

1 in not paying Plaintiffs overtime wages prescribed in the federal
2 Fair Labor Standards Act ("FLSA"). Provident also moves for
3 summary judgment on its affirmative defense in which it asserts
4 it was justified in not paying Plaintiff McKeen-Chaplin overtime
5 wages prescribed in the California Labor Code. Provident argues
6 that the FLSA Plaintiffs, who are former Provident mortgage
7 underwriters, were "administratively exempt" from the overtime
8 requirement in the FLSA, and that Plaintiff McKeen-Chaplin was
9 "administratively exempt" from the overtime requirement in the
10 California Labor Code.

11 Both federal and California law provide overtime
12 provisions for employees who work in excess of forty hours per
13 week. 29 U.S.C. § 207(a)(1); Cal. Labor Code § 510(a). However,
14 neither the FLSA nor the California Labor Code overtime
15 provisions apply to "any employee employed in a bona fide . . .
16 administrative . . . capacity." 29 U.S.C. § 213(a)(1); 8 Cal.
17 Code Regs. § 11040(1) (stating that California's overtime
18 requirements do "not apply to persons employed in administrative
19 . . . capacities."). Under both federal and California law, the
20 employer bears the burden of proving that the administrative
21 exemption applies to its employees. Bothell v. Phase Metrics,
22 Inc., 299 F.3d 1120, 1124 (9th Cir. 2002) ("An 'employer who
23 claims an exemption from the FLSA has the burden of showing that
24 the exemption applies.'") (quoting Donovan v Nekton, Inc., 703
25 F.2d 1148, 1151 (9th Cir. 1983)); Ramirez v. Yosemite Water Co.,
26 Inc., 20 Cal.4th 785, 794-95 (1999) ("[T]he assertion of an
27 exemption from [California's] overtime laws is considered to be
28 an affirmative defense, and therefore the employer bears the

1 burden of proving the employee's exemption."). This exemption is
2 "to be narrowly construed against [an] employer[]" asserting it.
3 Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392
4 (1960) (referencing the FLSA); Eicher v. Advanced Bus.
5 Integrators, Inc., 151 Cal. App. 4th 1363, 1370 (2007) ("[U]nder
6 California law, exemptions from statutory mandatory overtime
7 provisions are narrowly construed.").

8 II. UNCONTROVERTED FACTS¹

9 The following facts concern the motions and are either
10 admitted or are "deemed" uncontroverted since they have not been
11 controverted with specific facts as required by Local Rule
12 260(b).²

13 Provident "is in the business of selling mortgage
14 loans" and "employs . . . mortgage underwriters . . . whose
15 primary duty is to underwrite home mortgage loan[] applications
16 for one- to four-family residential units." (Def. SUF ¶ 1, ECF
17 No. 76-1; Pl. SUF ¶ 1, ECF No. 77-1.)

18 To initiate a mortgage, Provident "loan officers[,]
19 [who are not underwriters,] . . . discuss the loan products with
20 [the] borrower." (Pl. SUF ¶ 51.) "A loan processor then runs a

21 ¹ Provident requests judicial notice be taken of documents Plaintiffs
22 filed in state court. The request is denied since Provident does not explain
in the request the relevance these documents have to its motion.

23 ² LR 260(b) prescribes:

24 Any party opposing a motion for summary judgment . . .
25 [must] reproduce the itemized facts in the [moving
26 party's] Statement of Undisputed Facts and admit those
27 facts that are undisputed and deny those that are
28 disputed, including with each denial a citation to the
particular portions of any . . . document relied upon
in support of that denial.

27 If the non-movant does not "specifically . . . [controvert duly
28 supported] facts identified in the [movant's] statement of undisputed facts,"
the nonmovant "is deemed to have admitted the validity of the facts contained
in the [movant's] statement." Beard v. Banks, 548 U.S. 521, 527 (2006).

1 credit check, gathers further documentation, assembles the file
2 for the underwriter, and runs the loan through an automated
3 underwriting system [("AUS")].” (Pl. SUF ¶ 4.) The AUS “applies
4 certain guidelines to a loan and returns a preliminary decision
5 (approval, refer, or ineligible.)” (Pl. SUF ¶ 5.) “The loan . . .
6 goes to the underwriter after this processing is finished.” (Pl.
7 SUF ¶ 4.)

8 An “underwriter has to make sure that the [loan]
9 processor put the correct information into the AUS and . . . that
10 the AUS is applying the correct rules to the facts of a
11 particular loan.” (Pl. SUF ¶ 6.) The underwriter does this by
12 applying “Provident’s guidelines or lending criteria as well as
13 agency guidelines that are specific to each loan product to
14 determine whether the particular loan falls within the level of
15 risk Provident is willing to accept.” (Def. SUF ¶ 11.) A
16 Provident underwriter’s job includes consideration of “the
17 borrower’s income, assets, debts and investments This
18 comprises most of the Plaintiffs’ job duties.” (Def. SUF ¶
19 10) (emphasis added.)

20 In reviewing a loan application, underwriters may
21 impose “conditions” on a loan application and refuse to approve
22 the loan until the borrower satisfies those conditions. (Def. SUF
23 ¶¶ 14, 16, 19.) The referenced conditions include “items and/or
24 documentation that an underwriter requires” the loan will be
25 approved. (Def. SUF ¶ 13.) While some “conditions” are required
26 by the guidelines, underwriters can include additional conditions
27 beyond those the guidelines require. (Def. SUF ¶ 16.) Further,
28 “[i]n certain circumstances, [Provident underwriters] can request

1 that Provident make an exception to the guidelines" and approve a
2 loan that does not satisfy the guidelines. (Def. SUF ¶ 24.)

