compensation provided for work performed during the normal workweek, the example's language regarding "beyond the normal workweek" would be superfluous and unnecessary. As recognized by the Supreme Court, "one of the most basic interpretive canons" directs courts to construe a statute, or in this instance a regulation, "so

that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (citation and internal quotation marks omitted). Second, if the compensation is part of the employee's base compensation for work done during the normal workweek, then it does not seem to be additional compensation at all—it is just base compensation, perhaps calculated differently from other base compensation. And when the base compensation is computed on an hourly, daily, or shift basis, then § 541.604(b) applies.

Last year, the Fifth Circuit decided another case that deserves discussion. *See Hebert v. FMC Techs., Inc.*, No. 22-20562, 2023 WL 4105427, at *1 (5th Cir. June 21, 2023) (unpublished opinion), *cert. filed*, (U.S. Dec. 29, 2023). (affirmed lower court grant of summary judgment). In *Hebert*, it was "undisputed that [the employer] paid [the employee] a salary and that [the employee] received a field service premium for days he spent working at offshore sites." *Id.* at *1. The plaintiff there "admit[ted] that he received a bi-weekly salary without regard to the number of hours or days he worked" and in an unpublished opinion, the Fifth Circuit bluntly stated that such "salary plainly satisfies the definition of 'salary basis' in § 541.602(a)." *Id.* at *2. Relying on 29 C.F.R. § 541.604(a), the Fifth Circuit stated that an employee "does not lose his status as an employee paid on a salary basis just because he is also paid a bonus on top of the salary that the record has established was guaranteed to him." *Id.*

The Magistrate Judge distinguished *Hebert* on grounds that the case did not consider the argument at issue here that the asserted bonus payment was not a bonus or premium payment at all, but rather a day rate for base compensation for a normal workweek. R&R at 15 n.3. While not specifically noted by the Magistrate Judge, the field service premium appears more akin to the bonuses recognized by the Magistrate Judge to be additional compensation under § 604(a). As a premium, the bonus is not for an employee performing base duties under typical circumstances. But rather, such premium appears to be a bonus for performing duties outside the ordinary circumstances of the position, like the tech, reduced crew, and lead bonuses at issue in this case. The facts set out in *Hebert* support this conclusion.

The plaintiffs in *Hebert* were installation engineers who would "work in office environments and occasionally visit offshore sites." *Hebert*, 2023 WL 4105427, at *1. While providing on-site technical support was one of their main tasks, they only engaged in such fieldwork occasionally, and when they did, they received a premium for days working at the offshore site. *Id.* Stated more specifically,

> While at FMC, Hebert spent over half of his time in the office planning and reviewing installation projects. He also provided on-site technical support for issues and troubleshooting during the installation process for FMC's equipment. If any issues were discovered during installation, Hebert assisted with analyzing those issues and designing solutions to them. Occasionally,

> Hebert's on-site work required manual labor. Once a project was complete, Hebert and his team then conducted in-office reviews of that project.

Id.

The above facts are distinct from the facts in this case, which consistent with the summary judgment standard, the Court construes in the light most favorable to the Plaintiffs as the parties opposing summary judgment. As recognized by the Magistrate Judge, the hybrid pay structure in *Hebert* (salary plus a service premium/bonus) provides little guidance "as to how to evaluate the hybrid pay structure at issue" here. R&R at 15 n.3. Although Defendant maintains that the R&R is "directly contrary to" *Hebert, see* ECF No. 88 at 3, this Court disagrees. The Magistrate Judge properly distinguished *Hebert.*

Contrary to Defendant's objection, *see* ECF No. 88 at 8, the Magistrate Judge did not err in her consideration of *Hebert.* Relying on Hebert's appellate brief, Defendant argues that "the R&R draws distinctions without differences." *Id.* at 8 & n.11. In full, footnote 11 states:

> Hebert's brief to the Fifth Circuit reveals that he made the exact same arguments as are present in this case. "We go offshore, we work a ton of hours, we are hands-on, we do it for a hundred days a year." "FMC pays installation engineers, including Hebert, a salary plus a daily bonus (called a "field service premium,"

> when they work in the field.) "Field service premium "is a "daily bonus." "The field service premium [. . .] is a daily bonus that is purely based off the time that is spent working in the field [.]). *Hebert*, No. 22-20562, Doc. No. 26 at pp. 15–17. There is no difference between the (field premium) that the FMC engineers received for their hundreds of days worked offshore versus the day bonus STC directional drillers received for their work on days billable to a customer.

Id. at 8 n.11. In contrast to the facts of this case, Hebert's appellate brief seems to concede the issue that the field premium is a bonus for offshore worktime. In conjunction with the facts set out in the *Hebert* decision, it is clear that the offshore worktime is not an everyday occurrence or even something that occurs half the time. A bonus for occasional work activities like working offshore may fall within § 604(a) rather than invoking § 604(b). But viewing the facts in the light most favorable to Plaintiffs in this case, this case differs materially from *Hebert.*

The Magistrate Judge also relied on a district court decision from the Southern District of Texas. *See* R&R at 15-16 & n.3 (relying on *Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 3:19-CV-00320, 2022 WL 658768 (S.D. Tex. Mar. 4, 2022) (recommendation of Mag. J.) *adopted by* 2022 WL 889276 (S.D. Tex. Mar. 25, 2022)). *Gentry* reasoned that § 604(b) is invoked by a hybrid pay structure that guarantees a weekly salary based on less than a normal workweek plus an additional hourly rate for all additional hours worked. *See* 2022 WL 658768, at *5-6.

And it provides persuasive analysis and consideration. Importantly, as recognized by the Magistrate Judge, *Helix* supports the conclusions reached in *Gentry. See* R&R at 16.

As recognized by the Magistrate Judge, the employer had appealed *Gentry* to the Fifth Circuit and a circuit ruling "could be potentially dispositive of the HCE exemption issue before the Court." *Id.* at 15 n.3. And shortly after the R&R, the Fifth Circuit affirmed the judgment of the district court "essentially for the reasons stated in the magistrate judge's thorough and exhaustive report, adopted by the district court as its opinion." *See Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 22-40219, 2023 WL 4704115, at *1 (5th Cir. July 24, 2023) (per curiam). As foreshadowed by the Magistrate Judge here, such affirmance does provide a potentially dispositive basis to follow *Gentry* and its interpretation of the relevant regulations. But the Fifth Circuit recently treated a petition for rehearing en banc as a petition for panel rehearing, granted the petition, and withdrew the per curiam opinion. *See Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 22-40219, unpub. order (5th Cir. Jan. 26, 2024) (attached as Ex. A to ECF No. 100). This Court thus remains without a final ruling on the *Gentry* appeal. But beyond speculation, there is no basis to ascertain that a future ruling might hold. Courts do not engage in speculation as to future rulings. They instead proceed with the issues before them based on the existing state of the law. For all the reasons stated, the Court finds *Gentry* persuasive and supported by this Court's own interpretation of both *Helix* and *Hewitt.* If the Fifth

Circuit issues a binding decision to the contrary, the Court may of course revisit this matter upon proper motion raising the new opinion.

Defendant objects that the Magistrate Judge plainly erred because the R&R is directly contrary to (1) *Hebert*, (2) the *Helix* pronouncement in footnote three that § 602(a) and § 604(b) constitute separate and distinct paths for satisfying the salary basis requirement, (3) statements in *Hewitt* that it does not conflict with *Anani* or *Litz*, and (4) various cited caselaw finding that the reasonable relationship test does not apply when an exempt employee receives a salary that complies with § 602(a). ECF No. 88 at 3. As clearly conveyed by the above de novo analysis, the Court disagrees and thus overrules these objections. And to be clear, the Court disagrees that the Magistrate Judge erred in her consideration of *Hebert, Helix, Hewitt*, or other caselaw.

With respect to the various cited authorities not expressly considered by the Magistrate Judge, Defendant questions the decision not to specifically address each cited case. *See* ECF No. 88 at 13-17. Suffice to say, courts do not err simply by failing to address cited authorities on a case-by-case basis. This is particularly true when cited authority is from outside sources that are not binding on the court. The Magistrate Judge properly considered the binding sources, interpreted such sources, and made findings and conclusions therefrom. To the extent other cited authorities support a different interpretation, a reviewing court may safely view those other cited authorities as unpersuasive to the original analysis

and interpretation. Of course, an objecting party may specifically show how an undiscussed authority establishes error. Further, a de novo review negates any perceived error in consideration of cited authorities. To avoid any complaint by Defendant, the Court expressly states that it finds no cited authority persuasive enough to alter its interpretation of the regulations at issue in this case.

The Court, furthermore, rejects Defendant's argument, *see* ECF No. 88 at 13, that the Magistrate Judge committed clear error in relying on *Gentry.* As already discussed, the Court has accepted the Magistrate Judge's interpretation of relevant caselaw and regulatory text through its de novo review and views *Gentry* persuasive and supported by this Court's own interpretation of both *Helix* and *Hewitt.* Following *Gentry* is consistent with such interpretation. At one point, the Fifth Circuit affirmed *Gentry*, "found no reversible error of law or fact," and expressly recognized the lower court's ruling as "thorough and exhaustive." *See Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 22-40219, 2023 WL 4704115, at *1 (5th Cir. July 24, 2023) (per curiam). This affirmance provides some support for the Magistrate Judge finding the lower court decision persuasive and is a strong indicator that the Magistrate Judge committed no clear error in choosing to find *Gentry* persuasive to the issues before the Court. That the Fifth Circuit has recently withdrawn the initial affirmance provides no basis to find clear error, or error at all. When courts address a legal issue without the benefit of directly controlling binding precedent, they properly utilize non-binding precedent that they find persuasive. The Magistrate Judge did just that. And this Court

agrees that *Gentry* is persuasive on the facts before this Court. Notably, had the Fifth Circuit not withdrawn that affirmance, the review of the R&R may have been much simpler. Without a final ruling on the *Gentry* appeal, this Court remains in essentially the same circumstances that existed before the Magistrate Judge.

Defendant provided supplemental authority that the Court will address. *See* ECF No. 93 (providing *Wilson v. Schlumberger Tech. Corp.*, 80 F.4th 1170, 1176 (10th Cir. 2023)). It submits that "[t]he compensation plan at issue in *Wilson* is the same compensation plan that Plaintiffs assert here as being contrary to the FLSA." *Id.* at 2. Notably, *Wilson* vacated a jury verdict upon all evidence presented and remanded for a new trial. *See* 80 F.4th at 1172. Although the Tenth Circuit found that Schlumberger compensated the plaintiffs on a salary basis, it remanded the case because it found other issues that "may be subject to factual dispute." *Id.* at 1180.

Wilson appears to be a particularly apt comparison because it involved the same defendant as this case and the employee was an MWD, like O'Mara. *See id.* at 1173. In *Wilson*, the Tenth Circuit held that § 604(b) "applies only to employees whose base compensation is computed on an hourly, daily, or shift basis." *Id.* at 1176. But here, as recognized by the Magistrate Judge, there is evidence that Defendant paid Plaintiffs a day rate as part of their base compensation. *See* R&R at 13-14. Guilbeau also testified that he received his salary portion from Defendant because the employees "were on-call 24/7." ECF No. 73-1 at 37:25–38:1. He testified that employees did not receive

the day rate "other than being on a customer's well site." *See id.* 36:18–37:5. The only "work" identified other than being on a customer's well site consisted of attending training classes, which was not compensated by a day rate. *See id.*

As the Magistrate Judge found in this case, Defendant has not carried its burden to support its claimed exemption because it has not shown as a matter of law that it paid Plaintiffs on a salary basis. There remains a dispute as to whether the day-rate portion of Plaintiffs' compensation was part of the base compensation or constituted additional compensation within the scope of § 604(a) and thus outside the purview of § 604(b). *See* R&R at 12-19. Accepting the findings of the Magistrate Judge, the Court finds that Defendant has failed to carry its burden to establish its affirmative defense by failing to establish as a matter of law that § 604(b)'s reasonable relationship requirement does not apply under the facts construed in the light most favorable to Plaintiffs.

