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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Barbara Buckland, et al.,

Plaintiffs,

vs.

Maxim Healthcare Services, Inc.,

Defendant.

CASE NO. CV 11-8414-JST (JEMx)

ORDER (1) DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (Doc. 67), and (2) DENYING AS MOOT DEFENDANT'S REQUEST TO FILE A SUR-REPLY (Docs. 80, 82)

Before the Court is a Motion for Conditional and Class Certification ("Motion"), filed by Plaintiffs Barbara Buckland ("Buckland"), Anna Marie Stewart ("Stewart"), Carmen Peters ("Peters"), and Brian Piazza ("Piazza") (collectively, "Plaintiffs"), individually and on behalf of others similarly situated. (Mot., Doc. 67.) Defendant Maxim Healthcare Services, Inc. ("Defendant") filed an Opposition (Opp'n, Doc. 68), and Plaintiffs replied (Reply, Doc. 73.) Having read and considered the papers, and heard oral argument, the Court DENIES Plaintiffs' Motion. In light of this denial, the Court also DENIES as moot Defendant's ex parte application for leave to file a sur-reply. (Docs. 80, 82.)

I. Background

a. Procedural Background

Buckland, Peters, and Stewart (collectively, "Nurse Plaintiffs") were employed by Defendant as licensed vocational nurses ("LVNs"or "LPNs") and/or travel nurses (collectively, "Nurses") on a non-salaried basis. (First Am. Compl. ("FAC") ¶ 1, Doc. 7.) Nurse Plaintiffs filed this action on September 7, 2010, asserting claims for unpaid overtime wages under the Fair Labor Standards Act ("FLSA") and California law; and numerous additional claims under California law, including failure to pay minimum wage, unlawful deductions from wages, failure to provide meal periods, failure to provide rest periods, failure to reimburse business expenses, failure to timely pay wages due at termination, failure to provide accurate wage statements, unlawful business practices in violation of the UCL, and civil penalties pursuant to the California Private Attorneys General Act of 2004, California Labor Code §§ 2699, et seq. ("PAGA"). Nurse Plaintiffs requested damages, injunctive relief, and restitution. (Notice of Removal, Ex. C, Doc. 1.)

On December 3, 2010, Plaintiffs filed an amended complaint, adding Piazza ("Recruiter Plaintiff") as a Plaintiff. Defendant formerly employed Piazza as a recruiter ("Recruiter") at Defendant's San Diego location on a salaried basis. (FAC ¶ 5.) In

addition to asserting the same claims and seeking the same remedies as the original Complaint on behalf of the Nurse Plaintiffs, the FAC asserts all of the same claims—except for the claim for overtime under FLSA, the claim for failure to pay minimum wage, and the claim for unlawful deductions from wages—on behalf of the Recruiter Plaintiff, and seeks the same remedies.

On May 25, 2012, Plaintiff filed this Motion, seeking conditional certification of an FLSA collective action ("the FLSA Nurse Collective Action") defined as:

> All persons currently or formerly employed by Defendant in the United States having the job title of "Licensed Vocational Nurse," "Licensed Practical Nurse," "Travel Nurse," or equivalent position within three (3) years preceding the filing of the complaint in this action and who file their consents to join this collective action as party plaintiffs pursuant to 29 U.S.C. § 216(b).

(Mot. at 1.) Plaintiffs also seek certification of a class of California Nurses ("the Nurse Class") and of California Recruiters ("the Recruiter Class"), defined as follows:

> Nurse Class: All persons currently or formerly employed by Defendant in California having the job title of "Licensed Vocational Nurse," "Licensed Practical Nurse," "Travel Nurse," or equivalent position within four (4) years preceding the filing of the complaint in this action until the entry of judgment after trial.

> Recruiter Class: All persons currently or formerly employed by Defendant in California having the job title of "Recruiter" or equivalent position within four (4) years preceding the filing of the complaint in this action until the entry of judgment after trial.

(Id.)[1]

b. The Ruiz Stupi Action

On April 5, 2010—before this action was filed—Benjamin Matthew Ruiz Stupi filed a complaint in the Orange County Superior Court("the Ruiz Stupi action"), asserting claims for violations of the California Labor Code and violation of Business & Professions Code §§ 17200, et seq. ("UCL"). *Ruiz Stupi, et al. v. Maxim Healthcare Services, Inc.*, 8:10-cv-1456-JST-JEM. After the action was removed to this Court on September 27, 2010, the parties fully briefed a motion for class certification. (*Id.*)

On May 17, 2012, before the Court ruled on Plaintiffs' motion for class certification, the Court transferred the Ruiz Stupi action to the Southern District of Texas to facilitate a consolidated settlement of the Ruiz Stupi action and two other actions against Defendant.

