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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ELIZABETH SLIGER, CAROL
DION and SCOTT AVILA,
individually, on behalf
of others similarly situated,
and on behalf of the general
public,

Plaintiffs,

v.

PROSPECT MORTGAGE, LLC, and
DOES 1 through 50, inclusive,

Defendants.

NO. CIV. S-11-465 LKK/EFB

O R D E R

_____ /

Plaintiffs bring a wage and hour action arising under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq., and under California labor laws. Plaintiffs move to conditionally certify a collective action under Section 16(b) of the FLSA, 29 U.S.C. § 216(b), for an order compelling defendant to produce the contact information for the potential class members, and for an order authorizing notice to the potential class members. Defendant opposes collective certification. For the reasons stated below,

1 the motion is GRANTED in part and DENIED in part.

2 **BACKGROUND**

3 Named plaintiffs Carol Dion ("Dion") and Scott Avila
4 ("Avila")¹ worked for defendant Prospect Mortgage, LLC, as "loan
5 officers" between 2008 and 2009. First Amended Complaint
6 ("FAC"), Dkt. No. 25, ¶ 6 & 7; Avila Decl. ¶ 2; Dion Decl. ¶ 2.²
7 They allege the following in support of their claim that their
8 "primary" job duties were to sell mortgage loans.³ They "almost
9 always" made their sales "in person, over the phone, or over the
10 Internet at Prospect's branch office" or in their own homes.⁴
11 They did not "regularly" make sales "at the customer's home or
12 place of business."⁵

13 Both named plaintiffs were paid "on a commission only
14 basis."⁶ They were not paid overtime when they worked over 40

15
16 ¹ It appears that one of the original named plaintiffs,
17 Elizabeth Sliger, will withdraw from the lawsuit. Dkt. No. 58-1
18 (Plaintiff's "Memorandum of Points and Authorities in Support of
19 Motion for Conditional Certification and Judicial Notice") at p.5
20 n.1.

21 ² The Avila Declaration is pp. 2-3 of Exhibit B (Dkt. No. 58-
22 4) of the June 1, 2011 Declaration of Robert L. Schug ("Schug
23 Decl.") (Dkt. No. 58-2). The Dion Declaration is pp. 6-7 of the
24 Schug Declaration.

25 ³ FAC ¶ 29; Avila Decl. ¶ 3; Dion Decl. ¶ 3.

26 ⁴ Avila Decl. ¶ 4; Dion Decl. ¶ 4.

⁵ Avila Decl. ¶ 4; Dion Decl. ¶ 4; FAC ¶ 29.

⁶ FAC ¶ 17; Avila Decl. ¶ 6; Dion Decl. ¶ 6. Plaintiffs have
submitted the declarations of several opt-in plaintiffs. Two of
them, Easley and Petschl, indicate that while they were paid on a
commission basis, they were not paid on a commission only basis.
As to Easley and Petschl, defendant "provided a recoverable draw"

1 hours in a week.⁷ Indeed, they assert that defendant had a
2 uniform policy of paying its loan officers on a commission basis,
3 and not paying overtime for work beyond the 40 hour weekly
4 limit.⁸ During pay periods in which a loan officer completed few
5 or no mortgage sales, that loan officer received pay below the
6 minimum wage,⁹ or no pay at all.¹⁰ Plaintiff Dion did not
7 receive any pay for the first six or eight weeks of her
8 employment, starting in May 2008.¹¹ Plaintiff Avila worked from
9 March 2009 until June 2009 without receiving any pay.¹² The
10 complaint alleges that the commission-only pay structure was
11 uniformly applied to all loan officers, including the named
12 plaintiffs, although as noted, plaintiffs' declarations show that
13 the policy did not apply to two of the opt-in plaintiffs, Easley
14 and Petschl.

15 In addition to working some pay periods without pay, both
16 named plaintiffs sometimes worked more than eight hours per day
17
18 against their commissions.

19 ⁷ Avila Decl. ¶ 6; Dion Decl. ¶ 6; FAC ¶ 38.

20 ⁸ FAC ¶ 38.

21 ⁹ By referring here to the minimum wage, the court does not
22 intend to pre-judge whether any plaintiff is exempt or non-exempt.