This finding alone makes *Wilson* not dispositive of any issue in this case. Defendant simply wants to disregard the dispute as to whether the daily rate it paid to Plaintiffs was part of the employees' base compensation and thus calculated under § 604(b) or whether it was instead additional compensation falling under § 604(a). This Court's summary judgment ruling is not based on evidence presented in *Wilson.* Nor is it based on the Tenth Circuit's review of the evidence.

Limited to that holding, this Court finds *Wilson* distinguishable from this case. This case appears more similar to *Gentry* than to *Hebert*, and as *Wilson* noted: "Given the stark contrast in fact patterns our respective courts are concerned with, we are hard-pressed to say that the logic of *Gentry* bears on this case." 80 F.4th at 1179 n.4. Turning the tables, this Court is hard pressed to say that the logic of *Wilson* or *Hebert* bears on this case. While Defendant may ultimately provide evidence to carry its burden on its affirmative defense, it has not done so yet—particularly when the Court must view the evidence in the light most favorable to Plaintiffs.

Wilson, furthermore, did not recognize the superfluous nature of ignoring the § 604(a) "beyond the normal workweek" example when finding *Gentry* unpersuasive. *See id.* This Court, however, specifically recognizes a valid interpretive basis for limiting "additional compensation" under § 604(a) to circumstances where the compensation is actually additional to payment required for the normal workweek. In any event, the Tenth Circuit's holding underscores the differences between this case and others relied upon by Defendant.

Given this discussion of *Wilson*, the Court finds no need to consider Plaintiffs' Response to Defendant's Notice of Supplemental Authority (ECF No. 94). Having no need to consider such response the Court deems moot the Motion to Strike, or in the Alternative, Motion for Leave to file Reply (ECF No. 95), filed by Defendant. It thus has no need to consider Defendant's proposed reply

(ECF No. 95-2); Plaintiffs' response to Defendant's motion (ECF No. 96); or Defendant's reply (ECF No. 97).

Defendant seems to miss or ignore nuances in the R&R that are based upon the burden that Defendant must shoulder as the summary judgment movant and proponent of its affirmative defense that Plaintiffs are exempt employees. It also views the facts as clearly supporting its position. While viewed from its perspective the facts may be clear to Defendant, the summary judgment process requires courts to view the facts in the light most favorable to the non-movant. As identified in the R&R, there is evidence to support the view that Plaintiffs are not exempt employees because Defendant did not pay them on a salary basis. *See* R&R at 13-14 (identifying (1) deposition testimony that Guilbeau "would get a base payment that was . . . calculated by the day" every day that he worked on a rig; (2) remuneration statements that refer to this portion of his compensation as a "RigDay Rate"; and (3) deposition testimony that "it was Guilbeau's understanding that his day rate was part of his base remuneration for his normal duties as a DD working in the field at a rig site," while noting that the provided remuneration statements support that understanding). As noted earlier, this Court, moreover, views other deposition testimony from Guilbeau as also relevant to that matter.

Defendant takes issue with the Magistrate Judge stating: "There is no evidence before the Court that establishes this 'day rate' was extra compensation of the kind that would fall under Section 541.604(a)." *See* ECF No. 88 at 10 n.13 (citing R&R at 13). Defendant views

this as inaccurate because it "submitted testimony, pay statements and the bonus plan that established that Guilbeau's bonuses were conditional upon the type and amount of work he performed" and the bonuses were "not part of his base guaranteed compensation—which was his salary." *Id.* Defendant misses the point. Because Defendant has the burden on its affirmative defense, it must present evidence that establishes that the day-rate compensation was governed by § 604(a) instead of § 604(b) when application of the latter would eliminate the exemption. Defendant's identified evidence does not establish applicability of § 604(a) in light of the identified evidence of Plaintiffs.

The R&R merely recommends that the Court deny summary judgment because Defendant "has not proven as a matter of law that Guilbeau was paid on a 'salary basis,' as required to be exempt under the HCE exemption or any other white-collar exemption." R&R at 5. In making such recommendation, the Magistrate Judge fairly interpreted relevant regulations consistent with relevant precedent of the United States Supreme Court and the Fifth Circuit Court of Appeals. Based on the facts viewed in the light most favorable to the Plaintiffs, the Court agrees that Defendant has not carried its burden to establish its affirmative defense as a matter of law. A dispute remains as to whether Defendant's relevant pay structure is a hybrid salary plus bonus, which would not invoke § 604(b), or a hybrid salary plus a daily rate used to calculate the combined base compensation for a normal workweek for Plaintiffs. Under the interpretation of relevant caselaw and regulations, to which this Court agrees and accepts,

the latter hybrid pay structure would invoke § 604(b), and thus deny exemption status to Plaintiffs. Accordingly, summary judgment is denied.

In summary, for the reasons stated by the Magistrate Judge and as supplemented herein, the Court finds that an employer does not pay an employee on a salary basis when it uses a hybrid pay structure that pays employees a salary plus a day rate as a base compensation for work within the normal workweek. To the extent that there is a salary component that appears to satisfy § 602(a), the appearance is a ruse—an illusion to cover up the computation of the employee's earnings computed on a daily basis—a computation that directly invokes § 604(b) and its reasonable relationship component. Viewing the summary judgment evidence in the light most favorable to Plaintiffs, this is the hybrid pay structure utilized by Defendant in this case.

On the other hand, if the employer uses a hybrid pay structure that pays employees a guaranteed salary plus a day-rate bonus for work beyond the normal workweek, i.e., work beyond forty hours or beyond the scope of the employees' base duties typically performed in a normal workweek, then such pay structure does not invoke § 604(b) or its reasonable relationship component. While this case certainly does not require the Court to elaborate on the precise parameters of the meaning of "beyond the normal workweek," certain things could clearly qualify without much analysis. Even viewing the evidence in the light most favorable to Plaintiffs, the Court reasonably concludes that lesser payments received by Plaintiffs, i.e.,

for being on standby; carrying out duties with a reduced crew; working with specific tools or technologies; and for working as a lead, would fall under § 604(a). As previously discussed, these fall beyond the normal workweek. Depending on the normal workweek for a particular employee, other payments can readily be viewed as beyond the normal workweek—working night shifts, weekends, or at a different location, etc. But when an employer purports to pay an employee "additional compensation" for the employee simply doing his or her normal work, such compensation is not truly additional—it is simply compensation for the employee's base duties. And if it is "computed on an hourly, daily, or shift basis, then it activates § 541.604(b).

B. Objections to Magistrate Judge Order

In addition to issuing the R&R on the summary judgment motion, the Magistrate Judge issued orders addressing two motions referred for determination. *See* R&R and Order at 19-29. She outright denied Defendant's motion to defer notice pending resolution of threshold issues. *See id.* at 19, 30. And she granted in part and denied in part Plaintiff's motion for notice. *See id.* at 19, 30. Granting it as to a putative collective action for DD employees and denying it as to a MWD collective action. *Id.* at 19.

The Magistrate Judge recognized that *Swales v. KLLM Transportation Services, LLC*, 985 F.3d 430 (5th Cir. 2021) provides the standard for determining whether to certify a collective action and issue notice to putative

members. *See id.* at 20. The Magistrate Judge found that "Plaintiffs have satisfied their burden to demonstrate that the identified class of potential DD Plaintiffs are similarly situated and entitled to notice of this lawsuit." *Id.* at 19. The Magistrate Judge further found that "Plaintiffs have satisfied their burden to demonstrate that all DDs and MWDs were subject to the same pay practice, regardless of specific job duties or variations in the title of the position as listed above or variations in the specific rates of their pay." *Id.* at 23. But, as noted by the Magistrate Judge, "the similarities among the members of the MWD class is not as straightforward." *Id.* at 24. For the putative MWD collective action, "the duties component of the HCE exemption remains in dispute." *Id.* Ultimately, the Magistrate Judge concluded:

> Although Plaintiffs have presented the Court with some evidence that these distinctions may not ultimately be dispositive of the duties aspect of the HCE exemption, the undersigned is not convinced that the MWD class is similarly situated under the more searching *Swales* standard. Additionally, the undersigned notes that the MWD class is small—only consisting of 12 to 24 remote employees (and an unknown number of field employees). Combining this subclass with the much larger DD class is likely to complicate the resolution of this action and does not advance the case management and efficiency concerns underlying the collective action framework.

Id. at 28. Both sides assert objections to the Magistrate Judge orders. *See* ECF Nos. 88 and 91.

1. Plaintiffs' Limited Objection

Plaintiffs' objection is limited to requesting "that the Court direct notice to issue to both Defendant's DD and MWD employees." ECF No. 91 at 2. In a footnote, Plaintiffs note that they "lodge [their] objection regarding the Magistrate Judge's decision on class certification, although the R&R's section concerning certification of a collective action is technically an order and not a recommendation." *Id.* at 2 n.1. Nevertheless, they also "alternatively seek reconsideration pursuant to Fed. R. Civ. P. 54(b) of the R&R order denying certification of an MWD class because . . . after briefing closed, the Fifth Circuit issued an opinion clarifying the applicable standard under *Swales*, which supports class certification of both the MWD and DD classes." *Id.* (citing *Loy v. Rehab Synergies, LLC*, 71 F.4th 329 (5th Cir. 2023)).

In contrast to the R&R portion of the R&R and Order, the Magistrate Judge took direct action on the motions referred for determination, including the motion for notice. *See* R&R and Order at 19. Such an order can result in an appeal to the District Judge by filing objections in accordance with Fed. R. Civ. P. 72 and 28 U.S.C. § 636(b). But unlike a dispositive matter resolved through an R&R, an order fully resolved by a Magistrate Judge may also result in a motion to reconsider such order. "Typically, the Judge who issued the order to be re-reviewed would consider the filed motion for reconsideration." *Grant*

v. RentGrow, Inc., No. SA-21-CV-1172-JKP, 2023 WL 6518844, at *1 (W.D. Tex. Oct. 4, 2023). Indeed, in most instances, the preferred process by all involved is for the objecting party to first seek reconsideration from the judge who issued the order. This permits the issuing judge the initial opportunity to correct or clarify any aspect of his or her order that might need correction or clarification.

Plaintiffs initially object that, based on *Loy*, the Fifth Circuit has confirmed that *Swales* does not greatly alter the prior standard utilized in considering whether to permit a collective action to proceed with notice to be issued to putative members. ECF No. 91 at 2-3. This objection appears to be primarily motivated by the Magistrate Judge's statement that she was "not convinced that the MWD class is similarly situated under the more searching *Swales* standard." *See id.* at 3 (citing R&R and Order at 28).

The crux of *Loy* is that courts have "broad, litigation-management discretion" that is "cabined by the FLSA's 'similarly situated' requirement." 71 F.4th at 337 (quoting *Swales*, 985 F.3d at 443). The Magistrate Judge recognized this discretion. *See* R&R and Order at 20. Further, as the Magistrate Judge further recognized, *Swales* directed the district courts to "rigorously scrutinize the realm of 'similarly situated workers'" at "the outset of the case, not after a lenient, step-one 'conditional certification.'" *Id.* (quoting *Swales*, 985 F.3d at 434). Contrary to Plaintiffs' view, this does seem to be a more searching standard than previously applied. It was not contrary to law for the Magistrate Judge to apply the *Swales* legal standard in

considering whether to certify an MWD collective action and send notice.