On July 19, 2012, the Honorable Stephen W. Smith of the Southern District of Texas granted preliminary approval of the class settlement in the case with which the Ruiz Stupi action was consolidated, *Ene v. Maxim Healthcare Services, Inc.* ("the Ene action"), and conditionally certified a Rule 23 class of "[a]ll persons who were or are employed by Maxim as a salaried Recruiter in California at any time from April 5, 2006 through the

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[1] As discussed below, Plaintiffs do not specify which claims they seek to certify.

date of the Order Granting Preliminary Approval," among other classes. 4:09-CV-02453, Doc. 169 (S.D. Tex. July 19, 2012).

II. Legal Standard

a. Class Certification

"To obtain class certification, a class plaintiff has the burden of showing that the requirements of Rule 23(a) are met and that the class is maintainable pursuant to Rule 23(b)." *Narouz v. Charter Commc'ns, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010). "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). Under Rule 23(a), the party seeking certification must demonstrate:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Dukes*, 131 S. Ct. at 2548. Rule 23(b) is satisfied if:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
> (A) inconsistent or varying adjudications with respect to individual class members that would establish

> incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b).

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. at 2551. This requires a district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.*

b. FLSA Collective Action

Under Section 216(b), one or more employees may bring an FLSA claim in a representative capacity for "other employees similarly situated." 29 U.S.C. § 216(b). "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.* Thus, to certify a collective action under the FLSA, a district court must determine whether plaintiffs are similarly situated to each other. *Wynn v. Nat'l Broad. Co.*, 234 F. Supp. 2d 1067, 1081 (C.D. Cal. 2002).

Neither the FLSA nor the Ninth Circuit have defined "similarly situated." *Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 536 (N.D. Cal. 2007). District courts have taken three different approaches in interpreting the term for purposes for section 216(b): "(1) a two-tiered case-by-case approach, (2) the incorporation of the requirements of Rule 23 of the current Federal Rules of Civil Procedure, or (3) the incorporation of the requirements of the pre-1966 version of Rule 23 for 'spurious' class actions." *Id.* (quoting *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 481 (E.D. Cal. 2006)). The majority of courts, including three circuit courts, have adopted the two-tiered approach. *Id.; see, e.g.*, *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001); *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995); *Wynn*, 234 F. Supp. 2d at 1082. Likewise, this Court will use the two-tiered approach.

The two-tiered approach consists of the following:

> [T]he court must first decide, based primarily on the pleadings and any affidavits submitted by the parties, whether the potential class should be given notice of the action. Because the court generally has a limited amount of evidence before it, the initial determination is usually made under a

> fairly lenient standard and typically results in conditional class certification.
>
> Once discovery is complete and the case is ready to be tried, the party opposing class certification may move to decertify the class. The court then must make a factual determination regarding the propriety and scope of the class and must consider the following factors: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendants with respect to the individual plaintiffs; and (3) fairness and procedural considerations. Should the court determine on the basis of the complete factual record that the plaintiffs are not similarly situated, then the court may decertify the class and dismiss the opt-in plaintiffs without prejudice.

Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 467 (N.D. Cal. 2004) (internal citations omitted).

III. Discussion

Because the Court concludes that Plaintiffs fail to meet the commonality and adequacy requirements with respect to the Nurse Class, the Court addresses only these two requirements. Furthermore, because there is significant overlap between the commonality requirement under Rule 23 and certification of an FLSA collective action, the Court discusses certification of the FLSE Nurse Collective Action jointly with commonality. Finally, the Court declines to engage in a full Rule 23 analysis of the Recruiter Class in

light of the preliminary settlement approval, but nonetheless denies certification on adequacy grounds, as discussed with respect to the Nurse Class.

a. Analysis of Rule 23 Commonality (Nurse Class) and FLSA's "Similarly Situated" Requirement

Under Rule 23, "[t]o show commonality, Plaintiffs must demonstrate that there are questions of fact and law that are common to the class." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citing Fed. R. Civ. P. 23(a)(2)). "Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Evon v. Law Offices of Sidney Mickell*, --- F.3d ----, 2012 WL 3104620, at *9 (9th Cir. Aug. 1, 2012) (citation and internal quotation marks omitted). Additionally, "[c]ommonality requires the [P]laintiff[s] to demonstrate the class members have suffered the same injury." *Dukes*, 131 S.Ct. at 2551 (internal citations and quotation marks omitted). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation and internal quotation marks omitted).

