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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESS BATIZ, et al.,)
)
Plaintiffs,)
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v.)
)
AMERICAN COMMERCIAL)
SECURITY SERVICES, et.)
al.,)
)
Defendants.)
)
)
)
)
)

Case No. EDCV 06-00566-
VAP(OPx)

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
IN PART**

Before the Court is a "Motion for Summary Judgment of the Claims of Plaintiff Gordon Narayan and Partial Summary Judgment as to Relevant Dates Worked by Plaintiff Nicole Nabinett" ("Motion") filed by Defendants American Continental Security Services, ABM Industries, Inc., ABM Security Services, and Security Services of America (collectively, "Defendants"). After consideration of the papers in support of, and opposition to, the Motion, and arguments advanced at the March 7, 2011, hearing, the Court GRANTS Defendants' Motion in part.

1 I. BACKGROUND

2 A. Procedural History

3 The parties are familiar with the factual and
4 procedural history of this action, and the Court need not
5 repeat it here, with limited exception.¹ On January 17,
6 2008, Plaintiffs filed their Fourth Amended Complaint
7 ("FAC"), identifying Nicole Nabinett ("Nabinett") and
8 Gordon Narayan ("Narayan") as named Plaintiffs. (See
9 Doc. No. 108 (Fourth Am. Compl.) at ¶¶ 27, 30.) On
10 January 17, 2008, the Court also conditionally certified
11 a nationwide class consisting of "[a]ll current or former
12 nonexempt employees of [Defendants], who . . . worked
13 more than forty hours in one work week and failed to
14 receive overtime compensation" (Doc. No. 106
15 ("Order Granting in Part and Den. in Part Pls.' Mot. for
16 Conditional Class Certification") at 16.)

17
18 On September 22, 2010, the Court decertified the
19 class on fairness and procedural grounds, due to
20 Plaintiffs' lack of admissible class-wide damages
21 evidence. (See Sept. 22, 2010, Order at 8-10.)² In the
22 September 22, 2010, Order, the Court dismissed the opt-in
23

24 ¹ See, e.g., Doc. No. 225 (Sept. 22, 2010, Order) at
25 2-5 (describing the factual and procedural history in
more detail).

26 ² Plaintiffs sought permission to file an
27 interlocutory appeal of the September 22, 2010, Order,
which the Court denied on February 24, 2011. (See Doc.
28 Nos. 225, 253.)

1 Plaintiffs without prejudice, but permitted the named
2 Plaintiffs, including Nabinett and Narayan, to proceed in
3 their individual capacities. (Id. at 10.)
4

5 On September 28, 2010, the Court held a status
6 conference, and ordered, inter alia, that: (1) Plaintiffs
7 could propound additional discovery as to the named
8 Plaintiffs, which must be completed by no later than
9 January 14, 2011; and (2) Plaintiffs and Defendants could
10 file motions for summary judgment no later than January
11 31, 2011, with oppositions filed no later than February
12 14, 2011 and replies, if any, filed no later than
13 February 22, 2011. (Doc. No. 229 ("October 12, 2010,
14 Order") at 2.)
15

16 Defendants filed the instant Motion on January 31,
17 2011, attaching the following documents in support of
18 their Motion:

- 19 1. Declaration of Lynn Gilbert ("Gilbert
20 Declaration");
- 21 2. Printout of an electronic mail message ("e-
22 mail") conversation between Kristine Curtiss and
23 Mark Smith, dated October 26, 2004 ("Ex. A");
- 24 3. Payroll Summary Chart for Gordon Narayan ("Ex.
25 B");
- 26 4. Printout capturing a screen-shot of Narayan's
27 Employee Master File ("Ex. C");
28

- 1 5. Narayan's Internal Revenue Service Form W-2 for
- 2 tax year 2004 ("Ex. D");
- 3 6. Printout capturing a screen-shot of an Employee
- 4 Master Inquiry for Nabinett ("Ex. E");
- 5 7. Printout capturing a screen-shot of Nabinett's
- 6 Employee Master File ("Ex. F");
- 7 8. Nabinett's Internal Revenue Service Form W-2 for
- 8 tax year 2005 ("Ex. G");
- 9 9. Nabinett's Internal Revenue Service Form W-2 for
- 10 tax year 2006 ("Ex. H");
- 11 10. Payroll Detail Report for Nabinett ("Ex. I")
- 12 11. Declaration of Dominic Messiha ("Messiha
- 13 Declaration");
- 14 12. Certified Deposition Transcript for December 16,
- 15 2010, Deposition of Gordon Narayan ("Narayan
- 16 Depo.");
- 17 13. Certified Deposition Transcript for December 14,
- 18 2010, Deposition of Nicole Nabinett ("Nabinett
- 19 Depo.");
- 20 14. Declaration of Courtney Hobson ("Hobson Decl.");
- 21 and
- 22 15. Defendants' Proposed Statement of Uncontroverted
- 23 Facts and Conclusions of Law ("SUF").