Plaintiffs next object that the decision to not send notice to MWD employees ignores the identical pay structure between DDs and MWDs. ECF No. 91 at 4-6. However, the Magistrate Judge recognized that both groups of employees shared the same pay structure. *See* R&R and Order at 23. The Court finds no error in the consideration given to the identical pay structures.

While the Court agrees that "the uniformity in payment practices . . . may dispose of both types of employees' claims simultaneously," *see* ECF No. at 91 at 5, this does not lead necessarily to a conclusion that notice should be issued to the MWDs. The Magistrate Judge recognized other differences between the MWD members, i.e., lack of uniformity as to duties, which compelled the Magistrate Judge to deny the motion for notice as to MWDs. *See* R&R and Order at 24, 27-28. Such denial is not contrary to law. Nor is it based on any clear error. Such denial lies within the Magistrate Judge's discretion.

Lastly, Plaintiffs object to the Magistrate Judge imposing a numerosity requirement for issuing notice. *See* ECF No. 91 at 7-8. Although the Magistrate Judge mentioned the perceived much smaller number of MWDs that would comprise an MWD collective action, *see* R&R and Order at 28, the Court does not view the Magistrate Judge as imposing any numerosity requirement. The Magistrate Judge merely mentioned the comparatively small number of MWDs as an additional notation. *See id.*

With or without such additional notation, the Court finds the denial is not contrary to law or based on any clear error (even if interpolating some evidence to indicate that the number of field-MWDs were similar to the number of DDs).

In short, Plaintiffs have not shown that the denial of notice to MWD employees is clearly erroneous or contrary to law. Upon reviewing the entirety of the evidence and briefing, the Court has no definite and firm conviction that the Magistrate Judge committed any mistake. A de novo review of the legal conclusions shows no reason to reverse that denial. For all matters within the discretion of the Magistrate Judge, the Court finds no abuse of discretion.

Although Plaintiffs state that they alternatively seek reconsideration under Fed. R. Civ. P. 54(b), the Court declines to consider that attempt at reconsideration simultaneously with considering objections raised under Fed. R. Civ. P. 72 and 28 U.S.C. § 636(b). As mentioned previously, the preferred approach is that litigants present Rule 54(b) motions for reconsideration to the judge who issued the ruling sought to be reconsidered. Furthermore, in general, the Court does not view a footnote as a sufficient basis to assert a motion. That is especially true when the footnote is within objections under Rule 72 and § 636(b).

Whether *Loy* or some other basis justifies reconsideration under Rule 54(b), such basis should be submitted to the Magistrate Judge in the first instance. Although the Fifth Circuit issued *Loy* on June 21, 2023, after briefing concluded on the motion for notice but before

the Magistrate Judge issued the ruling on the motion, neither party presented the case for consideration and the Court finds no error in the Magistrate Judge not considering a case newly decided after briefing concluded. This Court, furthermore, finds no basis to return the matter to the Magistrate Judge under the standard of review applicable to objections asserted under Rule 72 and § 636(b).

2. Defendant's Objections

Defendant lodges objections against both adverse rulings by the Magistrate Judge. *See* ECF No. 88 at 4-5. As for the denial of Defendant's motion to defer consideration of the motion for notice/certification, it objects to the Magistrate Judge's consideration of its argument that Plaintiffs' reasonable relationship claim is a threshold issue that must be resolved before notice of a collective action is issued. *Id.* at 4-5.

As for the Magistrate Judge's certification of a nationwide collective action of individuals employed as DDs, Defendant objects that the Magistrate Judge failed to address several relevant issues regarding the ramifications of a certified collective action of DDs in the Western District of Louisiana. *See id.* at 5. It also asserts the same reasonable relationship and threshold issue asserted against the ruling on the motion to defer consideration. *See id.* at 5-6, 17-21. It further asserts objections based on the Magistrate Judge (1) failing to address "an argument that the regulation upon which Plaintiffs' claim is based is contrary to the controlling

statute," *id.* at 6, 17; (2) "adopting wholesale Plaintiffs' proposed notice and schedule," *id.* at 6-7; (3) abusing her discretion in certifying a DD collective action over Defendant's objection regarding threshold issues, *see id.* at 7; (4) committing error and abusing her "discretion in certifying the class and ordering the production of lists before the time expired for [Defendant] to even raise objections to the R&R as permitted under the Federal Rules and U.S. Code, let alone allowing time for those objections and any appeals to be resolved," *id.*; and (5) certifying a case with no cognizable claim, *id.* at 13.

Twenty-two months after Plaintiffs commenced this case, they moved for notice (ECF No. 62) under *Swales.* They sought leave to send notice to a collective action comprised of Defendant's current and former DDs and MWDs. ECF No. 62 at 1. After the Magistrate Judge held a hearing on the motion, *see* ECF No. 72, Defendant moved for summary judgment (ECF No. 73) and to defer issuance of notice (ECF No. 74). It moved to defer consideration of Plaintiffs' motion for notice/certification until the Court had fully resolved Defendant's threshold challenge that Plaintiffs had no valid reasonable relationship claim under § 604(b). ECF No. 74 at 1. As an alternative threshold issue, Defendant argued that Plaintiffs cannot proceed with a "salary-only challenge." *Id.* at 1-2. It sought to defer a ruling on Plaintiffs' request for notice until the Court decided these threshold issues through the summary judgment motion. *Id.* at 2.

Defendant objects that the Magistrate Judge incorrectly analyzed its threshold challenge. ECF No.

88 at 4. The initial gist of that objection is that the asserted threshold challenge does not arise from an affirmative defense, but instead arises from Plaintiffs' right or standing to state their claim. *Id.* It states that it "did not ask the Court to decide its exemption defense," it instead "asked the Court to find that Plaintiffs had not stated a cognizable claim in attempting to apply the reasonable relationship to an employee paid a true salary and qualifying under § 602(a) as being paid on a salary basis." ECF No. 88-1 at 10.

The latter statement does not explain how that differs from resolving its affirmative defense. The HCE exemption has three requirements, one of which is a minimum weekly payment on a salary or fee basis. *See* 29 C.F.R. § 601(a), (b). The salary basis requirement is a contested matter in this case. That exemption requirement mandates consideration of the general salary basis definition of 29 C.F.R. § 541.602. When an employer pays additional compensation to an exempt employee or computes an exempt employee's earnings on an hourly, daily, or shift basis, 29 C.F.R. § 541.604(a) or (b) come into play. Under § 604(b), the reasonable relationship issue does not arise unless "[a]n exempt employee's earnings" are "computed on an hourly, a daily or a shift basis."

The Court does not see how this perceived threshold issue differs in substance from considering the exemption defense. Plaintiffs present a claim for unpaid overtime. They assert the reasonable relationship issue only in anticipation or response to the HCE defense. Whether

that issue succeeds depends on a definitive ruling on the affirmative defense.

As to the objection based on Plaintiffs' right or standing to state their claim, the Court finds the objection has no basis under the facts. Through its motion for summary judgment, Defendant raises no issue that Plaintiffs lack standing to assert their overtime claim. There is no question that this Court has jurisdiction over this FLSA action. To the extent that Plaintiffs might lack a cognizable claim on the summary judgment briefing before the Court, they only do so if Defendant carries its burden to establish its affirmative defense that Plaintiffs are exempt employees. By not raising the second alternative threshold issue in its summary judgment motion, Defendant did not submit it for merits consideration. The Court finds that Defendant has waived the alternative argument as it pertains to the summary judgment ruling.

Defendant strenuously argues that the three basic elements of its affirmative defense are undisputed. ECF No. 88 at 4. But that argument completely disregards the fact that the required weekly salary must be paid on a salary basis, which still remains in a state of dispute. And as found by the Magistrate Judge and accepted by this Court, Defendant has not carried its burden to establish its affirmative defense. Viewing the facts in the light most favorable to Plaintiffs, a reasonable finder of fact could return a verdict for Plaintiffs despite the asserted affirmative defense. Defendant has not shown that it is entitled to judgment as a matter of law on its affirmative defense. Through the lens of summary judgment, the facts

do not show that Defendant paid Plaintiffs on a salary basis as required for them to be exempt employees.

Defendant later revisits the threshold challenge issue. *See id.* at 17-20. It contends that the Magistrate Judge clearly erred when she ruled that its argument was an affirmative defense that should be addressed on the merits. *Id.* at 18. It concedes that threshold issues vary "but they commonly involve the issue of limitations on a court's authority or ability to address the merits of an underlying matter." *Id.* Although Defendant presents a myriad of circumstances that have been noted or found to be threshold issues in the actions then before the various courts or boards, it presents none holding that the exemption relied upon by Defendant qualifies as a threshold issue that precludes issuance of notice in this type of FLSA collective action. *See id.* at 18-20. This Court does not view such authorities as a reason to defer issuing notice in this FLSA action.

Furthermore, although Defendant raised its affirmative defense as a threshold issue in its motion to dismiss (ECF No. 12), filed about two months after commencement of this case, this Court denied that motion because Defendant had not shown that the defense was viable from the face of the operative pleading. *See* ECF No. 27. Defendant chose not to reassert the defense until filing its summary judgment motion on March 30, 2023, more than two years after commencement of this action, a year after denial of its motion to dismiss, and nearly a month after the Magistrate Judge had held a hearing on the motion for notice. This does not indicate that the defense

should preclude the Magistrate Judge from considering the motion for notice.

In general, threshold matters are raised early in a case. Litigants should present them in such a manner as to not delay issuance of notice of a certified collective action. If a motion to dismiss fails on a perceived threshold matter, the litigant should garner its evidence and present it in a motion for summary judgment as soon as it is procedurally viable to do so. It is a bit incredulous for Defendant to continue to argue that its affirmative defense is a threshold matter that the Court must decide before issuing notice to prospective members of a collective action when it waited so long to assert it in a motion for summary judgment. Regardless, the Magistrate Judge appropriately recognized that "Plaintiffs should not be required to marshal summary-judgment evidence to disprove Schlumberger's affirmative defense in the context of a motion for notice." R&R at 22. Furthermore, the defense is one that appears to relate to all putative members of the collective action. Thus, it is not a defense that must be addressed before notice issues. Additionally, as made abundantly clear in this Memorandum Opinion and Order, Defendant has still not succeeded on its defense.

As for the second threshold matter asserted in the motion to defer notice, such matter blends into Defendant's objection that the Magistrate Judge erred in failing to consider or address its alternative argument "that the DOL regulations were contrary to the governing statute as the governing statute establishes the exemptions

based upon the duties performed by the incumbent, not the amount the incumbent is paid." *See* ECF No. 88 at 17. Defendant objects that even though it "raised the issue in its opposition to certification," the Magistrate Judge did not address it. *Id.*

Defendant indeed raised the issue in response to the motion for notice. *See* ECF No. 66 at 5-6 (relying on *Nevada v. U.S. Dept. of Labor*, 275 F. Supp. 3d 795, 805-06 (E.D. Tex. 2017) and 69 Fed. Reg. 22122, 22165 (April 23, 2004)). But Plaintiffs challenged the issue in reply by arguing that the regulations are permissible under the rulemaking authority to define and delimit exemptions, Defendant misreads the non-binding case from the Eastern District of Texas, and judicial estoppel bars Defendant from disavowing the binding nature of the regulations it has previously relied upon. *See* ECF No. 69 at 1-4.

Defendant did not raise this alternative issue in its summary judgment motion. In response to the summary judgment motion, Plaintiffs viewed that failure as an abandonment of the alternative issue. *See* ECF No. 78 at 6-7. Defendant addresses the argument in its reply brief, ECF No. 82 at 1 n.1, but makes no attempt to assert the issue into its summary judgment motion. Of course, even had it tried to raise the issue in its reply brief, such attempt would not be sufficient to present it to the Court for resolution through the summary judgment process.