23 ¹⁰ FAC ¶ 17; Avila ¶ 6; Dion ¶ 6. Neither Easley or Petschl
24 asserts that they were ever paid below minimum wage or not paid at
all when they failed to make sales. As noted above, they do not
assert that they were paid on a "commission-only" basis.

25 ¹¹ FAC ¶ 19.

26 ¹² FAC ¶ 20.

1 or forty hours per week without receiving overtime pay.¹³ Dion
2 and Avila typically began their work day in the "early morning,"
3 five days per week, and continued to work into the evening and
4 also on weekends.¹⁴ Dion "often" worked eleven hours per day,
5 six days per week.¹⁵ Avila "often" worked in the evenings and on
6 weekends, in addition to eight hours per day worked in the
7 office.¹⁶ Prospect Mortgage expected plaintiffs and other loan
8 officers to respond to phone calls and emails in the evenings and
9 weekends.¹⁷ Defendant had a policy of requiring loan officers to
10 respond to leads within two hours of receiving them, even when
11 the leads came in outside of the regular working hours.¹⁸
12 Plaintiffs observed other loan officers working in excess of
13 eight hours per day and forty hours per week.¹⁹ Defendant had
14 production requirements that applied to plaintiffs and other loan
15 officers, which required loan officers to work through lunch and
16 rest periods.²⁰ Defendant uniformly represented to plaintiffs
17 and other loan officers that they were exempt employees, and were

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19 ¹³ FAC ¶ 22; Avila ¶ 6; Dion ¶ 6.

20 ¹⁴ FAC ¶ 22.

21 ¹⁵ FAC ¶ 24.

22 ¹⁶ FAC ¶ 25.

23 ¹⁷ FAC ¶ 25.

24 ¹⁸ FAC ¶ 25.

25 ¹⁹ FAC ¶ 26.

26 ²⁰ FAC ¶ 30.

1 not entitled to overtime pay.²¹ Defendant did not keep records
2 of hours worked by plaintiffs.²² Nor did they require plaintiffs
3 to keep records of their own hours worked.²³

4 ANALYSIS

5 "The FLSA imposes minimum labor standards on employers to
6 promote the 'health, efficiency, and general well-being of
7 workers.'" Christopher v. Smithkline Beecham Corp., 635 F.3d 383,
8 389 (9th Cir. 2011). As one means of achieving these goals, the
9 FLSA imposes on employers the requirement to pay a minimum wage
10 to its employees. 29 U.S.C. § 206(a)(1). They must also pay
11 overtime - that is, a pay rate "not less than one and one-half
12 times the regular" pay rate - to employees who work in excess of
13 forty hours per week. 29 U.S.C. § 207(a)(1). In general,
14 however "an employee employed in a bona fide executive,
15 administrative, or professional capacity ..., or in the capacity
16 of outside salesman" is exempt from both requirements. 29 U.S.C.
17 § 213(a)(1); Christopher, 935 F.3d at 689.

18 I. CERTIFICATION STANDARD

19 Plaintiffs allege in their complaint that defendant
20 improperly classified them as exempt under the FLSA, and
21 therefore improperly failed to pay them minimum wage and
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23

24 ²¹ FAC ¶ 27.

25 ²² FAC ¶ 32.

26 ²³ FAC ¶ 32.

1 overtime.²⁴ Their complaint is filed on behalf of themselves
2 "and other persons similarly situated." Section 16(b) of the
3 FLSA authorizes employees to bring an action for violations of
4 the minimum wage and overtime provisions of the Act, "for and in
5 behalf of ... themselves and other employees similarly situated."
6 29 U.S.C. § 216(b).

7 The FLSA does not define "similarly situated," and the
8 Supreme Court and the Ninth Circuit still have not interpreted
9 the term. However, the Ninth Circuit has confirmed that a
10 "collective action" under Section 16(b) differs from the Rule 23
11 "class action." McElmurry v. U.S. Bank Nat. Ass'n, 495 F.3d
12 1136, 1139 (9th Cir. 2007) ("A 'collective action' differs from a
13 class action"); accord, Wang v. Chinese Daily News, Inc., 623
14 F.3d 743, 761 (9th Cir. 2010) ("[t]he clear weight of authority
15 holds that Rule 23 procedures are inappropriate for the
16 prosecution of class actions under § 216(b)"); Smith v. T-Mobile
17 USA Inc., 570 F.3d 1119, 1122 (9th Cir. 2009) (relying upon the
18 "structural distinctions between a FLSA collective action and a
19 Rule 23 class action" in deciding that an appeal by FLSA named
20 plaintiffs was moot). Accordingly, rather than using the
21 approaches derived from Rule 23 class action cases, this court
22 will use the "two-tiered" approach previously taken by this and
23 other district courts in the Ninth Circuit. See Kress v.
24 PricewaterhouseCoopers, LLP, 263 F.R.D. 623, 627 (E.D. Cal.