24

25 On February 14, 2011, Plaintiffs filed their Opposition
26 to Defendants' Motion, and attached the following
27 documents:

28

- 1 1. Statement of Genuine Issues of Material Fact
2 ("SGI");
- 3 2. Objections to Defendants' Evidence ("Plaintiffs'
4 Objections");
- 5 3. Declaration of André Jardini ("Jardini
6 Declaration");
- 7 4. Plaintiffs' Request for Production of Documents,
8 Set Two, attached as Exhibit 1 to the Jardini
9 Declaration ("Plaintiffs' RFP");
- 10 5. Declaration of K.L. Myles ("Myles Declaration");
- 11 6. Transcript Portions from the September 28, 2010,
12 Status Conference ("September 28 Hearing
13 Transcript");
- 14 7. Copy of the Court's October 12, 2010, Order
15 ("October 12 Order");
- 16 8. Letter to Courtney Hobson from André Jardini,
17 dated November 17, 2010 ("Ex. 3");
- 18 9. Printout of an e-mail from K.L. Myles to
19 Courtney Hobson, dated November 30, 2010 ("Ex.
20 4");
- 21 10. Declaration of Gordon Naryan, dated July 31,
22 2007 ("Narayan Declaration");
- 23 11. Survey completed by Nicole Nabinett, dated March
24 9, 2010 ("Ex. 6");
- 25 12. Deposition Transcript for December 16, 2010,
26 Deposition of Gordon Narayan ("Narayan Depo.");

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- 1 13. Additional portions of the Deposition Transcript
- 2 for December 16, 2010, Deposition of Gordon
- 3 Narayan ("Narayan Depo.");
- 4 14. Deposition Transcript for December 14, 2010,
- 5 Deposition of Nicole Nabinett ("Nabinett
- 6 Depo.");
- 7 15. Additional portions of the Deposition Transcript
- 8 for December 14, 2010, Deposition of Nicole
- 9 Nabinett ("Nabinett Depo.");
- 10 16. Employment records, personnel documents, and
- 11 payroll records produced by Defendants on
- 12 January 26 and 28, 2011, for Narayan ("Ex. 11");
- 13 17. Employment records, personnel documents, and
- 14 payroll records produced by Defendants on
- 15 January 26 2011, for Nabinett ("Ex. 12");
- 16 18. Declaration of Grace Corsini ("Corsini
- 17 Declaration"); and
- 18 19. Declaration of Nicole Nabinett ("Nabinett
- 19 Declaration").

20

21 On February 22, 2011, Defendants filed their "Response in
22 Support of Motion" ("Reply"), and attached the
23 "Declaration of Courtney Hobson in Support of Defendants'
24 Reply" ("Hobson Reply Declaration").

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1 **B. Evidentiary Issues**

2 Before setting forth the uncontroverted facts in this
3 action, the Court examines the admissibility of the
4 evidence offered by both sides in support of, and
5 opposition to, the Motion. "A trial court can only
6 consider admissible evidence in ruling on a motion for
7 summary judgment." Orr v. Bank of America, 285 F.3d 764,
8 773 (9th Cir. 2002); In re Oracle Corp. Sec. Litig., 627
9 F.3d 376, 385 (9th Cir. 2010) ("A district court's ruling
10 on a motion for summary judgment may only be based on
11 admissible evidence."); Hollingsworth Solderless Terminal
12 Co. v. Turley 622 F.2d 1324, 1335 n. 9 (9th Cir. 1980);
13 see also Fed. R. Civ. Proc. 56(c)(4) ("An affidavit or
14 declaration used to support or oppose a motion must . . .
15 set out facts that would be admissible in evidence . . .
16 ."). The party seeking admission of a piece of evidence
17 bears the burden of demonstrating its admissibility.
18 Oracle, 627 F.3d at 385.

19
20 **1. Exhibits B, C, E, F, and I**

21 Here, Defendants do not satisfy their burden of
22 demonstrating the admissibility of Exhibits B, C, E, F,
23 and I. Defendants offer these Exhibits for the truth of
24 their contents, rendering the Exhibits hearsay. See Fed.
25 R. Evid. 801(c). Defendants appear to assert the
26 Exhibits are subject to the business records exception
27 under Federal Rule of Evidence 803(6).
28

1 Under Rule 803(6), for a memorandum or record
2 to be admissible as a business record, it must
3 be (1) made by a regularly conducted business
4 activity, (2) kept in the regular course of
5 that business, (3) the regular practice of
6 that business to make the memorandum, (4) and
7 made by a person with knowledge or from
8 information transmitted by a person with
9 knowledge.

10 Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1258
11 (9th Cir. 1984) (internal quotations omitted) (citing
12 Clark v. City of Los Angeles, 650 F.2d 1033, 1036-37 (9th
13 Cir. 1981)). Moreover, the writing must be made "by a
14 person with knowledge at or near the time of the incident
15 recorded." Sea-Land Serv., Inc. v. Lozen Intern., LLC.,
16 285 F.3d 808, 819 (9th Cir. 2002) (citing United States
17 v. Miller, 771 F.2d 1219, 1237 (9th Cir. 1985)).

18 In support of Exhibit B's admission, the Gilbert
19 Declaration states only that Ms. Gilbert is familiar with
20 Defendants' payroll record keeping system, and that
21 Exhibit B represents payroll summaries for Narayan for
22 the years 2003 and 2004. (Gilbert Decl. ¶ 6.) The
23 Gilbert Declaration does not state whether it is the
24 regular practice of the business to generate the
25 summaries, or that Exhibit B was made by a person with
26 knowledge "at or near the time of the incident recorded."
27 Sea-Land, 285 F.3d at 819. Thus, Defendants have not
28 demonstrated that Exhibit B is a business record under
Rule 803(6).

1 Similarly, Defendants have not established that
2 Exhibits C, E, and F are business records under Rule
3 803(6). The Gilbert Declaration states that "[i]n the
4 ordinary course of business, [Defendants] maintain
5 software programs that contain master data pertaining to
6 employees." (Gilbert Decl. ¶ 7.) The Gilbert
7 Declaration does not state, however, whether the data is
8 entered by a person with knowledge at or near the time of
9 the event recorded. Sea-Land, 285 F.3d at 819.
10 Accordingly, Exhibits C, E, and F do not satisfy the
11 business records exception under Rule 803(6).
12

13 Finally, like Exhibit B, the Gilbert Declaration does
14 not support sufficiently Exhibit I's admissibility, as
15 the declaration does not state whether it is the regular
16 practice of the business to generate the summaries, or
17 that Exhibit I was made by a person with knowledge at or
18 near the time of the incident recorded. Accordingly, as
19 with Exhibit B, Defendants have not satisfied their
20 burden of demonstrating Exhibit I is a business record
21 under Rule 803(6).
22

23 **2. Exhibits D, G, and H**

24 Plaintiffs object to admission of Exhibits D, G, and
25 H, contending: (1) "[t]he evidence is prejudicial under
26 FRE 403;" (2) "[D]efendants cannot reply [sic] on
27 documents not previously identified or produced during
28

1 discovery;" and (3) "[D]efendants have failed to provide
2 adequate explanation for [the] delayed disclosure, which
3 has prejudiced [P]laintiffs." (Pls.' Objections at 4, 5,
4 8, 9.) The Court overrules Plaintiffs' objections.