To the extent a litigant believes it has a threshold issue that must be resolved before notice may issue in

a collective action, it is incumbent upon such litigant to present it to the Court for resolution. The Magistrate Judge simultaneously resolved the two motions referred for disposition along with issuing a recommendation that the Court deny Defendant's summary judgment motion. The Magistrate Judge knew exactly what issues were and were not presented as reasons for obtaining summary judgment. Defendant's failure to assert the issue in its motion for summary judgment provides ample reason to disregard it as it pertains to issuance of notice for a collective action. And while Defendant did raise it as a reason to defer notice, even then, it merely sought to defer issuance of notice pending resolution of its motion for summary judgment. By not asserting the second threshold matter in that motion, the Magistrate Judge had no reason to consider it as a viable reason to defer or deny notice.

Furthermore, even though the Magistrate Judge did not expressly consider the alternative argument in making the ruling on the motion for notice, the ruling itself necessarily indicates that the Magistrate Judge rejected the alternative argument as a reason not to issue notice to the DD employees. Defendant has not shown that such rejection is clearly erroneous or contrary to law. And this Court does not find such rejection to be clearly erroneous, contrary to law, or any abuse of discretion.

Defendant's argument was endorsed in a dissent in *Helix*. *See* 598 U.S. at 67-68, 143 S.Ct. 677 (Kavanaugh, J., dissenting). Plaintiffs notified the Magistrate Judge of the *Helix* decision, *see* ECF No. 70, which prompted Defendant to respond, *see* ECF No. 71. That latter

response again raised the issue that Defendant asserts that the Magistrate Judge failed to consider. *See id.* at 6. Its response relies only upon the *Helix* dissent. *Id.* Dissenting opinions, however, are not binding on lower courts.

Defendant also objects that the Magistrate Judge certified a collective action that lacks a cognizable claim. *See* ECF No. 88 at 13. The entirety of this objection relates to the Defendant's view that Guilbeau and other DDs are exempt employees as to the overtime provisions at issue in this case. *See id.* at 13-17. For the reasons already stated, this Court agrees that Defendant has not carried its burden to show that the DD employees are exempt. Accordingly, the Court finds no error in certifying the collective action due to the lack of a cognizable claim.

Defendant further disagrees with the Magistrate Judge failing to address issues that arose in a certified collective action of DDs in the Western District of Louisiana, adopting the notice and schedule proposed by Plaintiffs, and failing to provide adequate time for producing lists of employees. *See* ECF No. 88 at 5-7. Defendant also states that the certified collective action "includes DXs which Plaintiffs recognized as not suitable for certification and even removed them from consideration in the MWD class after [Defendant's] objections." ECF No. 88-1 at 11. But like Defendant's prior objections, the Court finds no basis to reconsider the Magistrate Judge's rulings. The Magistrate Judge, of course, is free to revisit these matters as she handles the notice and certification issues that may arise as this case proceeds.

With respect to the motion for notice and motion to defer, the Court finds nothing clearly erroneous or contrary to law. The Magistrate Judge simply acted within her broad discretion. The Magistrate Judge did not abuse her discretion by denying the motion to defer ruling and partially granting the motion for notice despite the potentially dispositive affirmative defense, which she had recommended be denied. Notably, after issuing her order denying the motion to defer notice and granting notice as to a DD collective action, the Magistrate Judge granted Defendant's unopposed motion to stay the order on the motion for notice and stayed the deadlines and timelines while the Court considers Defendant's objections to the R&R and Order.

III. CONCLUSION

Having reviewed the R&R and Order in accordance with Fed. R. Civ. P. 72 and 28 U.S.C. § 636, and under the appropriate standard of review, the Court **ACCEPTS** the Report and Recommendation of the United States Magistrate Judge (ECF No. 86), **AFFIRMS** the order portion of the R&R and Order, **OVERRULES** all asserted objections, and **DENIES** Defendant's Partial Motion for Summary Judgment (ECF No. 73). For the reasons stated herein, the Court also **MOOTS** the Motion to Strike, or in the Alternative, Motion for Leave to file Reply (ECF No. 95), filed by Defendant.

This action will continue to proceed under the Referral Order (ECF No. 4) previously issued in this case. Consistent with the deadlines set forth in the R&R

and Order that the Magistrate Judge stayed pending resolution of the R&R, Defendant shall make the required disclosure of putative members of the DD collective action within ten days of this Memorandum Opinion and Order, unless the Magistrate Judge orders otherwise. The other deadlines set in the R&R and Order also restart as of the date of this Memorandum Opinion and Order unless the Magistrate Judge orders otherwise.

Because this case is already three years old, the Court intends to expedite this case to the extent possible. From deadlines in the R&R, the Court expects the notice and consent process to be completed within about four months absent any extensions by the Magistrate Judge. Further, consistent with this Court's Fact Sheet, *see* Fact Sheet for Judge Jason K. Pulliam ¶ 35, Defendant has filed its one and only allowed motion for summary judgment. Any future dispositive motion deadline will exclude another summary judgment from Defendant unless the undersigned has specifically granted leave for another such motion. To the extent there is need for a dispositive motion deadline at all, such deadline should expire within the consent period. Further, given the age of this case, the Court intends to set a trial date preferably in the last quarter of this year. **On or before March 19, 2024**, the parties shall confer and submit multiple proposed trial dates along with their best estimate as to the length of trial. To aid their conference, the Court's current schedule precludes trial in December 2024. It also has trials currently scheduled from September 23, 2024, through early October, as well as a trial commencing on October

21, 2024. The Court will have a firm trial setting in place before the end of March 2024.

It is so ORDERED this 5th day of March 2024.

/s/ Jason Pulliam
Jason Pulliam
United States District Judge

APPENDIX E — REPORT AND RECOMMENDATION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, FILED JULY 7, 2023

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-21-CV-0142-JKP

TREVER GUILBEAU, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; AND CHRISTOPHER O'MARA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant.

Filed July 7, 2023

REPORT AND RECOMMENDATION AND ORDER OF UNITED STATES MAGISTRATE JUDGE

Appendix E

To the Honorable United States District Judge Jason K. Pulliam:

This Report and Recommendation and Order concerns Plaintiffs' Opposed Motion for Notice Under *Swales* [#62], Defendant's Motion for Summary Judgment With Respect to the Claims of Trever Guilbeau [#73], and Defendant's Opposed Motion to Defer Notice Pending Resolution of Threshold Issues [#74]. All non-dispositive pretrial matters in this case have been referred to the undersigned pursuant to Western District of Texas Local Rule CV-72 and Appendix C [#4]. The District Court has also referred Defendant's motion for summary judgment for a report and recommendation [#75]. The undersigned therefore has authority to enter a recommendation on Defendant's motion for summary judgment pursuant to 28 U.S.C. § 636(b)(1)(B) and an Order on Plaintiffs' motion for notice and Defendant's motion to defer notice pursuant to 28 U.S.C. § 636(b)(1)(A). For the reasons set forth below, it is recommended that Defendant's motion for summary judgment be **denied**. The undersigned will also **deny** Defendant's motion to defer notice and **grant in part** Plaintiff's motion for notice, issuing notice for the identified class of "directional drilling employees" but declining to issue notice for the class of "measuring while drilling employees."

I. Background

This case arises under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219, and the Portal-to-Portal Act, 29 U.S.C. §§ 251–262. Plaintiffs Trever Guilbeau

and Christopher O'Mara bring this action on behalf of themselves and all others similarly situated against their former employer, Defendant Schlumberger Technology Corporation ("Schlumberger"), an oilfield services company, seeking unpaid overtime compensation. Guilbeau worked for Schlumberger as a directional drilling employee ("DD") in connection with Schlumberger's oilfield drilling operations, meaning he provided oilfield drilling services to Schlumberger and was generally responsible for executing non-vertical well-drilling projects. (Second Am. Compl. [#50], at ¶ 31; Salomon Dep. [#62-1], at 47:1–48:10.) O'Mara worked as a measuring while drilling employee ("MWD"), an engineering position involving collecting, monitoring, and reporting data collected from various tools and sensors on directional drilling rigs regarding drilling operations. (Second Am. Compl. [#50], at ¶ 32; Salomon Dep. [#62-1], at 38:21-42:16; O'Mara Dep. [#62-3], at 118:23–120:3, 160:3–161:18.)

Plaintiffs contend that they regularly worked over 40 hours per workweek (12-hour shifts up to seven days a week) and were not paid the overtime compensation they are due. (*See* Salomon Dep. [#62-1], at 76:4–77:4, 140:6–18.) Schlumberger takes the position that Plaintiffs were not entitled to overtime compensation because they were exempt from the overtime-pay provisions of the FLSA under the highly compensated employee exemption ("HCE exemption") and other white-collar exemptions. (Answer [#54], at ¶¶ 11–17.) Plaintiffs contend they were misclassified as exempt employees and Schlumberger's compensation structure violates the FLSA.

Appendix E

Plaintiffs filed a motion requesting issuance of notice of this putative collective action to two separate classes of employees of Schlumberger (DD employees and MWD employees) under the standards set forth in *Swales v. KLLM Transportation Services, L.L.C.*, 985 F.3d 430 (5th Cir. 2021). The parties have engaged in the limited discovery they agree is permissible and appropriate under *Swales*, and Plaintiffs believe each class of employees is in all material respects similarly situated and therefore entitled to notice of this suit.

Schlumberger opposes the motion, arguing that notice should not issue to either class of employees because *Swales* requires a decision on the merits on the application of the HCE exemption prior to the issuance of notice. Schlumberger's response to the motion briefs the Court why it believes Plaintiffs are exempt employees who were paid a guaranteed salary and received overall compensation qualifying them for the HCE exemption.[1]

1. Schlumberger raised some version of this same argument in two early motions to dismiss. The first motion to dismiss challenged the Original Complaint, which was filed in Guilbeau's name only and alleged that Guilbeau was paid a day rate. In response to the motion, Guilbeau filed a First Amended Complaint alleging he was paid partially on a salary basis and partially on a day rate, and the District Court mooted the motion to dismiss. Schlumberger's second motion to dismiss challenged the amended pleading, arguing that Guilbeau's First Amended Complaint still failed to state a claim under the FLSA. The District Court denied the motion, concluding that Plaintiffs' pleading did not conclusively establish that the affirmative defense of the HCE exemption or other exemptions barred their claims. (Order [#27].) Following the denial of the motion, Plaintiffs moved to file the Second Amended

Schlumberger also argues that, regardless of the exemption issue, Plaintiffs have not satisfied their burden to demonstrate that the identified classes are similarly situated such that collective treatment would advance the purposes of the FLSA.

The undersigned held a hearing on Plaintiff's motion for notice on March 1, 2023, at which counsel for Plaintiffs and Schlumberger appeared via videoconference. At the hearing, the undersigned questioned Schlumberger as to why it had not elected to file an early motion for summary judgment on the exemption issue, rather than asking the Court to address this merits issue in the context of its opposition to Plaintiffs' motion for notice. At the close of the hearing, the undersigned orally ordered the parties to confer and for Schlumberger to file an advisory within seven days informing the Court if it intended to file an early summary judgment motion or the parties could agree to tolling the statute of limitations of the putative class members pending the resolution of the exemption issue.