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²⁴ FAC ¶¶ 27, 29 & 39.

1 2009).²⁵

2 Under the two tiered approach, the first tier is the "notice
3 stage," which asks whether the employees are sufficiently
4 similarly situated that a "conditional certification" should be
5 granted, and notice should be sent to prospective plaintiffs
6 under Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169,
7 172 (1989).²⁶ Kress, 263 F.R.D. at 626.²⁷ The proceedings now

8
9 ²⁵ Defendant invites this court to use the Rule 23 analysis
10 set forth in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ____, 131 S.
11 Ct. 2541 (2011), as a guide, arguing that the commonality standard
12 of Rule 23 and the "similarly situated" standard of Section 16(b)
13 are "entirely consistent," and citing Burns v. Village of Wauconda,
14 1999 WL 529574 (N.D. Ill. July 15, 1999) (unpublished) (declining
15 to apply either the two-tier standard or the Rule 23 standard
16 because the plaintiffs plainly could not satisfy either standard)
17 and MacGregor v. Farmers Ins. Exchange, 2011 U.S. Dist. LEXIS 80361
18 (D.S.C. July 22, 2011) (the facts, construed in the light most
19 favorable to plaintiffs, demonstrated only "isolated supervisor
20 misconduct," and thus the case was inappropriate even for
21 conditional certification). This court declines the invitation as
22 it appears inconsistent with the Ninth Circuit's apparent view that
23 the Rule 23 standards should not be used.

24
25 ²⁶ Hoffmann-La Roche concerned a collective action brought
26 under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.
§ 621 et seq. However, the ADEA explicitly incorporates the
collective action procedures of the FLSA. 29 U.S.C. § 626(b). The
Supreme Court's interpretation of these procedures in Hoffmann-La
Roche therefore applies to FLSA cases. Advanced Textile Corp., 214
F.3d at 1064.

27 Certification at the initial stage is conditional in that
it may be revisited at the second tier. Kress, 263 F.R.D. at 628,
citing Wynn v. NBC, 234 F. Supp.2d 1067, 1082 (C.D. Cal. 2002).
The second tier may be reached "at the conclusion of discovery
(often prompted by a motion to decertify)." Id. at 628, quoting
Thiessen v. GE Capital Corp., 267 F.3d 1095, 1102-03 (10th
Cir. 2001). At that point, the court considers factors such as
"(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.'" Kress, 263 F.R.D. at
628.

1 are at the first tier.²⁸ Plaintiffs can meet their burden at
2 this stage by providing "substantial allegations, supported by
3 declarations or discovery, that the putative class members were
4 together the victims of a single decision, policy, or plan."
5 Kress, 263 F.R.D. at 627, quoting Gerlach v. Wells Fargo & Co.,
6 No. 05-0585, 2006 U.S. Dist. LEXIS 24823, *6-7, 2006 WL 824652,
7 *2-3 (N.D. Cal. Mar. 28, 2006) (internal quotation marks
8 omitted). This is a "fairly lenient standard" that does not
9 require the court to consider contrary evidence provided by
10 defendant. Id., citing Lewis v. Wells Fargo & Co., 2009 U.S.
11 Dist. LEXIS 102773 at *9, 2009 WL 3517660 at *3-4 (N.D.Cal. Oct.
12 26, 2009), and Wynn v. NBC, 234 F. Supp.2d 1067, 1082 (C.D.
13 Cal. 2002).

14 **II. CONDITIONAL CERTIFICATION**

15 Plaintiffs have met their burden in this case in regard to
16 the commission-only plaintiffs. The plaintiffs have submitted
17 sworn declarations showing that the named plaintiffs and the opt-
18 in plaintiffs share similar job duties: they sell mortgage
19 loans; work with customers to complete the mortgage process;
20 collect standard information; submit the loan for approval; and
21 obtain information needed to close the loan.²⁹ See Declarations

22
23 ²⁸ Plaintiffs filed this motion for conditional certification
24 one month after defendant's motion to dismiss the First Amended
Complaint was denied.