5
6 First, Plaintiffs misstate the standard under Rule
7 403. The standard under Rule 403 is not whether
8 "evidence is prejudicial," as Plaintiffs contend, but
9 rather whether the evidence's "probative value is
10 substantially outweighed by the danger of unfair
11 prejudice." Fed. R. Evid. 403 (emphases added). Here,
12 evidence demonstrating the dates Narayan and Nabinett
13 worked is highly probative as to whether Narayan's and
14 Nabinett's claims were made timely, or fall outside the
15 statute of limitations. Moreover, the unfair prejudice
16 here is minimal as Narayan's 2004 W-2 form, and
17 Nabinett's 2005 and 2006 W-2 forms are documents that
18 Nabinett and Narayan would have received before they
19 joined the action in January 2008. See 26 U.S.C. § 6051
20 (requiring an employer "furnish to each . . . employee .
21 . . on or before January 31 . . . a written statement
22 [(i.e., W-2 form)]" reflecting the remuneration received
23 during the last calendar year.). As Plaintiffs do not
24 articulate how the unfair prejudice substantially
25 outweighs the probative value of Narayan's and Nabinett's
26 W-2 forms, Plaintiffs' Rule 403 objection lacks merit.

1 Plaintiffs also contend Defendants cannot rely on
2 documents not previously identified or produced during
3 discovery, citing Linde v. Arab Bank, PLC, 269 F.R.D.
4 186, 207 (E.D.N.Y. 2010). In Linde, after the defendant
5 refused to comply with court orders requiring production
6 of documents, the plaintiffs filed a motion with the
7 court, which sanctioned the defendant under Federal Rule
8 of Civil Procedure 37(b). 269 F.R.D. at 194, 202.
9 Unlike Linde, here Plaintiffs have not filed any motions
10 under Rule 37 requesting sanctions for Defendants'
11 purportedly-untimely disclosures of Exhibits D, G, and H.
12 Accordingly, Linde is inapplicable.

13
14 Under Rule 37(c)(1), however, a court may, sua
15 sponte, exclude evidence that a party failed to disclose
16 under Rules 26(a) or 26(e). Nevertheless, to the extent
17 Plaintiffs rely on Rule 37(c) to exclude Exhibits D, G,
18 and H, they do so in vain. Rule 37(c)(1) provides,

19 If a party fails to provide information or
20 identify a witness as required by Rule 26(a)
21 or 26(e), the party is not allowed to use that
22 information or witness to supply evidence on
a motion, at a hearing, or at a trial, unless
the failure was substantially justified or is
harmless.

23 Fed. R. Civ. P. 37(c)(1). "This particular subsection,
24 implemented in the 1993 amendments to the Rules, is a
25 recognized broadening of the sanctioning power. The
26 Advisory Committee Notes describe it as a
27 'self-executing,' 'automatic' sanction to 'provide[] a
28

1 strong inducement for disclosure of material'"
2 Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d
3 1101, 1106 (9th Cir. 2001) (citations omitted). The Rule
4 applies even where a party does not violate an explicit
5 court order, "and even absent a showing in the record of
6 bad faith or willfulness." Id. Rule 37(c)(1) was
7 amended in 2000 to "explicitly add[] failure to comply
8 with Rule 26(e)(2) as a ground for sanctions under Rule
9 37(c)(1), including exclusion of withheld materials."
10 Fed. R. Civ. P. 37 Advisory Committee's Note (2000).
11 Nevertheless, "[t]wo express exceptions ameliorate the
12 harshness of Rule 37(c)(1): The information may be
13 introduced if the parties' failure to disclose the
14 required information is substantially justified or
15 harmless." Yeti, 259 F.3d at 1106.

16
17 Even assuming, without deciding, that Defendants
18 disclosed Exhibits D, G, and H, untimely in violation of
19 Rule 37(c)(1), the Court finds any tardiness in
20 disclosure was harmless. As stated above, Exhibits D, G,
21 and H, are W-2 forms that Narayan and Nabinett would have
22 received before becoming named Plaintiffs in this action;
23 tellingly, neither Narayan nor Nabinett assert they did
24 not receive the W-2 forms. Accordingly, Plaintiffs are
25 not harmed by the allegedly-untimely disclosure of
26 documents already in Plaintiffs' possession. Thus,

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1 Plaintiffs' argument that Exhibits D, G, and H, should be
2 excluded as untimely lacks merit.

3
4 Plaintiffs' related argument that Defendants' failure
5 "to provide adequate explanation for [the] delayed
6 disclosure" prejudiced Plaintiffs similarly lacks merit,
7 as Plaintiffs do not articulate how untimely disclosure
8 of documents already in Plaintiffs' possession prejudiced
9 Plaintiffs.

10
11 In sum, the Court overrules Plaintiffs' objections to
12 Defendants' Exhibits D, G, and H.