The parties did not file any supplemental advisory or motion indicating they had reached a consensus on the alternative approach discussed at the hearing within the seven days ordered by the Court. However, Schlumberger ultimately filed a motion for summary judgment on March 30, 2023, seeking summary judgment on all claims asserted by Plaintiff Trever Guilbeau on behalf of himself

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Complaint currently before the Court, and the undersigned granted the motion. (Order [#49].)

and all other DDs. The motion argues that Guilbeau was an exempt employee under the HCE exemption and therefore not entitled to overtime compensation. That same day, Schlumberger filed a separate motion asking the Court to defer the issuance of notice to either class of Plaintiffs (DDs and MWDs) pending the resolution of the summary judgment motion. After seeking various extensions of time to respond to the motions, the parties have filed their responses and replies [#66, #69, #78, #79, #82, #83]. All three motions are now ripe for review. The undersigned first addresses the motion for summary judgment, then the motions related to notice.

II. Motion for Summary Judgment

Schlumberger seeks summary judgment on all claims asserted by Guilbeau on behalf of himself and all other DDs. Schlumberger argues that Guilbeau was an exempt employee under the HCE exemption and therefore was not entitled to overtime compensation. The parties' dispute centers on the "salary basis" component of the HCE exemption, outlined *infra*. The Court should deny the motion because Schlumberger has not proven as a matter of law that Guilbeau was paid on a "salary basis," as required to be exempt under the HCE exemption or any other white-collar exemption.

A. Legal Framework on the HCE Exemption

The FSLA exempts individuals from overtime compensation if they are "employed in a bona fide executive, administrative, or professional capacity."

29 U.S.C. § 213(a)(1). Through that statute, Congress has authorized the Secretary of Labor to promulgate regulations exempting these individuals from overtime. *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289, 290 (5th Cir. 2021) (en banc), *affirmed*, 598 U.S. 39, 143 S. Ct. 677, 214 L.Ed.2d 409 (2023). "Under that authority, the Secretary has exempted 'highly compensated' as well as more modestly paid 'executive,' 'administrative,' and 'professional' employees." *Id.* (citing 29 C.F.R. §§ 541.601, 541.100, 541.200, 541.300).

To be exempt under any of these exemptions, the employee must satisfy three conditions: (1) the employee must meet certain criteria concerning the performance of executive, administrative, and professional duties; (2) the employee must meet certain minimum income thresholds; and (3) the employee must be paid on a "salary basis." *Id.* at 290–91. While "the duties criteria and income thresholds vary from exemption to exemption, the regulations apply the same salary-basis requirement to all four exemptions." *Id.*

To qualify for the HCE exemption specifically, an employee must (1) satisfy the threshold for annual compensation, (2) perform primary duties of office or non-manual work, and (3) customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive or administrative employee. *Hobbs v. EVO Inc.*, 7 F.4th 241, 248 (5th Cir. 2021). The compensation requirements under the HCE exemption, set forth at 29 C.F.R. § 541.601, have gone through multiple changes over the past few years, the most recent of which went

into effect on January 1, 2020, and requires annual total compensation of at least $107,432 to qualify a worker as exempt. 29 C.F.R. § 601(a)(1); *see also* Overtime Eligibility for White Collar Employees, 84 Fed. Reg. 51,230, 51,249–50, 51,307 (Sept. 27, 2019). This element of the exemption, however, is not contested in this case, and Guilbeau's salary met the compensation standards both in the relevant period ($100,000) and would meet the newest standard. Additionally, the parties are not contesting that Guilbeau satisfied the duties components of the HCE exemption. Their dispute centers on the "salary basis" requirement.

As to "salary basis," the HCE exemption explains that, as of January 1, 2020, "total annual compensation" must include compensation on a "salary basis" of a rate of not less than $684 per week. 29 C.F.R. § 541.601(b)(1). Because Guilbeau worked only until August 19, 2019, the weekly threshold governing his claims is the prior rate of $455 per week. 29 C.F.R. § 541.602 defines "salary basis" for purposes of all the white-collar exemptions, including the HCE exemption. This section provides:

> An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.602(a). In other words, an employee is only paid on a "salary basis" for purpose of the exemption if the employee receives "the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." *Id.* § 541.602(a)(1).

29 C.F.R. § 541.604 addresses scenarios involving additional compensation beyond the minimum guaranteed salary ("minimum guarantees plus extras"). Subsection (a) explains that an employer "may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement," so long as the employment arrangement "also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." *Id.* § 541.604(a). The regulation provides examples of this "additional compensation," such as "a one percent commission on sales," "a percentage of the sales or profits of the employer," or "additional compensation based on hours worked for work beyond the normal workweek." *Id.* Furthermore, the regulation states that this additional compensation "may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off." *Id.*

Subsection (b) explains that an employer may calculate earnings "on an hourly, daily or a shift basis, without losing the exemption or violating the salary basis requirement" so long as the following conditions are met:

> the employment arrangement *also includes a guarantee of at least the minimum weekly*

> *required amount paid on a salary basis* regardless of the number of hours, days or shifts worked, and a *reasonable relationship* exists between the guaranteed amount and the amount actually earned.

Id. § 641.604(b) (emphasis added). Furthermore,

> The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

Id.

The HCE exemption is an affirmative defense to liability under the FLSA. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974). Schlumberger therefore bears the burden to prove that Guilbeau was exempt from receiving overtime wages by a preponderance of the evidence, including that he was paid on a salary basis under the governing regulations. 29 U.S.C. § 213(a); *Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 273 (5th Cir. 2020).

B. Summary Judgment Standard

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also* Fed. R. Civ. P. 56(c). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548. Once the movant carries its burden, the burden shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). The non-movant must respond to the motion by setting forth particular facts indicating that there is a genuine issue for trial. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954

F.2d 1125, 1131 (5th Cir. 1992). The Court will view the summary judgment evidence in the light most favorable to the non-movant. *Rosado v. Deters*, 5 F.3d 119, 123 (5th Cir. 1993). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Westphal*, 230 F.3d at 174.

C. Summary Judgment Record

The summary judgment record contains evidence establishing the following undisputed facts regarding Guilbeau's compensation and employment with Schlumberger. Schlumberger employed Guilbeau from 2011 through approximately 2014. (Guilbeau Dep. [#73-1], at 17:23–18:4.) Guilbeau returned to work for Schlumberger in November 2017, and his employment with Schlumberger ended on August 15, 2019. (*Id.* at 5:19–6:9, 18:8–14.) Guilbeau worked as a DD. (*Id.* at 18:8–11, 20:22–24.)

During the relevant time period (2017 to 2019), Guilbeau was paid pursuant to a "hybrid" pay practice that consisted of two primary parts. (*Id.* at 37:17–42:4, 38:18–19; Salomon Dep. [#73-2], at 14:20–23, 64:8–11.) The first part of Guilbeau's pay structure was a biweekly salary. (Guilbeau Dep. [#73-1], at 33:14–35:20, 37:17–21; Maxwell Decl. [#73-3], at ¶¶ 4, 7, and 9.) Guilbeau's annual salary during the relevant time period was $47,476.00. (Guilbeau Dep. [#73-1], at 20:25–21:5; Maxwell Decl. [#73-3], at ¶ 13.) This equates to a biweekly salary of approximately

$1,826.00, or a weekly salary of approximately $913.00. (Guilbeau Dep. [#73-1], at 20:25–21:5.)

Guilbeau received the same biweekly salary regardless of whether he worked or not. (*Id.* at 33:14–35:20, 37:17–42:4; Maxwell Decl. [#73-3], at ¶ 10.) During the pay period of February 3, 2019, through February 16, 2019, for example, Guilbeau worked two days in the first week and every day the second week. (Maxwell Decl. [#73-3], at ¶ 5–6.) Guilbeau received the same biweekly salary of $1,826.00. (*Id.* at ¶ 4.) In the pay period of February 17, 2019, through March 2, 2019, Guilbeau worked every day of both weeks within the pay period. (*Id.* at ¶¶ 8–9.) Guilbeau received his biweekly salary of $1,826.00. (*Id.* at ¶ 7.) In the pay period of August 4, 2019, through August 17, 2019, Guilbeau did not work at all. (*Id.* at ¶ 10.) Guilbeau received his full biweekly salary of $1,826.00. (*Id.* at ¶ 9 (authenticating pay statement).)

The second part of Guilbeau's hybrid compensation was a "Rig-site Day Rate Bonus" and other lesser "bonus" payments. (Guilbeau Dep. [#73-1], at 33:14–22.) Schlumberger refers to this part of Guilbeau's compensation as a "bonus," while Plaintiffs refer to it as a "day rate." The "Rig-site Day Rate Bonus" was paid pursuant to a written policy setting forth conditions that must be met in order for an employee to earn the day rate for each day of performing job duties at a rig-site. (*Id.* at 44:18–46:20; Salomon Dep. [#73-2], at 112:23–113:12; Maxwell Decl. [#73-3], at ¶¶ 11–12; Pay Policy [#73-3], at 67.) Guilbeau's remuneration statements in the record

refer to the "Rig-site Day Rate Bonus" as a "Rig Day Rate." (Guilbeau Compensation [#78-2].)

Guilbeau also received a lesser "Standby Day Rate Bonus," which was paid "when the client [was] being charged for the field crew to be on standby." (Pay Policy [#73-3], at 67–68.) Guilbeau also received a "Reduced Crew Incentive," "Lead Bonus," and "Key Tech Bonus" when he worked with a smaller crew, worked as the lead for the crew, or was required to employ certain technologies or tools in performing his duties, respectively. (Guilbeau Compensation [#78-2], at 2–6; Guilbeau Dep. [#78-1], at 34:11–24.) Guilbeau recorded the job bonuses to which he was entitled in Schlumberger's system called "LoadChart." (Guilbeau Dep. [#73-1], at 48:11–21; Salomon Depo. [#73-2], at 74:14–21, 90:3–13.) Guilbeau did not receive these job bonuses for days worked that were not billable to Schlumberger's customers. (Guilbeau Dep. [#73-1], at 33:14–35:20.) For example, when Guilbeau attended training, he did not receive any additional "bonus" or "day rate" compensation. (*Id.* at 36:18–37:16.)

For 2018, Guilbeau's total annual income was $260,423.50. (*Id.* at 38:25–40:25.) That year, $175,300.00 of this income was from "Rig Day Rate" compensation, and $43,824.00 was Guilbeau's guaranteed base salary. (Guilbeau Compensation [#78-2], at 4.) For 2019, Guilbeau's total annual income was $143,199.79. (Guilbeau Dep. [#73-1], at 40:25–41:22.) That year, $78,125.00 of his income was from "Rig Day Rate" compensation, and $26,659.60 was his guaranteed base salary. (Guilbeau Compensation [#78-2], at 6.) At all time periods relevant to this suit, Guilbeau

earned over $100,000.00 per annum and over $455.00 per week in guaranteed base salary. (Guilbeau Dep. [#73-1], at 33:7–10, 37:17–42:4.)

D. Analysis

Schlumberger asks the Court to award it summary judgment on Guilbeau's claims on the basis that he was exempt from the FLSA's overtime compensation requirements under the HCE exemption. Schlumberger argues all three requirements of the HCE exemption are easily satisfied here: (1) Guilbeau was paid on a salary basis and received an annual salary of $47,467 (which amounts to a weekly salary of $913.00—an amount well in excess of the $455.00 required by the FLSA's regulations); (2) Guilbeau's total annual compensation exceeds $100,000, the threshold annual compensation for the exemption, as he was paid $260,423.50 in 2018 and $132,900.00 in 2019; and (3) Guilbeau regularly performed at least one or more exempt duties.

As noted, Plaintiffs dispute the salary-basis requirement. Plaintiffs maintain the hybrid pay structure at issue does not satisfy the salary-basis requirement of the exemption because Guilbeau's actual compensation did not bear a "reasonable relationship" to his guaranteed weekly salary as required by Section 541.604(b). Schlumberger responds that Section 541.604(b) does not govern this case because its reasonable relationship requirement only applies when an employee's compensation consists of a day rate *and a day rate only.* According to Schlumberger, because Guilbeau received a guaranteed salary that

otherwise satisfied the income thresholds of the exemption under Section 541.602(a) (even if that salary comprised a small portion of his overall compensation), Section 541.604(b) does not apply. Schlumberger misreads the governing regulations and is not entitled to summary judgment.

i. Schlumberger has not established as a matter of law that Section 541.604(b) does not govern the hybrid compensation scheme at issue.