Here, Plaintiffs struggle even to frame common questions for the Nurses' claims. For example, one of the "common questions" Plaintiffs assert in their moving papers is "whether [Defendant's] centralized payroll system underpaid overtime wages by failing to properly calculate the total hours worked per day and per week for nurses who serviced more than one client during a workday or workweek." (Mot. at 15.) However, the only evidence Plaintiffs proffer in support of this purportedly uniform practice is Peters' wage statements. (*Id.* at 4.) As Plaintiffs' counsel ("Counsel") conceded at oral argument, these wage statements do not provide any information about the mechanism by which any underpayment occurred, let alone whether that mechanism derived from a uniform policy or practice. Furthermore, after Defendant submitted a declaration in opposition to the

Motion explaining that Defendant's national "payroll department reviews reports regarding each day worked by an external California employee to audit and double check whether the employee was properly paid all daily and weekly overtime owed," and explaining that Peters' wage statements were correct, except for one occasion, for which she was paid an adjustment (Redding Decl. ¶¶ 6, 8, Doc. 68-5), Plaintiffs completely reframed the common questions in their Reply (*compare* Mot. at 15 *with* Reply at 7), and apparently abandoned any argument based on a "policy" of not paying correct overtime when a Nurse services more than one client in a workday or workweek (Reply at 7.)

As best as the Court can tell, the essence of Plaintiffs' argument with respect to commonality is summarized in Counsel's statement at oral argument that "whatever system they are using isn't working." Not only are Plaintiffs unable to identify any common policy or practice, they assume that the system, whatever it may be, has caused others the same injury. There is simply no evidence to support this assumption. Accordingly, the Court concludes that Plaintiffs have failed to show commonality with respect to the Nurses' claims.

In FLSA collective actions, district courts have held that conditional certification at this stage of litigation requires only that "plaintiffs make substantial allegations that the putative class members were subject to a single illegal policy, plan or decision." *Adams*, 242 F.R.D. at 536 (quoting *Leuthold*, 224 F.R.D. at 468). However, "[w]hile the standard for conditional approval at the [first-tier] stage of litigation is lenient, it does require some evidentiary support. The lack of any evidence of similarity or even other potential class members precludes class certification." *Sarviss v. Gen. Dynamics Info. Tech., Inc.*, 663 F. Supp. 2d 883, 903 (C.D. Cal. 2009) (citation and internal quotation marks omitted). Here, as discussed above, the evidence Counsel submitted in support of this Motion is so lacking, and the proffered theories so inconsistent, that the Court cannot determine that those Nurses within the scope of the FLSA Nurse Collective Action were subject to a single

illegal policy, plan or decision, or that there are others similarly situated to Nurse Plaintiffs. Therefore, the Court will not conditionally certify an FLSA collective action.

b. Adequacy of Counsel

"In assessing whether class representatives and their counsel will vigorously prosecute a class action litigation, courts may consider the actual progress of the proceedings to that point." *Kandel v. Brother Int'l Corp.*, 264 F.R.D. 630, 634 (C.D. Cal. 2010). Based on the actual progress of this case, the Court concludes that Counsel will not adequately represent the class. Counsel continue to prosecute claims on behalf of a deceased class representative, fail to present any modicum of evidence of Defendant's policies and practices related to the Nurses' Class, rely entirely on recycled evidence from the Ruiz Stupi action in support of the Recruiters Class, and have failed to comply with the Local Rules and this Court's Orders.

i. Prosecuting the Claims of a Deceased Class Representative

Counsel's persistence in prosecuting this case in Buckland's name, despite the fact that she has been deceased since August 24, 2011, puzzles the Court. On May 17, 2012, Counsel filed an ex parte application to extend the class certification deadline, in part because "Plaintiff discovered on December 1, 2011, that Barbara Buckland had passed away. Buckland was the lead class representative with respect to the claims based on the Defendant's reduction in nurses' hourly rates of pay to avoid paying overtime premiums." (Doc. 62, ¶ 2.) While Counsel apparently recognized that Buckland could not serve as a class representative, Counsel failed to replace Buckland, despite having over six months between Buckland's death and the deadline for filing this motion for class certification. Instead, Plaintiffs filed this Motion, requesting that the Court appoint Buckland as a class representative anyway, without further acknowledging her death or its impact on her ability to adequately represent the class. In fact, Plaintiffs inexplicably complain that

Defendant has failed to produce Buckland's payroll records, earning statements, W-2 forms, and personnel file. (Reply at 3.) While Counsel stated at oral argument that Plaintiffs were not asking the Court to appoint Buckland as a class representative, this is belied by Plaintiffs' Proposed Order, which lists Buckland as such (Proposed Order, Doc. 67-6). Moreover, Counsel have made no attempts to withdraw Buckland's claims. This demonstrates Counsel's inadequacy.

ii. Briefing and Evidence in Support of this Motion

The Court is troubled by Counsel's failure to obtain (1) any discovery related to Defendant's policies and practices regarding the Nurses' claims, or (2) any original evidence in support of the Recruiters' claims. Of the fifteen exhibits submitted in support of Plaintiffs' Motion, five are documents filed by other counsel in the Ruiz Stupi action, three are orders granting class certification in other actions against Defendant, one is a screenshot of Defendant's webpage, one is the operative complaint in this action, and one is a declaration by Piazza that appears to be virtually identical to those declarations filed by the proposed class representatives in the Ruiz Stupi action. (*Compare* Piazza Decl., Doc. 67-4 *with* Ruiz Stupi Decl., Doc. 67-4.)[2] Thus, Counsel not only copied the theory of the Ruiz Stupi action, but rely entirely on the evidence in the Ruiz Stupi action. Based on this cookie-cutter approach to litigation, the Court lacks confidence that Counsel are capable of prosecuting the case on behalf of the Recruiters or the Nurses.