13
14 **3. Defendants' Exhibits 106 and 107 Attached to**
15 **Nabinett's Deposition**

16 In support of their Motion, Defendants included
17 documents introduced as Exhibits 106 and 107 at
18 Nabinett's Deposition, which are purportedly documents
19 from Nabinett's personnel records with Defendants that
20 establish Nabinett's employment was terminated effective
21 September 19, 2006. (See SUF 19; Nabinett Depo. 62:10-
22 66:21; Nabinett Depo., Exs. 106, 107.) Defendants do not
23 satisfy their burden of demonstrating the admissibility
24 of Exhibits 106 and 107. Under Federal Rule of Evidence
25 901, authentication of an exhibit is a condition
26 precedent to admissibility, and "is satisfied by evidence
27 sufficient support a finding that the" document is what
28

1 its proponent claims. Fed. R. Evid. 901. Defendants
2 have not offered any evidence supporting their assertion
3 that these documents are what Defendants claim.
4 Accordingly, Exhibits 106 and 107 to Nabinett's
5 deposition are not authenticated properly, and are
6 therefore inadmissible.

7
8 Moreover, even if the documents were authenticated
9 properly, Defendants offer these Exhibits for the truth
10 of their contents, rendering the Exhibits hearsay. See
11 Fed. R. Evid. 801(c). Defendants do not, however, assert
12 that any hearsay exceptions apply. Accordingly, as
13 Defendants have not articulated a hearsay exception for
14 Exhibits 106 and 107, the exhibits are inadmissible
15 hearsay.

16 17 **4. Plaintiffs' Evidence**

18 In support of their Opposition, Plaintiffs submit
19 several transcripts of court proceedings and depositions.
20 Specifically, Plaintiffs attached:

- 21 1. Transcript Portions from the September 28, 2010,
22 Status Conference;
- 23 2. Deposition Transcript portions for December 16,
24 2010, Deposition of Gordon Narayan; and
- 25 3. Deposition Transcript portions for December 14,
26 2010, Deposition of Nicole Nabinett

1 Plaintiffs did not, however, authenticate the transcript
2 exhibits properly.

3
4 To authenticate a transcript, or portion thereof, a
5 party must "identif[y] the names of the deponent and the
6 action and include[] the reporter's certification that
7 the deposition is a true record of the testimony of the
8 deponent." Orr, 285 F.3d at 774; see also Fed. R. Civ.
9 P. 30(f)(1) ("The [reporter's] certificate must accompany
10 the record of the deposition."). Here, Plaintiffs do not
11 attach reporters certifications to any of their
12 transcript portions. Accordingly, as Plaintiffs have not
13 authenticated the attached transcript portions properly,
14 they are inadmissible.³

16 **C. Uncontroverted Facts**

17 The following material facts are supported adequately
18 by admissible evidence and are uncontroverted. They are
19 "admitted to exist without controversy" for purposes of
20 the Motion. L.R. 56-3.

22 **1. Gordon Narayan's Employment**

23 Narayan began his employment with Defendants in 2003.
24 (SUF 1; Narayan Depo. 31:18-19; SGI 1.) While working

26 ³ The Court has, nevertheless, reviewed these
27 inadmissible transcript portions and finds that even if
28 this testimony was admissible, it would not alter the
Court's analysis or raise any genuine issues of material
fact.

1 for Defendants, Narayan worked exclusively at Defendants'
2 Microsoft Redmond Campus in the Seattle, Washington area
3 ("Defendants' Microsoft Campus"). (SUF 2, 11; Narayan
4 Depo: 30:24-31:11, 58:3-7; SGI 2.) Defendants' Microsoft
5 Campus has been closed since June 2005. (SUF 12; Gilbert
6 Decl. ¶ 4.)⁴

7
8 In a declaration filed with the Court, Narayan
9 indicated that he was discharged in 2005. (SUF 7;
10 Narayan Decl. ¶ 4; SGI 7.) During Narayan's deposition,
11 however, he stated that he continued to work for
12 Defendants until 2006. (SUF 6; Narayan Depo. 31:18-21;
13 SGI 6.) Narayan has not produced any documentation
14 during this litigation demonstrating that he worked for
15 Defendants beyond 2004. (SUF 10; Messiha Decl. ¶ 11; SGI
16 10.) Moreover, when Defendants deposed Narayan, he did
17 not identify any documentation establishing that he

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21 ⁴ Plaintiffs dispute this fact "to the extent that
22 defendants attempt to use the fact that [Defendants'
23 Microsoft Campus] has been closed in June 2005 to argue
24 that Mr. Narayan was not employed by [D]efendants through
25 the statutory period." (SGI 12.) Plaintiffs do not,
26 however, offer any evidence or declarations in support of
27 their dispute. Under Local Rule 56-3 a court may assume
28 a fact exists without controversy unless the fact is "(a)
included in the "Statement of Genuine Disputes" [i.e.,
SGI]) and (b) controverted by declaration or other
written evidence filed in opposition to the motion."
L.R. 56-3. Here, Plaintiffs filed no "declaration or
other written evidence" that controverts the closure date
of Defendants' Microsoft Campus. Accordingly, the
closure date for Defendants' Microsoft Campus is deemed
admitted without controversy.

1 worked for Defendants in 2006. (SUF 9; Narayan Depo.
2 32:3-10, 90:8-19; SGI 9.)

3
4 Narayan became a party to this action on January 17,
5 2008. (SUF 16; SGI 16; FAC ¶ 30.)

6 7 **2. Nicole Nabinett's Employment**

8 Nabinett began her employment with Defendants in May
9 2005, and worked as a security officer at various
10 locations in the Washington, D.C. area. (SUF 17, 18;
11 Nabinett Depo. 51:4-25, 91:22-92:21; SGI 17, 18.)
12 Nabinett alleged she worked for Defendants through July
13 2008. (SUF 26; Nabinett Depo. 8:24-9:9; SGI 26.) At her
14 deposition, Nabinett stated she did not keep any
15 documents demonstrating that she was employed by
16 Defendants past August 9, 2006. (SUF 24; Nabinett Depo.
17 70:10-17; SGI 24.) Nabinett has not produced any
18 documents demonstrating she worked for Defendants beyond
19 September 2006. (SUF 25; Messiha Decl. ¶ 11; SGI 25.)