The Court should reject Schlumberger's argument that the hybrid compensation scheme at issue satisfies the salary-basis requirement of the HCE exemption because it has not established as a matter of law that Section 541.604(b)'s reasonable relationship requirement does not apply.

Section 541.604 is triggered where employees receive some additional compensation over and above their minimum weekly guaranteed salary, just like Guilbeau here. Section 541.604(a) governs where the additional compensation is a commission or bonus or pay for hours "beyond the normal workweek," i.e., additional work not typically contemplated by the employee's regular schedule or hours worked in excess of 40 hours per week. Schlumberger asks the Court to treat the day-rate portion of Guilbeau's compensation as remuneration for this kind of extra work under 541.604(a) because Schlumberger referred to Guilbeau's day rate as a "Rig-site Day Rate *Bonus*." (Pay Policy [#73-3], at 67 (emphasis added).)

How Schlumberger characterized or referred to the day-rate portion of Guilbeau's compensation does not control; the reality of the compensation arrangement and the textual requirements of the governing regulations do. *See Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981) (A label is "dispositive only to the degree that it mirrors the economic reality of the relationship.").

Guilbeau testified in his deposition that "every day [he] was working on a rig, [he] would get a base payment that was . . . calculated by the day . . . ." (Guilbeau Dep. [#78-1], at 33:18–34:10.) Guilbeau's remuneration statements refer to this portion of his compensation as a "Rig Day Rate." (Guilbeau Compensation [#78-2].) There is no evidence before the Court that establishes this "day rate" was extra compensation of the kind that would fall under Section 541.604(a).

Aside from pointing to its decision to call Guilbeau's day rate a "bonus" in its pay policy documents, Schlumberger argues that Guilbeau's additional compensation is a "bonus" because it was tied to Schlumberger's revenue. Schlumberger argues that Guilbeau received his day-rate "bonus" only when Schlumberger's customers were charged for work performed at their oil rigs and Schlumberger generated revenue. The fact that Schlumberger charged its customers for days it staffed DDs to oilrigs does not establish as a matter of law that Guilbeau's day rate was a bonus falling under Section 541.604(a).

Again, to fall under Section 541.604(a), Guilbeau's extra compensation must be for extra work *beyond* Guilbeau's "normal workweek" or compensation for a commission on sales or a bonus based on employer profits. Although the regulations indicate that extra compensation under Section 541.604(a) may "in some weeks" exceed the employee's guaranteed salary, the remuneration statements in the record suggest that Guilbeau's day rate exceeded his guaranteed salary not just some weeks but every single week in which he performed work for Schlumberger. Furthermore, it was Guilbeau's understanding that his day rate was part of his base remuneration for his normal duties as a DD working in the field at a rig site. (Guilbeau Dep. [#78-1], at 33:18–34:10.) The remuneration statements before the Court support this assertion.

In contrast to his day rate, Guilbeau's other "bonuses" comprised a far lesser portion of his overall compensation. In 2018, for example, Guilbeau only received $900 in "Key Tech Bonus" payments and $4,800 in "Standby Rate" payments all year long. (Guilbeau Compensation [#78-2], at 4.) Even the "Reduced Crew Incentive" payment of $20,625 in 2018 pales in comparison to the $175,300 Guilbeau received in "Rig Day Rate" payments throughout that year. (*Id.*) Viewing Guilbeau's compensation structure as a whole it is reasonable to conclude that these lesser payments would fall under Section 541.604(a). These payments compensated Guilbeau for being on standby; carrying out his duties with a reduced crew; and being required to work with specific tools or technologies. Schlumberger has not advanced a persuasive argument

for categorizing Guilbeau's day rate, which consistently comprised the majority of his pay, similarly.[2] As Schlumberger has not proven as a matter of law that Guilbeau's day rate was a bonus under Section 541.604(a),

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2. The undersigned acknowledges that one judge in the Western District of Louisiana has embraced Schlumberger's "revenue-linked" commission argument. *See Venable v. Schlumberger Ltd.*, No. 6:16-CV-00241 LEAD, 2022 WL 895447 (W.D. La. Mar. 25, 2022) (Summerhays, J.); *Boudreaux v. Schlumberger Tech. Corp.*, No. 6:14-cv-02267, 2022 WL 992670 (W.D. La. Mar. 30, 2022) (Summerhays, J.). These decisions did not have the benefit of the Supreme Court's *Helix* decision, *see infra*, and the undersigned disagrees with Judge Summerhays's characterization of the day-rate compensation at issue based on the record before the Court for the reasons already stated.

Moreover, these opinions were based on two pre-*Helix* opinions out of the First and Second Circuits regarding the HCE exemption, which Schlumberger again cites in its briefing here. *See Litz v. Saint Consulting Group, Inc.*, 772 F.3d 1 (1st Cir. 2014); *Anani v. CVS RX Servs., Inc.*, 730 F.3d 146 (2d Cir. 2013). Yet these cases are inapposite for multiple reasons. *Anani* squarely held that Section 604(b) did not apply to the HCE exemption, a proposition directly rejected by the Supreme Court in *Helix, see infra.* Additionally, in *Anani* the plaintiff was a pharmacist who received a base salary based on a 44-hour work week; his extra compensation paid at an hourly rate was for work beyond his normal 44-hour work week, not compensation for the primary work of the employee, as here. 730 F.3d at 147. In *Litz*, Section 541.604(b) was not even at issue; the plaintiffs had abandoned the argument that this subsection applies to highly compensated employees in their reply brief. 772 F.3d at 5. Regardless, the First Circuit's agreement with the Second Circuit that Section 541.604(b) does not apply to the HCE exemption (in dicta) is counter to the Supreme Court's statements in its decision in *Helix.*, *See id.*

Guilbeau's extra compensation must therefore be analyzed under Section 541.604(b).

A district court in the Southern District of Texas analyzing a similar compensation structure recently also denied an employer summary judgment on the HCE exemption. *See Gentry v. Hamilton-Ryker IT Sols., LLC*, No. 3:19-CV-00320, 2022 WL 658768, at *1 (S.D. Tex. Mar. 4, 2022), *report and recommendation adopted*, No. 3:19-CV-00320, 2022 WL 889276 (S.D. Tex. Mar. 25, 2022).[3]

3. The employer filed an appeal with the Fifth Circuit on April 8, 2022. *See Gentry v. Hamilton-Ryker IT Solutions*, 22-40219. The appeal was stayed pending the Supreme Court's decision in *Helix*, but now briefing is complete and the parties are awaiting oral argument and a decision. If the Fifth Circuit issues a ruling during the pendency of this case, it could be potentially dispositive of the HCE exemption issue before the Court.

The undersigned also notes that Schlumberger recently provided the Court with a notice of another recent Fifth Circuit FLSA decision regarding the salary basis test [#85]. *See Hebert v. FMC Tech., Inc.*, 22-20562, 2023 WL 4105427 (5th Cir. June 21, 2023). Schlumberger argues this decision is "highly relevant" to the issues raised in its motion for summary judgment. The undersigned has reviewed the *Hebert* decision and finds it to be related to though not dispositive of any issue raised in Schlumberger's motion. In *Hebert*, which is an unpublished decision, the Fifth Circuit affirmed a district court's grant of summary judgment in favor of an employer on the basis that the employee was exempt from the FLSA's overtime-compensation requirements under the "learned professional" exemption. Fifth Circuit rejected the plaintiff's argument that because he received a "field service premium" for days he was required to work in the field in addition to his guaranteed salary he was not paid

In *Gentry*, the plaintiffs were paid a guaranteed weekly salary equal to only eight hours of pay plus an additional hourly rate for all hours worked in excess of eight hours, including those hours worked over 40 in a given workweek. *Id.* at *2. Yet the plaintiffs almost always worked more than 40 hours a week. *Id.* As the guaranteed weekly salary was not intended to compensate plaintiffs for their full regular workweek, and the additional hourly compensation instead functioned as part of the employee's base pay for regular hours worked, the district court reasoned that the compensation structure had to be evaluated under Section 541.604(b). *Id.* at *5–6.

The Supreme Court's recent decision in *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39, 143 S. Ct. 677, 214 L.Ed.2d 409 (2023), supports this conclusion. In *Helix*, the Supreme Court addressed the HCE exemption in the context of an oilfield worker paid solely by the day. Hewitt was paid a day rate for his work as a "toolpusher" on an offshore oil rig; he regularly worked 12 hours a day and seven days a week, then had 28 days off before reporting back to the vessel. *Id.* at 684. The Supreme Court rejected the employer's argument that just because Hewitt received a paycheck every two weeks that contained pay exceeding the threshold $455 for the exemption, he was paid under Section 541.602(a) on a salary basis. *Id.* at 687. The Supreme Court reasoned

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on a salary basis. *Id.* at *2. The Fifth Circuit in *Hebert* was not considering the argument raised here—that the bonus payment was not a bonus or a premium payment at all but rather a day rate. This decision does not provide significant guidance to the Court as to how to evaluate the hybrid pay structure at issue in this case.

that day-rate workers like Hewitt could not be deprived of the benefits of the FLSA just because they received a high day rate and were ultimately well paid; the text of the exemption makes plain that day-rate workers are only exempt if their compensation satisfies the reasonable relationship requirement of Section 604(b). *Id.* at 691–92. Hewitt was therefore not exempt under the FLSA and was entitled to overtime compensation. *Id.* at 692.

In reaching this conclusion, the Supreme Court explained that the employer "could come into compliance with the salary-basis requirement for Hewitt and similar employees in either of two ways." *Id.* at 691. "It could add to Hewitt's per-day rate a weekly guarantee that satisfies § 604(b)'s conditions. Or it could convert Hewitt's compensation to a straight weekly salary for time he spends on the rig." *Id.* In making this statement, the Supreme Court intimated that receiving a weekly guarantee in addition to the per-day rate would not remove the pay structure from the ambit of Section 604(b).

In advocating for a different interpretation of *Helix* and Section 604(b), Schlumberger directs the Court to footnote three of the *Helix* opinion. In that footnote, the Supreme Court emphasized that Section 602(a) and Section 604(b) are "independent routes for satisfying the HCE rule's salary-basis component" and that "a pay scheme meeting § 602(a) and the HCE rule's other requirements does not also have to meet § 604(b) to make a worker exempt." *Id.* at 685 n.3. But footnote three does not say anything regarding the type of hybrid compensation structure at issue here or in *Gentry*. This footnote merely

establishes that where a worker is paid on a purely salary basis (on a weekly or less frequent basis), Section 604(b) is not triggered. That is not the scenario here, where Guilbeau's base compensation for his work as a DD at oilrig sites is comprised not just of a weekly salary but also a day rate.

The Department of Labor ("DOL") appears to agree. In 2018, the DOL issued an opinion letter on the HCE exemption consistent with the district court's approach in *Gentry*. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA 2018-25, 2018 WL 5925115 (Nov. 8, 2018). The opinion applied Section 604(b) to a compensation structure in which an engineer was paid a guaranteed weekly salary of $2,100 for 30 hours of work per week (not the full workweek) with additional compensation of $70 for each additional hour over 30. *Id.* Just like the Supreme Court explained in *Helix*, payment of a weekly guarantee plus additional hourly or daily compensation falls under Section 604(b). Whether the employee retains the exemption despite the additional compensation depends upon whether there is a reasonable relationship between the guaranteed salary and the employee's actual earned pay.