25 ²⁹ The First Amended Complaint relies principally on
26 plaintiffs' formal designation as "loan officers" to say that they
are similarly situated. This would not be enough to meet their
burden at this stage. In a "mis-classification" case such as this

1 of Avila, Dare, Dion, Easley Guy, Helin, Petschl, Schenkler,
2 Schneider, Wilds and Woodburn (Odish), Exh. B. to the Motion for
3 Conditional Certification.³⁰ The declarations also show that the
4 named plaintiffs and the opt-in plaintiffs are not paid overtime
5 even when they work in excess of 40 hours in a week and that they
6 have witnessed other employees in their offices - prospective
7 class members - who "performed the same job duties" as they do.
8 The declarations also show that named plaintiffs and opt-in
9 plaintiffs - other than Easley and Petschl - are paid on a
10 commission-only basis and have gone without pay when they have
11 made no sales. No more is required of plaintiffs to show that
12 the named plaintiffs and opt-in plaintiffs - other than Easley
13 and Petschl - are "similarly situated" at this stage of the
14 proceedings.

15 Defendant opposes the request for conditional certification
16 principally by arguing that its evidence shows that plaintiffs
17 are exempt employees - either under the "outside" sales
18 exemption, or the "administrative" exemption. The documents and
19 declarations submitted by defendant are beside the point at this
20 stage of the proceeding. Defendant will have an opportunity to
21 demonstrate the merits of its affirmative defenses at the second
22 tier stage of this proceeding. At this stage, however, the court

23
24 one, plaintiffs must provide allegations or evidence "indicating
25 that prospective class members share similar job duties." Kress,
at 629-30. They have done so with the declarations.

26 ³⁰ Dkt. No. 58-4.

1 is focused only on whether the named plaintiffs and the opt-in
2 plaintiffs are "similarly situated."

3 Defendant goes on to argue that the plaintiffs' declarations
4 should be "disregarded" as "unreliable" because they are
5 "boilerplate, lack foundation, and offer an identical set of
6 conclusory and speculative statements about proposed members of
7 the FLSA Collective." Defendant's assertion that the submitted
8 declarations are "boilerplate" and contain "identical" statements
9 completely misses the thrust of plaintiffs' motion.³¹ Plaintiffs
10 assert that their jobs were identical in the material respects
11 covered by the declarations. Accordingly, since these are
12 declarations, not literary works of art, there is no reason why
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14
15 ³¹ The claim that the declarations "lack foundation" is
16 without merit. Defendant has submitted a document called
17 "Objections to Evidence" (Dkt. No. 65-1), asserting that the
18 declarations by the named plaintiffs "are not based on personal
19 knowledge and lacks foundation," under Fed. R. Evid. 602 ("Lack of
20 Personal Knowledge") and 901 ("Requirement of Authentication or
21 Identification"). In fact, the declarations set forth plaintiffs'
22 and opt-in plaintiffs' own experience and eyewitness accounts: who
23 the plaintiffs are, where they work, what they do at work, how they
24 were paid and what they observed co-workers doing at work.
25 Defendant apparently objects to the declarants' statements that
26 they "believe" that their co-workers did the same job the
plaintiffs did, based upon what they saw. Defendant points out
that plaintiffs did not observe their co-workers when they were not
at work. The objections miss the point. The declarations don't
purport to say what the co-workers did outside the office. The
import of the objected-to portion of the declarations is that
plaintiffs saw their co-workers doing the same job they (the
plaintiffs) were doing. The plaintiffs' use of the word "believe"
has no relevance here. In that regard, they only report what the
declarants saw with their own eyes. If what plaintiffs saw with
their own eyes gave them an incorrect view of what their co-workers
were doing over-all, then defendant can bring that up on a motion
to de-certify the class. Defendant's "Objections" are overruled.