20
21 Nabinett became a party to this action on January 17,
22 2008. (SUF 27; SGI 27; FAC ¶ 27.)

23 24 **D. Disputed Facts**

25 The parties dispute when Narayan's and Nabinett's
26 employment with Defendants ended. Defendants contend
27 Narayan's employment with Defendants ended in 2004, while
28

1 Plaintiffs assert that Narayan worked for Defendants
2 through January 18, 2005. (SUF 3; Ex. D; SGI 4, 5, 15.)
3 Similarly, Defendants contend Nabinett's employment with
4 Defendants ended on September 19, 2006, (SUF 19; Exs. G &
5 H), but according to Plaintiffs, Nabinett worked for
6 Defendants through 2008. (SGI 19, 20, 22.)

7
8 **II. LEGAL STANDARD FOR SUMMARY JUDGMENT**

9 A motion for summary judgment shall be granted when
10 there is no genuine issue as to any material fact and the
11 moving party is entitled to judgment as a matter of law.
12 Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc.,
13 477 U.S. 242, 247-48 (1986). The moving party must show
14 that "under the governing law, there can be but one
15 reasonable conclusion as to the verdict." Anderson, 477
16 U.S. at 250.

17
18 Generally, the burden is on the moving party to
19 demonstrate that it is entitled to summary judgment.
20 Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998);
21 Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707
22 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears
23 the initial burden of identifying the elements of the
24 claim or defense and evidence that it believes
25 demonstrates the absence of an issue of material fact.
26 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

1 When the non-moving party has the burden at trial,
2 however, the moving party need not produce evidence
3 negating or disproving every essential element of the
4 non-moving party's case. Celotex, 477 U.S. at 325.
5 Instead, the moving party's burden is met by pointing out
6 there is an absence of evidence supporting the non-moving
7 party's case. Id.

8
9 The burden then shifts to the non-moving party to
10 show that there is a genuine issue of material fact that
11 must be resolved at trial. Fed. R. Civ. P. 56(e);
12 Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The
13 non-moving party must make an affirmative showing on all
14 matters placed in issue by the motion as to which it has
15 the burden of proof at trial. Celotex, 477 U.S. at 322;
16 Anderson, 477 U.S. at 252; see also William W. Schwarzer,
17 A. Wallace Tashima & James M. Wagstaffe, Federal Civil
18 Procedure Before Trial, 14:144. "This burden is not a
19 light one. The non-moving party must show more than the
20 mere existence of a scintilla of evidence." In re Oracle
21 Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir.
22 2010) (citing Anderson, 477 U.S. at 252). "The
23 non-moving party must do more than show there is some
24 'metaphysical doubt' as to the material facts at issue."
25 In re Oracle, 627 F.3d at 387 (citing Matsushita Elec.
26 Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586
27 (1986)).

1 A genuine issue of material fact exists "if the
2 evidence is such that a reasonable jury could return a
3 verdict for the non-moving party." Anderson, 477 U.S. at
4 248. In ruling on a motion for summary judgment, the
5 Court construes the evidence in the light most favorable
6 to the non-moving party. Barlow v. Ground, 943 F.2d
7 1132, 1135 (9th Cir. 1991); T.W. Elec. Serv. Inc. v. Pac.
8 Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir.
9 1987).

11 III. DISCUSSION

12 Defendants argue they are entitled to summary
13 judgment as to Narayan and partial summary judgment as to
14 Nabinett. Defendants first contend Nabinett's claims for
15 violations of the Fair Labor Standards Act ("FLSA") are
16 barred by the FLSA's statute of limitations. Defendants
17 also contend there is no genuine issue of material fact
18 as to the date Nabinett's employment with Defendants
19 ended.

21 A. FLSA Statute of Limitations

22 The statute of limitations for an FLSA action for
23 overtime pay is codified in 29 U.S.C. § 255. Under §
24 255,

25 an action must be commenced 'within two years after
26 the cause of action accrued,' unless the cause of
27 action arises 'out of a willful violation.' 29 U.S.C.
28 § 255(a). In the case of a willful violation, the
limitations period is extended to three years. Id. A
new cause of action accrues at each payday

1 immediately following the work period for which
2 compensation is owed. See, e.g., O'Donnell v. Vencor
3 Inc., 466 F.3d 1104, 1113 (9th Cir.2006) (addressing
the statute of limitations under 29 U.S.C. § 255).

4 Dent v. Cox Comm. Las Vegas, Inc., 502 F.3d 1141, 1144
5 (9th Cir. 2007). "A violation of the FLSA is willful if
6 the employer 'knew or showed reckless disregard for the
7 matter of whether its conduct was prohibited by the
8 [FLSA].'" Chao v. A-1 Med. Servs., Inc., 346 F.3d 908,
9 918 (9th Cir. 2003) (quoting McLaughlin v. Richland Shoe
10 Co., 486 U.S. 128, 133 (1988)). "If an employer acts
11 unreasonably, but not recklessly, in determining its
12 legal obligation" under the FLSA, its action is not
13 willful. McLaughlin, 486 U.S. at 135 n. 13.

14
15 Here, Plaintiffs seek unpaid overtime under the FLSA.
16 (See, e.g., FAC ¶¶ 40, 55-67.) Moreover, Plaintiffs
17 claim Defendants recklessly, willfully, and intentionally
18 failed to pay Plaintiffs the required overtime. (FAC ¶¶
19 59, 63.) Accordingly, as Plaintiffs allege willful
20 violations of the FLSA, the maximum applicable statute of
21 limitations is three years from the date Plaintiffs'
22 cause of action accrued. Dent, 502 F.3d at 1144; see
23 also Mot. at 7, 10.