In summary, Schlumberger has not established as a matter of law that the extra compensation received by Guilbeau in the form of a "rig day rate" constitutes a bonus or commission that falls under Section 541.604(a). It follows, therefore, that Schlumberger has not established as a matter of law that this extra compensation satisfies the "salary basis" requirement of Section 541.602(a)

without regard to the reasonable relationship requirement of Section 541.604(b). Guilbeau received substantial additional compensation beyond his guaranteed weekly salary that, if not falling under Section 541.604(a), must be evaluated under Section 541.604(b).

ii. Schlumberger has not established as a matter of law that Guilbeau's compensation satisfied Section 541.604(b)'s reasonable relationship requirement.

If Section 541.604(b) governs, Schlumberger cannot prove that there was a reasonable relationship between Guilbeau's guaranteed salary and actual compensation. The DOL, in evaluating reasonableness, has concluded that a ratio of 1 to 1.5 or below (when comparing guaranteed salary and actual earned pay) is reasonable. Opinion Letter FLSA 2018-25, 2018 WL 5925115. Thus, the DOL determined that the engineer addressed in its 2018 opinion letter (if regularly receiving earnings of $3,761 per week, an amount constituting 1.8 times the guaranteed weekly salary of $2,100) would not be considered to be paid on a salary basis and would therefore lose the exemption. *Id.* Similarly, in *Gentry*, the plaintiffs regularly received compensation over five times their guaranteed salary (e.g., a guaranteed weekly salary of only $984 with average total weekly compensation in the amount of $5,347.66). 2022 WL 658768, at *6. The district court concluded "[t]hese numbers are far beyond what is considered reasonable." *Id.*

The same conclusion is compelled here. The summary judgment record establishes that, in 2018, Schlumberger paid Guilbeau a guaranteed "base salary" of $43,824.00 and total compensation of $260,423.50, a ratio of 1 to 5.9 between guaranteed salary and actual earned pay. (Remuneration Statements [#78-2], at 4; Guilbeau Dep. [#78-1], at 38:25–40:25.) In 2019, Schlumberger paid Guilbeau a guaranteed base salary of $26,659.60 and total annual compensation of $143,199.79, a ratio of 1 to 5.3 between guaranteed salary and actual earned pay. (Remuneration Statements [#78-2], at 6; Guilbeau Dep. [#78-1], at 40:25–41:22.) These numbers far exceed the 1:1.5 ratio embraced by the Department of Labor and applied in the Fifth Circuit. *See Gentry*, 2022 WL 658768, at *6; *Sonnier v. Recon Mgmt. Servs. Inc.*, No. 2:20-CV-00002, 2022 WL 141779, at *6 (W.D. La. Jan. 14, 2022) (collecting authorities).

In summary, Guilbeau's hybrid compensation, comprised of both a guaranteed weekly minimum plus a day rate, does not satisfy Section 541.604(b)'s reasonable relationship requirement. Therefore, Schlumberger has not established as a matter of law that it paid Guilbeau on a salary basis for purposes of the HCE and other white-collar exemptions. Accordingly, Schlumberger has not proven its affirmative defense of the HCE exemption and is not entitled to summary judgment.

III. Motion for Notice and Motion to Defer Notice

In addition to recommending that the District Court deny Schlumberger's motion for summary judgment, the

undersigned will deny Schlumberger's motion to defer notice and grant in part Plaintiffs' motion for notice. Whether Plaintiffs are ultimately exempt employees under the HCE exemption or other white-collar exemptions is not the type of threshold issue the Court must decide on its merits prior to issuing notice. Additionally, Plaintiffs have satisfied their burden to demonstrate that the identified class of potential DD Plaintiffs are similarly situated and entitled to notice of this lawsuit. The undersigned will, however, deny the motion for notice as to the MWD class.

A. Legal Standard

In the Fifth Circuit's recent decision in *Swales*, the court rejected the two-step approach of conditional certification and decertification applied by district courts across the country for decades in favor of a more searching initial inquiry on whether notice should be issued. *Swales*, 985 F.3d at 434. The Fifth Circuit has now directed district courts to "rigorously scrutinize the realm of 'similarly situated' workers" and requires that courts "do so from the outset of the case, not after a lenient, step-one 'conditional certification.'" *Id.* Per *Swales*, courts should now "identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.'" *Id.* This initial inquiry includes a consideration of what merits questions can be answered collectively. *Id.* at 442. The district court should then "authorize preliminary discovery accordingly." *Id.* at 441. "After identifying the material facts and legal considerations at issue, the Court may decide (i) collective action is not

appropriate; (ii) additional discovery is needed to make a determination; or (iii) a certain category of employees is similarly situated and should be given notice." *Young v. Energy Drilling Co.*, 534 F. Supp. 3d 720, 723 (S.D. Tex. 2021) (quoting *Swales*, 985 F.3d at 443). Plaintiffs bear the burden of demonstrating the proposed classes of employees identified in their motion for notice are similarly situated. *Swales*, 985 F.3d at 443; *Snively v. Peak Pressure Control, LLC*, 314 F. Supp. 3d 734, 739 (W.D. Tex. 2018). A district court has broad discretion in deciding whether and to whom to issue notice for purposes of litigation management. *Swales*, 985 F.3d at 443.

B. Analysis

Plaintiffs ask the Court to issue notice to two classes of employees—DDs and MWDs. Schlumberger contends the Court should not issue notice before deciding the threshold issue of whether Plaintiffs are exempt under the HCE exemption. Although the undersigned has recommended that the District Court deny Schlumberger's motion for summary judgement, the Court is not required to resolve the merits issue of whether Guilbeau and other Plaintiffs are exempt employees falling outside of the FLSA's overtime-compensation before evaluating whether notice should be issued. Additionally, the undersigned concludes that Plaintiffs have established that the DD employees are similarly situated and entitled to notice, but the undersigned will deny the motion for notice as to the MWD employees. Finally, because Schlumberger has not raised any actual arguments challenging Plaintiffs' proposed notice in their response to Plaintiffs' motion,

the undersigned will approve Plaintiffs' proposed notice and consent form and procedures.

i. *Swales* does not direct courts to resolve whether an employee is exempt under the HCE exemption at the notice stage of an FLSA collective action.

The Fifth Circuit has admonished courts that while a district court may facilitate notice to potential plaintiffs' for case-management purposes, "it cannot signal approval of the merits or otherwise stir up litigation." *Swales*, 985 F.3d at 434 (citing *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989)). Yet, the Fifth Circuit has also endorsed the resolution of certain threshold issues that bear on the ultimate merits of a case prior to addressing the issuance of notice. A district court abuses its discretion, for example, by issuing notice to those employees who executed valid agreements to arbitrate their disputes with their employer, as those persons are not "potential participants" in an FLSA action pending in federal court. *In re JPMorgan Chase & Co.*, 916 F.3d 494, 502–03 (5th Cir. 2019). A district court errs also when it refuses to consider available evidence that bears on whether the economic-realities test (in a case turning on whether workers were misclassified as independent contractors) establishes that members of the FLSA class were not "employees" such that they cannot bring an FLSA claim. *Swales*, 985 F.3d at 441.

But the issue of whether Guilbeau and other DD Plaintiffs were exempt under the HCE exemption is a

different type of threshold issue than whether an FLSA plaintiff is an "employee" or has a right to proceed in a judicial rather than an arbitral forum. Unlike these issues, the HCE exemption is an affirmative defense, for which Schlumberger—not Plaintiffs—bears the burden of proof. Plaintiffs should not be required to marshal summary-judgment evidence to disprove Schlumberger's affirmative defense in the context of a motion for notice. This is not compelled by *Swales* or *JPMorgan Chase*, and the Court declines to endorse this line of reasoning here. Accordingly, regardless of the recommendation to deny Schlumberger's motion for summary judgment, the undersigned will deny Schlumberger's motion to defer notice.

ii. Plaintiffs have satisfied their burden to demonstrate entitlement to notice under *Swales* as to the DD class.

Plaintiffs ask the Court to issue notice to two subclasses of Plaintiffs, DDs and MWDs. The DD subclass is defined as follows:

> All current and former employees of Defendant, of any job title, who performed any DD ("directional drilling") duties and were paid partially on a "salary" basis that did not bear a reasonable relationship to their total weekly earnings and partially on a day rate basis without receiving overtime premium pay for all hours worked over forty in each seven-day workweek for the time period beginning three

> years prior to the filing of this lawsuit through the date of the final disposition of this action.

Plaintiffs' proposed notice also states that the DD class includes FSDD, FEDD, FSDX, FEDX, and any individual with such job title or performing any such role remotely. (Proposed Notice [#62-9].)

The MWD subclass is defined as follows:

> All current and former employees of Defendant, of any job title, who performed the role of an MWD ("measurements while drilling"), LWD ("logging while drilling"), or MLWD ("measurements and logging while drilling"), and were paid partially on a "salary" basis that did not bear a reasonable relationship to their total weekly earnings and partially on a day rate basis without receiving overtime premium pay for all hours worked over forty in each seven-day workweek and/or whose job duties did not meet any exemption to the FLSA for the time period beginning three years prior to the filing of this lawsuit through the date of the final disposition of this action.

Plaintiffs' proposed notice also informs the MWD class that this class includes FSMWD, FSMLWD, FSLWD, FEMWD, FEMLWD, FELWD, and any individual with such job title or performing any such role remotely. (Proposed Notice [#62-10].)

Appendix E

As previously discussed, Plaintiffs' FLSA claims turn on the factual and legal determination of whether they were exempt workers under the HCE exemption and other white-collar exemptions. Given the nature of Plaintiffs' claims, the determination of whether they are similarly situated for purposes of collective treatment turns primarily on whether they were paid pursuant to the same pay policy. Plaintiffs have satisfied their burden to demonstrate that all DDs and MWDs were subject to the same pay practice, regardless of specific job duties or variations in the title of the position as listed above or variations in the specific rates of their pay.

The evidence presented by Plaintiffs establishes that Schlumberger currently employs approximately 200 to 250 DDs and 12 to 24 remote MWDs (the number of field MWDs is unknown). (Salomon Dep. [#62-1], at 87:18–88:10, 120:14–121:4.) Schlumberger's corporate representative testified in his deposition that all of Schlumberger's DDs and MWDs are subject to the same pay policy, regardless of the geographic location of their work. (Salomon Dep. [#62-1], at 14:15–16:7, 61:20–62:16, 64:8–11.) All DDs and MWDs receive both a guaranteed weekly salary and a "job bonus" component, which includes the "day rate rig bonus" and smaller bonuses discussed *supra*. (Salomon Dep. [#62-1], at 14:20–16:7; Guilbeau Dep. [#62-7], at 30:7–11.)

This evidence is sufficient to establish that the DD class is similarly situated as to Plaintiffs' FLSA claims and entitled to notice of this lawsuit. Plaintiffs stipulated at Guilbeau's deposition that Guilbeau is not challenging his exempt status based on his job duties, only whether

he was paid on a salary basis. (Guilbeau Dep. [#62-7], at 6:23–7:2.) Because the primary components of the DD class compensation—the guaranteed weekly salary and the day rate—are the same throughout the class and Plaintiffs are not challenging the duties element of the HCE exemption, there will not be variation between class members that would require individualized treatment to evaluate the merit of this class's FLSA claims and the application of the exemption. Schlumberger does not advance any argument in its response to Plaintiffs' motion for notice suggesting otherwise, aside from a general assertion as to all Plaintiffs that various bonuses they might receive differentiate them from one another in terms of pay structure. Neither does Schlumberger argue that DDs who work in different locations are paid differently; no one disputes that all DDs were paid using the guaranteed-salary plus day-rate "bonus" pay structure. Thus, given that plaintiffs' argument is not based on the DDs' duties (which might vary), and the pay structure is the same for all DDs who work for Schlumberger, the undersigned finds claims of the DD class can be handled collectively and there is no reason to limit the geographic scope of the DD class.