1 their declarations should vary in those material aspects.³²

2 Defendant further opposes by providing declarations of
3 employees who say they were outside loan officers. That misses
4 the point. Plaintiffs' class is of persons who were non-exempt
5 loan officers, who were denied the minimum wage or overtime for
6 their hours in excess of 40 hours per week. Plaintiffs do not
7 claim that every single employee with the title "loan officer" is
8 non-exempt. They do request that those who are non-exempt (that
9 is, who are subject to the wage and hour requirements), and who
10 have been denied overtime pay or the minimum wage should be
11 notified that they can opt-in to this lawsuit.³³

12 As to Easley and Petschl, however, their declarations show
13 that they are not paid on a commission-only basis.³⁴ They also

14
15 ³² In any event, two of the declarations do differ in
16 important aspects. Neither Easley nor Petschl claim that they were
17 paid on a "commission-only" basis (although they say were paid
18 commissions), that they were ever paid less than the minimum wage
19 or that they ever worked from home. These are likely to be
20 important differences at the second stage of these proceedings,
21 since the FLSA claims are for wage and hour violations against non-
22 exempt employees (those not fitting the "outside" sales exemption).

23 ³³ Defendant also claims that the administrative exemption
24 applies. This argument fails for the same reason, namely,
25 defendant relies exclusively on its own evidence, but does not
26 address plaintiffs' evidence. Plaintiffs' evidence is the focus
on this tier of the analysis. Litigation over the applicability
of defendant's affirmative defenses, such as exemptions, is for the
second tier stage of this litigation.

27 ³⁴ Defendant's view is that Easley and Petschl are hourly paid
workers who are not exempt from the overtime requirements, and that
any claim that they were not paid overtime is not a mis-
classification issue. It is not necessary for the court to
determine whether it should consider this representation in making
its decision, because the Easley and Petschl declarations, standing
alone, are sufficient to show that they should not be included in

1 do not assert that they ever went without pay or were paid less
2 than minimum wage. These are important distinctions in a wage
3 and hour case.³⁵ Accordingly, the motion will be denied as to
4 Easley and Petschl, and other employees who were not paid on a
5 commission-only basis.³⁶

6 **III. NOTICE**³⁷

7 Plaintiffs request an order compelling defendant:
8 to provide Plaintiffs' counsel with a list of all loan
9 officers (in Excel or similar format) who are, or were,
10 employed by Prospect Mortgage at any time during the
11 three years preceding the Court's Order. This list
12 should include each class member's (1) name, (2) job
13 title, (3) last known address and telephone number,
14 (4) last known personal email address, (5) dates of
15 employment, (6) location of employment, (7) employee
16 number, and (8) social security number (last four

17 _____
18 the conditional certification.

19 ³⁵ Plaintiffs' Second and Fourth Claims for Relief allege a
20 failure to pay minimum wages under federal and state law. It
21 appears that a "sub-class" would be inappropriate here because the
22 named plaintiffs both have minimum wage claims and work on a
23 commission-only basis.

24 ³⁶ There is no "prejudice" in this determination; it is not
25 intended to prevent Easley and Petschl from filing their own
26 lawsuit if they wish.

27 ³⁷ To facilitate the opt-in process, "a district court may
28 authorize the named plaintiffs in a FLSA collective action to send
29 notice to all potential plaintiffs, and may set a deadline for
30 plaintiffs to join the suit by filing consents to sue." Does I
31 thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1064 (9th
32 Cir. 2000).

1 digits only)."
2 Plaintiffs also request "a 90-day notice period with a reminder
3 notice after 45 days, with notice to be distributed by
4 Plaintiffs' counsel via U.S. Mail and email." At oral argument,
5 defendant suggested that the parties meet and confer to work out
6 a stipulation on the notice issue, and plaintiff agreed to do so.


7 **IV. SUMMARY**

8 For the reasons stated above, plaintiffs' motion for
9 conditional certification (Dkt. No. 58) is GRANTED in part and
10 DENIED in part, as follows:

- 11 1. The court CONDITIONALLY CERTIFIES a collective action
12 under 29 U.S.C. § 216(b), consisting of all persons who
13 are, or were, employed by Defendant Prospect Mortgage,
14 LLC, as a loan officer at any time from three years
15 prior to October 18, 2007, and continuing to the
16 present, and who were paid on a commission-only basis.
- 17 2. The parties are GRANTED forty-five (45) days from the
18 date of this order to submit a joint proposal for
19 notice to the class, or separate statements as to why
20 no such joint proposal could be reached.

21 IT IS SO ORDERED.

22 DATED: August 23, 2011.

23
24 
25 LAWRENCE K. KARLTON
26 SENIOR JUDGE
UNITED STATES DISTRICT COURT