24 25 **B. Gordon Narayan's Claims**

26 Defendants argue the FLSA statute of limitations bars
27 Narayan's claims completely, entitling Defendants to
28

1 summary judgment. Narayan joined this action on January
2 18, 2008. (SUF 16.) Accordingly, under the FLSA's
3 three-year statute of limitations, Narayan's claims must
4 have accrued no later than January 18, 2005. Dent, 502
5 F.3d at 1144.

6
7 Defendants assert there is no genuine issue of
8 material fact that Narayan's employment with Defendants
9 ended in 2004, rendering Narayan's claims time-barred.
10 In support of their assertion, Defendants rely on the
11 Gilbert Declaration and Narayan's W-2 form (Exhibit D).
12 Defendants' Division Director of Human Resources, Lynn
13 Gilbert, reviewed personnel documents pertaining to
14 Narayan, and stated that he "was one of several employees
15 selected for a layoff from [Defendants'] Microsoft Campus
16 in 2004." (Gilbert Decl. ¶¶ 2, 3, 5.) Additionally,
17 Defendants conducted a search of their electronic tax
18 records for Narayan for the years 2004, 2005, and 2006,
19 and located a copy of Narayan's 2004 W-2 form. (Gilbert
20 Decl. ¶ 9; Ex. D.) Defendants could not locate any W-2
21 forms for Narayan for the years 2005 or 2006. (Gilbert
22 Decl. ¶ 9.)

23
24 The Court finds that the Gilbert Declaration and
25 Narayan's W-2 form for 2004, in conjunction with the lack
26 of W-2 forms showing Narayan worked in 2005 or 2006,
27 demonstrate sufficiently that Narayan's employment with
28

1 Defendants ended in 2004. Defendants therefore have
2 satisfied their burden of demonstrating they are entitled
3 to summary judgment. Accordingly, the burden shifts to
4 Plaintiff to make an affirmative showing that there is a
5 genuine issue of material fact to be resolved at trial.
6 Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324

7
8 Here, the only evidence Plaintiffs offer to counter
9 Defendants' evidence is Narayan's Deposition testimony
10 and his Declaration. At Narayan's deposition, he
11 testified that he worked for Defendants from "2003 to
12 2006." (Narayan Depo. 31:18-21.) In his declaration,
13 Narayan stated that he began working for Defendants in
14 2002, and "[i]n 2005 [he] was fired by [Defendants]."
15 (Narayan Decl. ¶¶ 2,4.) Narayan has not produced any
16 documentation supporting Plaintiffs' contention that he
17 worked for Defendants beyond 2004; nor was Narayan able
18 to identify documentation at his deposition that
19 indicated he worked for Defendants in 2006. (SUF 9, 10;
20 SGI 9, 10.)

21
22 Moreover, Narayan's conclusory deposition testimony
23 that he worked for Defendants until 2006 cannot satisfy
24 his burden of raising a genuine issue of material fact,
25 in light of the undisputed facts here. The parties do
26 not dispute that while employed by Defendants, Narayan
27 worked at Defendants' Microsoft Campus exclusively. (SUF
28

1 2; Narayan Depo: 30:24-31:11, 58:3-7.) It is also
2 undisputed that Defendants' Microsoft Campus has been
3 closed since June 2005. (SUF 12; see also Section
4 I.C.1., n. 4, supra.) Thus, given the undisputed facts,
5 Narayan could not have worked for Defendants after June
6 2005. Accordingly, Narayan's conclusory deposition
7 testimony that he worked for Defendants until 2006 does
8 not create a genuine issue of material fact.

9
10 Plaintiffs nevertheless contend Narayan's Deposition
11 and Declaration alone are sufficient to create a genuine
12 issue of material fact, citing Rodriguez v. Airborne
13 Express, 265 F.3d 890 (9th Cir. 2001) and Cornwell v.
14 Electra Central Credit Union, 439 F.3d 1018 (9th Cir.
15 2006). Plaintiffs rely on these authorities in vain.

16
17 In Rodriguez, the court rejected the defendant's
18 argument that the plaintiff's "'self-serving affidavit'
19 is insufficient to create a triable issue of fact," and
20 noted that "self-serving affidavits are cognizable to
21 establish a genuine issue of material fact so long as
22 they state facts based on personal knowledge and are not
23 too conclusory." 265 F.3d at 902. Unlike Rodriguez,
24 however, where the affidavit "set[] forth the facts . . .
25 with great specificity," Narayan's deposition testimony
26 and declaration state only the date Narayan's employment
27 purportedly ended. Neither Narayan's deposition
28

1 testimony nor his declaration provide additional factual
2 detail supporting his conclusory assertion regarding the
3 date his employment with Defendants ended.

4
5 Plaintiffs rely on Cornwell for the proposition that
6 "The Ninth Circuit 'has long held that a plaintiff may
7 defeat summary judgment with his or her own deposition.'"
8 (Opp'n at 3 (purportedly citing Cornwell, 439 F.3d at
9 1029).) Plaintiffs' reference to Cornwell is incorrect;
10 the case does not contain the language Plaintiffs cite.⁵
11 Rather, the cited language is from the Seventh Circuit in
12 Paz v. HealthCare and Rehabilitation Center, LLC, 464
13 F.3d 659, 664 (7th Cir. 2006), which Plaintiffs also
14 cite.