The remaining evidence submitted in support of Plaintiffs' Motion goes entirely to the Nurses' claims, and consists only of excerpts of and exhibits to Stewart's deposition, exhibits to Peters' deposition, Buckland's pay statements, and an email from Buckland to an HR representative regarding unpaid overtime and deductions. Notably absent are

[2] The Ruiz Stupid declaration was also submitted in support of this motion for class certification.

declarations by any of the Nurse Plaintiffs. The significant holes in the evidence suggest that Counsel are inadequate to prosecute the Nurses' claims.

First, Counsel failed to indicate in its moving papers that Plaintiffs seek certification on only some of their claims, and fail to discuss certification on a claim-by-claim basis in the Motion. Furthermore, Counsel has failed to withdraw Plaintiffs' request for injunctive relief, which they must because all of the proposed class representatives are former employees, who have no standing to seek such relief. *Ellis v. Costco Wholesale Corp.*, 657 F. 3d 970, 986 (9th Cir. 2011).

Counsel's other major error—which infects Plaintiffs' entire Motion—is providing evidence only of specific instances to establish that Defendant has a particular policy or practice. The only evidence of Defendant's policies is declarations by Defendant's representatives in support of the *Opposition* to Plaintiffs' Motion. In fact, Counsel stated at oral argument that Plaintiffs were relying entirely on the Redding declaration—evidence that Counsel did not even know about until Defendant filed its Opposition—as evidence of the existence of common policies.

As discussed above, Plaintiffs fail to commit to common questions driving this litigation. At this stage of litigation, the Court has to assume that this is at least in part due to Counsel's inadequacy in prosecuting this case. While Plaintiffs' counsel, Mark Thierman, states in his declaration that "[t]he employer's records[,] like job descriptions, work billings and reimbursement requests[,] and scheduling documents are usually far more significant in wage [and] hour cases than live testimony," Plaintiffs do not submit any of this type of evidence in support of the Nurses' claims. (Thierman Reply Decl. ¶ 20, Doc. 76.) In their Reply, Plaintiffs complain that "Defendant has . . . completely stonewalled Plaintiffs' discovery attempts. With the exception of those documents chosen by Defendant for use in deposing plaintiffs Peters and Stewart and their personnel files, Defendant has refused to produce a single document in response to Plaintiffs' requests for production . . . ." (Reply at 2.) Although intended as an excuse for Plaintiffs' lack of

evidence, or alternatively, as a request for the Court to compel Defendant to comply with Plaintiffs' discovery requests (*id.* at 3), Counsel's failure to file a motion to compel under these circumstances further demonstrates Counsel's inability to protect the rights and interests of absent class members. Based on the briefing and lack of evidence submitted in support of this Motion, it does not appear that Counsel have vigorously prosecuted this action. Counsel have failed to take any depositions or file any motion to compel to obtain necessary discovery. While this inaction has undoubtedly prejudiced absent class members, *see Kandel*, 264 F.R.D. at 635, the Court cannot determine the extent of the prejudice because the Court does not know what evidence would exist had Counsel conducted appropriate discovery.

Finally, the Court notes that Counsel have failed to comply with the Local Rules. Specifically, Counsel failed to submit mandatory chambers copies, in accordance with Local Rule 5-4.5. Even after this Court issued two orders requiring Counsel to submit mandatory chambers copies, Counsel failed to submit all mandatory chambers copies of all documents related to this Motion.

Accordingly, the Court concludes that Counsel will not adequately represent the Nurse Class. The Court DENIES certification of the Nurse Class because Plaintiffs fail to meet the commonality and adequacy requirements.

c. Rule 23 Certification (Recruiter Class)

In light of the preliminary approval of class settlement in the Ene action, the Court declines to engage in a Rule 23 analysis of the Recruiter Class. However, because the Court concludes that Counsel are inadequate, the Court DENIES Plaintiffs' Motion with respect to the Recruiter Class.

IV. Conclusion

For the foregoing reasons, the Court DENIES Plaintiffs' Motion.

DATED: August 27, 2012

JOSEPHINE STATON TUCKER
JOSEPHINE STATON TUCKER
UNITED STATES DISTRICT JUDGE