Assessing the similarities among the members of the MWD class is not as straightforward. Again, there is testimony in the record that MWDs were all subject to the same pay policy regardless of geographic location or work in a remote or field capacity. Yet, as to this class, the duties component of the HCE exemption remains in dispute. Schlumberger vigorously argues there are significant variations in the job duties of MWDs that make collective

treatment impossible. Plaintiffs argue that the overall duties of the MWD subclass are the same. Plaintiffs further argue that this Court is collaterally estopped from considering any variation in duties of MWDs in whether to issue notice because similarly situated MWDs already litigated this issue against Schlumberger and prevailed. *See Gilchrist v. Schlumberger Tech. Corp.*, 1:16-cv-00008-LY.

First, the undersigned disagrees with Plaintiffs' collateral-estoppel argument. Offensive collateral estoppel forecloses a defendant from litigating an issue the defendant has previously litigated unsuccessfully with another party. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). For a plaintiff to invoke the doctrine of offensive collateral estoppel, the Fifth Circuit has held that the following requirements must be satisfied: (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine. *Amaya v. City of San Antonio*, 980 F. Supp. 2d 771, 777 (W.D. Tex. 2013) (citing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 391 (5th Cir. 1998)).

The issue currently before the Court is whether the proposed class of MWDs working for Schlumberger are similarly situated for purposes of receiving notice of a collective action. The court in *Gilchrist* never decided this legal issue. The plaintiffs in *Gilchrist* were two field

MWDs also working for Schlumberger (John Gilchrist and Byron Brockman), alleging misclassification as exempt employees and seeking unpaid overtime compensation. However, in *Gilchrist* there was never a decision on the issuance of notice and there was never a class of MWDs identified. The plaintiffs moved for conditional certification (under the pre-*Swales* standard) but ultimately withdrew their motion, as well as the additional two consents to join the lawsuit that had been filed, and chose to proceed solely on an individual basis. *See Gilchrist*, 1:16-cv-00008-LY (dkt. 50, 54). Thereafter, Schlumberger moved for summary judgment on the HCE exemption, but unlike in this case, the primary issue in dispute was not whether the plaintiffs were paid on a salary basis (the parties stipulated that they had been), but whether they performed exempt duties. *See id.* (dkt. 87). The district court denied the motion. *Id.* (dkt. 114). The case proceeded to a bench trial before the district court, after which the court held that Schlumberger had misapplied the HCE exemption to the two MWD plaintiffs and that they were entitled to overtime compensation. *Id.* (dkt. 240). The final judgment memorializing these findings is currently on appeal before the Fifth Circuit.

Plaintiffs have appended to their motion for notice over 600 pages of the *Gilchrist* trial transcript in an attempt to establish various facts related to the duties of O'Mara (the lead MWD Plaintiff in this case) and the proposed class. Yet all that the *Gilchrist* case decided was that the specific plaintiffs proceeding on an individual basis—Gilchrist and Brockman—did not regularly perform executive and administrative duties, as defined in the regulations and

the HCE and administrative exemptions. This decision said nothing about all MWDs working for Schlumberger or the duties of the breadth of the proposed class here. And importantly, the plaintiffs in *Gilchrist* were both field MWDs, whereas O'Mara is a remote MWD. Thus, collateral estoppel cannot be employed by Plaintiffs here to prevent Schlumberger from arguing that the MWD class (which encompasses both remote and field MWDs across geographic locations) is not similarly situated, as Schlumberger never had the opportunity to litigate that question in the *Gilchrist* case. Nor does collateral estoppel bar Schlumberger down the road in this case from contesting the duties element of the HCE exemption as to O'Mara and the MWD class in a motion for summary judgment or at trial.

Plaintiffs can, however, in arguing that the MWD class is similarly situated and entitled to notice, rely on testimony from O'Mara in his deposition that his duties as a remote MWD were the same as the duties of the field MWDs in the *Gilchrist* case. In the deposition, counsel for Plaintiffs read O'Mara excerpts from the *Gilchrist* trial transcript, and Plaintiffs point to this testimony to establish that there is no material difference in the duties between field and remote MWDs. (O'Mara Dep. [#62-6], at 118:23–148:18.) O'Mara also generally testified to this effect throughout his deposition: that being a field MWD and remote MWD involved the same tasks "minus the physical stuff you can't do remotely obviously." (*Id.* at 13:6–14:7, 153:14–23.) Additionally, O'Mara testified that there is no material difference between an MWD, an LWD, and an MLWD, and Schlumberger's corporate

representative agreed that the job description for MWDs was appropriate for any tier or grade of the position. (*Id.* at 18:11–22:23, 92:24–93:2; Salomon Dep. [#62-1], at 101:14–102:1, 113:16–114:4.)

Schlumberger, however, points to evidence highlighting the distinction between the duties of field and remote MWDs, arguing that the duties of field and remote MWDs could not possibly be the same, if O'Mara testified he did not do any "physical stuff," i.e. manual labor, because he worked solely at a remote operations center. (*See* O'Mara Dep. [#62-6], at 13:6–14:7, 100:12–102:13.) Schlumberger also directs the Court to testimony from the *Gilchrist* trial to establish that those MWDs like O'Mara who worked at Schlumberger's remote operations centers had expertise and problem-solving and quality-control abilities differentiating them from field MWDs. (*See* Gilchrist Tr. [#66-8], at 38–41, 140–41, 148.) Brockman testified at the *Gilchrist* trial that remote MWDs were the "highest level of MWDs." (*Id.* at 148.) Finally, testimony of Richard Lovelace and Magid Ibrahim—two MWD plaintiffs from another FLSA action against Schlumberger out of the Western District of Louisiana—raises additional fact questions as to whether the MWD class is similarly situated. *See Boudreaux v. Schlumberger*, 6:14-cv-02267. Lovelace testified that as part of his role as an MWD, he helped onboard new MWDs by showing them how to program tools and to find their way around the rig; evaluated junior MWDs on their completion of new tasks for promotion purposes; and sometimes filled in for his supervisor in submitting required survey reports to state agencies. (Lovelace Dep. [#66-10], at 37–38, 51–55.)

Ibrahim testified that he made high-level decisions himself rather than sending his questions to the remote operations center and provided design recommendations and pre-job planning and support, duties he did not share with all MWDs. (Ibrahim Dep. [#66-12], at 119–20, 140, 154–55.)

Although Plaintiffs have presented the Court with some evidence that these distinctions may not ultimately be dispositive of the duties aspect of the HCE exemption, the undersigned is not convinced that the MWD class is similarly situated under the more searching *Swales* standard. Additionally, the undersigned notes that the MWD class is small—only consisting of 12 to 24 remote employees (and an unknown number of field employees). Combining this subclass with the much larger DD class is likely to complicate the resolution of this action and does not advance the case management and efficiency concerns underlying the collective action framework.

In summary, Plaintiffs have satisfied their burden to demonstrate that the DD subclass is similarly situated with respect to the merits of their FLSA claims and the application of the HCE exemption. The DD class is therefore entitled to notice of this lawsuit. However, the motion for notice to the MWD class is denied.

iii. The undersigned will approve the proposed notice and consent procedures.

Having concluded that the DD class of Plaintiffs is entitled to notice, the undersigned will also approve Plaintiffs' proposed notice to the DD class members,

consent form, and notice procedures. Plaintiffs request notice via mail, e-mail, and text message, a 90-day opt-in period, with a 45-day reminder postcard. Schlumberger's response to Plaintiffs' motion does not object to any specific aspect of the proposed notice and consent forms and notice schedule. The undersigned finds these proposed procedures to be reasonably calculated to provide assurance that potential class members, many of whom work in the field engaged in direct oilfield operations, receive notice of this lawsuit.

IV. Conclusion, Order, and Recommendation

Having considered the parties' motions, the responses and replies, the arguments of counsel at the Court's March 1, 2023 hearing, the record before the Court, and governing law, the undersigned recommends that Defendant's Motion for Summary Judgment With Respect to the Claims of Trever Guilbeau [#73] be **DENIED**.

IT IS ALSO ORDERED that Plaintiffs' Opposed Motion for Notice Under *Swales* [#62] be **GRANTED IN PART** as follows:

- The undersigned hereby approves Plaintiffs' Notice Letters and Consent Form attached to their motion [#62-9, #62-10, #62-11] and notice shall be issued to the DD class of potential plaintiffs. The motion is denied as to the MWD class.

Appendix E

- The undersigned hereby approves the following notice schedule:

DEADLINE	DESCRIPTION OF DEADLINE
10 Days from Order Approving Notice to Potential Class Members	Schlumberger to disclose the names, all known addresses, all phone numbers (home, mobile, etc.), all known email addresses (work and personal), social security numbers, dates of employment, and locations employed of those described in above-referenced group of Putative Class Members to be notified in a usable electronic format.
20 Days from Order Approving Notice to Potential Class Members	Plaintiffs' Counsel shall send by mail, e-mail, and text message a copy of the Court approved Notice and Consent Form to the Putative Class Members. Schlumberger is required to post the Notice and Consent forms at all of its restaurants for 90 days in an open and obvious location, such as an employee breakroom.
90 Days from Date Notice is Mailed to Potential Class Members	The Putative Class Members shall have 90 days to return their signed Consent forms for filing with the Court. Schlumberger may take down the posted Notice and Consent forms.

45 Days from Date Notice is Mailed to Potential Class Members	Plaintiffs' Counsel is authorized to send by mail, e-mail, and text message the Reminder Notice to the Putative Class Members reminding them of the deadline for the submission of the Consent forms.

- Class members are allowed to execute their consent form electronically via DocuSign. Plaintiffs' counsel may use the contact information of the Putative Class Members to mail, email, or text notice and forms. Plaintiffs' counsel may hire, if necessary, a third-party class action administration company to conduct the actual mailing, emailing and text messaging of the notice and forms. Schlumberger is hereby prohibited from communicating, directly or indirectly, with any current or former DD employee about any matters which touch or concern the settlement of any outstanding wage claims, or other matters related to this suit, during the opt-in period. Schlumberger shall so instruct all of its managers. This order shall not restrict Schlumberger from discussing with any current employee matters that arise in the normal course of business.

IT IS FINALLY ORDERED that Defendant's Opposed Motion to Defer Notice Pending Resolution of Threshold Issues [#74] is **DENIED**.

Appendix E

V. Instructions for Service and Notice of Right to Object/Appeal

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The party shall file the objections with the Clerk of Court and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the un-objected-to proposed factual findings and legal conclusions accepted by the district

court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

IT IS SO ORDERED.

SIGNED this 7th day of July, 2023.

/s/ Elizabeth S. Chestney
Elizabeth S. ("Betsy") Chestney
United States Magistrate Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 21, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-50594

TREVER GUILBEAU, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; CHRISTOPHER O'MARA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; HENRY HERBERT, JR.,

Plaintiffs-Appellees,

versus

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant-Appellant.

Filed July 21, 2026

ON PETITION FOR REHEARING AND REHEARING EN BANC

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-142

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges.*

Appendix F

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 40 and 5TH CIR. R. 40), the petition for rehearing en banc is DENIED.

APPENDIX G — STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 213

Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

> **(1)** any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

* * *

Appendix G

29 C.F.R. § 541.602

Salary basis.

(a) General rule. An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

(2) An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

* * *

Appendix G

29 C.F.R. § 541.604

Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $684 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $684 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $684 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually

earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $725 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $210 per shift without violating the $684–per-week salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.