15
16 In Paz, the Seventh Circuit reversed a district
17 court's grant of summary judgment, holding that "a
18 plaintiff may defeat summary judgment with his or her own
19 deposition." 464 F.3d at 665. In support of this
20 holding, the Paz court relied, in part, on Payne v.
21 Pauley, 337 F.3d 767 (7th Cir. 2003). Paz, 464 F.3d at
22 664-65. In Payne, the court held that "self-serving

23
24 ⁵ Cornwell is also distinguishable from our case.
25 The Cornwell court addressed the evidentiary standard for
26 circumstantial evidence used to establish that a
27 defendant's nondiscriminatory explanation for terminating
28 an employee is a pretext for racial discrimination. 439
F.3d at 1029. Plaintiffs do not assert a claim for
racial discrimination, nor do Plaintiffs rely on
circumstantial evidence. Accordingly, Cornwell is
inapplicable here.

1 testimony cannot support a claim if the testimony is . .
2 . 'inherently implausible.'" Darchak v. City of Chicago
3 Bd. of Educ., 580 F.3d 622, 631 (7th Cir. 2009)
4 (describing the holding in Payne).

5
6 Here, Narayan's testimony is "inherently
7 implausible." Payne, 337 F.3d at 773. The dates Narayan
8 claimed he worked changed between his declaration and his
9 deposition, Narayan's deposition testimony regarding the
10 date he ended his employment with Defendants conflicts
11 with the undisputed facts, and Narayan has not produced,
12 nor could he identify any documents demonstrating he
13 worked for Defendants on or after January 18, 2005.
14 Accordingly, to the extent Payne is persuasive authority,
15 Narayan's deposition testimony and declaration do not
16 create a genuine issue of material fact, as they are
17 "inherently implausible."

18
19 This finding is in accord with the binding authority
20 in this circuit. In F.T.C. v. Neovi, Inc., 604 F.3d
21 1150, 1159 (9th Cir. 2010), a district court granted
22 summary judgment in favor of the plaintiff despite a
23 declaration from one of the defendant's executives. 604
24 F.3d at 1159. The Ninth Circuit affirmed, holding
25 "[s]pecific testimony by a single declarant can create a
26 triable issue of fact, but the district court was correct
27 that it need not find a genuine issue of fact if, in its
28

1 determination, the particular declaration was
2 'uncorroborated and self-serving.'" Id. (citing
3 Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061
4 (9th Cir. 2002)).

5
6 Like the testimony in Neovi, here, Narayan's
7 deposition testimony and declaration are self-serving and
8 uncorroborated. Neovi, 604 F.3d at 1159; cf. McSherry v.
9 City of Long Beach, 584 F.3d 1129, 1138 (9th Cir. 2009)
10 ("Summary judgment requires facts, not simply unsupported
11 denials"); Addisu v. Fred Meyer, Inc., 198 F.3d
12 1130, 1134 (9th Cir. 2000) ("A scintilla of evidence or
13 evidence that is merely colorable . . . does not present
14 a genuine issue of material fact.") Accordingly,
15 Narayan's deposition testimony and declaration do not
16 create a genuine issue of material fact. The Court
17 therefore finds Defendants have established conclusively
18 that they did not employ Narayan after 2004.

19
20 Narayan joined this action on January 18, 2008.
21 Under the FLSA's three-year statute of limitations,
22 Narayan's claims must have accrued no later than January
23 18, 2005. Dent, 502 F.3d at 1144. As Defendants did not
24 employ Narayan after 2004, any claims accrued more than
25 three years before Narayan joined the action and are,
26 accordingly, barred. The Court therefore GRANTS

1 Defendants' Motion as to Gordon Narayan and DISMISSES his
2 claims with prejudice.

3
4 **C. Nicole Nabinett's Claims**

5 Defendants seek a determination that Nabinett may
6 seek relief only for those claims running from the
7 maximum limitations period to the end of her employment
8 with Defendants in September 2006. (Mot. at 10.) The
9 parties do not dispute that Nabinett began working for
10 Defendants in May 2005, and became a party to this action
11 on January 17, 2008. (SUF 17, 27; SGI 17, 27.) As
12 Nabinett began her employment with Defendants within
13 three years of becoming a party to this suit, none of
14 Nabinett's claims are barred by the FLSA's three-year
15 statute of limitations. Dent, 502 F.3d at 1144. The
16 inquiry as to Nabinett, therefore, is when her employment
17 with Defendants ended.

18
19 Defendants assert there is no genuine issue of
20 material fact that Nabinett's employment with Defendants
21 ended on September 19, 2006. In support of their
22 assertion, Defendants rely on the Gilbert Declaration,
23 Nabinett's W-2 forms for tax years 2005 and 2006, the
24 absence of W-2 forms for Nabinett for tax years 2007 and
25 2008, and Nabinett's failure to produce or identify any
26 documents demonstrating she worked for Defendants after
27 September 2006.

1 Defendants' Division Director of Human Resources,
2 Lynn Gilbert, reviewed personnel documents pertaining to
3 Nabinett. (Gilbert Decl. ¶ 3.) The Gilbert Declaration
4 contains several statements summarizing the contents of
5 Exhibits, but does not contain any independent statements
6 reflecting Ms. Gilbert's personal knowledge of Nabinett's
7 employment dates. (See, e.g., Gilbert Decl. ¶ 12 ("The
8 summary shows").)

9
10 Nevertheless, the Gilbert Declaration also states
11 that Defendants conducted a search "for all IRS Form W-2s
12 issued to Nicole Nabinett by Defendants in the years
13 2005, 2006, 2007 and 2008." (Gilbert Decl. ¶ 11.)
14 Defendants located a copy of Nabinett's 2005 and 2006 W-2
15 forms. (Id.; Exs. G, H.) Defendants could not locate
16 any W-2 forms for Nabinett for the years 2007 or 2008.
17 (Gilbert Decl. ¶ 11.)⁶ Moreover, it is undisputed that

18
19 ⁶ Plaintiffs dispute this statement, contending
20 "Paragraph 11 of [the Gilbert Declaration] does not state
21 whether any IRS W-2 forms were located for Ms. Nabinett
22 in 2008." (SGI 22.) The Gilbert Declaration, Paragraph
23 11, states in relevant part,
24 A search was conducted for all IRS Form W-2s issued
25 to Nicole Nabinett by Defendants in the years 2005,
2006, 2007 and 2008. IRS Form W-2s were issued to
Nabinett in 2005 and 2006. No such forms were
located for the years 2006 or 2007. True and correct
copies of Nabinett's 2005 and 2006 IRS Form W-2s . .
. are attached respectively hereto as Exhibits "G"
and "H."

26 Further, Exhibits G and H appear to be Nabinett's 2005
27 and 2006 W-2 forms. Plaintiffs are correct that the
28 Gilbert Declaration does not state whether any IRS Form
W-2 was found for 2008. The Court assumes this is a
(continued...)

1 Nabinett has not produced any documents establishing she
2 worked for Defendants beyond September 2006, nor could
3 she identify any documentation establishing she worked
4 for Defendants through 2008. (SUF 24, 25; SGI 24, 25.)
5

6 The Court finds that the presence of W-2 forms for
7 2005 and 2006, in conjunction with the lack of W-2 forms
8 demonstrating Nabinett worked for Defendants in 2007 or
9 2008 and Nabinett's inability to identify or produce
10 documents demonstrating she worked for Defendants past
11 September 2006, demonstrates sufficiently that Nabinett's
12 employment with Defendants ended in September 2006.
13 Defendants therefore have satisfied their burden of
14 demonstrating they are entitled to summary judgment by
15 "pointing out . . . that there is an absence of evidence
16 to support the nonmoving party's case." Celotex, 477
17 U.S. at 325; see also Soremekun v. Thrifty Payless, Inc.,
18 509 F.3d 978, 984 (9th Cir. 2007) (affirming the

19 _____
20 ⁶(...continued)
21 typographical error.

22 The Gilbert Declaration states that no W-2 "forms
23 were located for the years 2006 or 2007." (Gilbert Decl.
24 ¶ 11.) Yet, Defendants identify and attach Nabinett's W-
25 2 form for 2006 as Exhibit G. Accordingly, it appears
26 the sentence in paragraph 11 stating no "forms were
27 located for the years 2006 or 2007" should read "forms
28 were located for the years 2007 or 2008." Indeed, this
reading comports with the facts alleged here, as neither
party contends Nabinett worked for Defendants in 2006,
ceased working for Defendants throughout 2007, and then
resumed her employment with Defendants in 2008. Thus,
the Court assumes paragraph 11 contains a typographical
error, and that no W-2 forms were found for Nabinett for
2007 or 2008.

1 continued validity of Celotex and holding "On an issue as
2 to which the nonmoving party will have the burden of
3 proof, however, the movant can prevail merely by pointing
4 out that there is an absence of evidence to support the
5 nonmoving party's case."). Accordingly, as Defendants
6 have satisfied their initial burden, the burden shifts to
7 Plaintiff to make an affirmative showing that there is a
8 genuine issue of material fact to be resolved at trial.
9 Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324

10
11 Here, Nabinett's statements are the only evidence
12 Plaintiffs offer to counter Defendants' evidence.
13 Specifically, Plaintiffs offer Nabinett's deposition
14 testimony, a survey she completed during this litigation,
15 and her declaration. Nabinett testified during her
16 deposition that she worked for Defendants through 2008.
17 (Nabinett Depo. 8:19-9:9.) Additionally, in a survey
18 dated March 9, 2010, Nabinett stated her "Approximate
19 date[s] [of employment with Defendants were] May 2005 to
20 April 2008." (Ex. 6 at 1.) Finally, in a declaration
21 signed on February 8, 2011, Nabinett stated "In or around
22 July 2008, [she] concluded her employment with
23 [Defendants]." (Nabinett Decl. ¶ 3.) Nabinett was
24 unable to produce or identify any documents, however,
25 that could corroborate her assertions that she worked for
26 Defendants through 2008. (SUF 24, 25; SGI 24, 25.)

1 Where, as here, the only evidence Plaintiffs offer is
2 "uncorroborated and self-serving," Plaintiffs have not
3 satisfied their burden of demonstrating a genuine issue
4 of fact exists as to the date Nabinett left Defendants
5 employ. Neovi, 604 F.3d at 1159.
6

7 Nevertheless, while Defendants have demonstrated
8 Nabinett's employment did not continue beyond September
9 2006, Defendants have not provided admissible evidence
10 demonstrating when in September 2006 Nabinett's
11 employment with Defendants ended. Accordingly, the Court
12 GRANTS Defendants' Motion as to Nicole Nabinett in part;
13 Defendants have established conclusively that Nabinett
14 worked for Defendants until September 2006.
15

16 IV. CONCLUSION

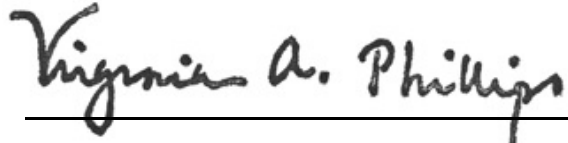
17 For the foregoing reasons, the Court finds Defendants
18 are entitled to summary judgment on Gordon Narayan's
19 claims. As Narayan's claims are barred by the FLSA
20 statute of limitations, the Court DISMISSES his claims
21 WITH PREJUDICE.
22

23 The Court also finds Defendants are entitled to
24 summary adjudication on Nabinett's claims, i.e.,
25
26
27
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1 Defendants have established conclusively Nabinett worked
2 for Defendants until September 2006. Plaintiffs may not
3 assert otherwise at trial or in future motions.

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Dated: March 9, 2011



VIRGINIA A. PHILLIPS
United States District Judge