3 When a Provident underwriter approves a loan, the loan
4 is "transferred to other [Provident] employees . . . to finalize
5 loan funding." (Pl. SUF ¶ 55.) Provident sells approved mortgage
6 loans to third-party investors. (Pl. SUF ¶ 12.)

7 III. DISCUSSION

8 A. FLSA Claim

9 "The FLSA delegates to the Secretary of Labor broad
10 authority to 'define [] and delimit[]' the scope of the
11 administrative exemption. In accordance with that authority, the
12 Secretary has formulated a test, known as the 'short duties
13 test,' to determine whether employees . . . qualify for the
14 administrative exemption." In re Farmers Ins. Exch., 481 F.3d
15 1119, 1127 (9th Cir. 2006). Federal courts "must give deference
16 to [Department of Labor's] regulations interpreting the FLSA."
17 Webster v. Public Sch. Emp. of Wash, Inc., 247 F.3d 910, 914 (9th
18 Cir. 2001). The "short duties test" states:

19 The term "employee employed in a bona fide
20 administrative capacity" . . . shall mean any
employee:

21 (1) Compensated on a salary or fee basis at a
22 rate of not less than \$455 per week . . .
23 exclusive of board, lodging or other
facilities;

24 (2) Whose primary duty is the performance of
25 office or non-manual work directly related to
26 the management or general business operations
of the employer or the employer's customers;
and

27 (3) Whose primary duty includes the exercise
28 of discretion and independent judgment with
respect to matters of significance.

1 29 C.F.R. § 541.200(a) (emphasis added).

2 It is undisputed that the salary requirement is
3 satisfied. Provident seeks summary judgment on the second and
4 third requirements and Plaintiffs cross move on the second
5 requirement.

6 **1. Work Directly Related to Provident's General**
7 **Operations**

8 Plaintiffs argue Provident cannot satisfy the second
9 requirement of the administrative exemption, which involves
10 determination of whether Plaintiffs' "primary duty is[,] [or
11 was,] the performance of office or non-manual work directly
12 related to the management or general business operations of
13 [Provident] or [Provident's] customers." 29 C.F.R. §
14 541.200(a)(2).

15 The uncontroverted facts establish that each
16 Plaintiff's primary duty was "to underwrite home mortgage loan
17 applications for one- to four-family residential units," and that
18 this duty constitutes "office work" referenced in 29 C.F.R. §
19 541.200(a)(2). (Pl. SUF ¶ 1; see also Def. SUF ¶ 10.) However,
20 Plaintiffs argue this mortgage loan underwriting duty did not
21 constitute work directly related to Provident's general business
22 operations.

23 29 C.F.R. § 541.201(a) defines the phrase "directly
24 related to management or general business operations" as it is
25 used in the administrative exemption in pertinent part as
26 follows:

27 The phrase "directly related to . . . general
28 business operations" refers to the type of
work performed by the employee. To meet this
requirement, an employee must perform work

1 directly related to assisting with the
2 running or servicing of the business, as
3 distinguished, for example, from working on a
4 manufacturing production line or selling a
5 product in a retail or service establishment.

6 (emphasis added).

7 The distinction between "running or servicing
8 of the business" and "working on a
9 manufacturing production line or selling a
10 product in a retail or service
11 establishment," has given rise to what many
12 courts refer to as the
13 "administrative/production dichotomy." Under
14 the dichotomy, "production employees (whose
15 job it is to generate the product or service
16 the business offers to the public) will not
17 qualify for the exemption." Stated
18 differently, if a court determines that an
19 employee generates, or "produces" the
20 product/service that the employer offers to
21 the public, then that employee is a
22 "production" employee who cannot qualify for
23 the administrative exemption. If, on the
24 other hand, the employee does not "produce"
25 the employer's product or service, the court
26 must undertake an additional analysis to
27 determine whether the employee performs an
28 "administrative" function within the meaning
29 of 29 C.F.R. § 541.201.

30 Lutz v. Huntington Bankshares, No. 2:12-cv-01091, 2014 WL
31 2890170, at *8 (S.D. Ohio June 25, 2014).

32 [T]he administration/production dichotomy
33 [is] . . . one piece of the larger inquiry,
34 recognizing that a court must "constru[e] the
35 statutes and applicable regulations as a
36 whole." Indeed, some cases analyze the
37 primary duty test without referencing the . . .
38 dichotomy at all. This approach is sometimes
39 appropriate because . . . the dichotomy is
40 but one analytical tool, to be used only to
41 the extent it clarifies the analysis. Only
42 when work falls "squarely on the 'production'
43 side of the line," has the
44 administration/production dichotomy been
45 determinative.

46 Bothell, 299 F.3d at 1127 (third alteration in original,
47 quotations omitted).

48 Plaintiffs argue they were part of Provident's

1 production line since they produced loans that Provident sold to
2 third-party investors, and rely on the Second Circuit's opinion
3 in Davis v. J.P. Morgan Chase & Co., 587 F.3d 529 (2d Cir. 2009)
4 as support for this argument. Provident counters Plaintiffs
5 "d[id] not 'sell' mortgage loans;" "[r]ather the underwriters
6 service[d] Provident's mortgage selling business by assessing the
7 risk associated with loan applications and deciding whether to
8 approve them." (Def. Mot. 1:21-25.)

9 Davis concluded that on the facts before it, an
10 underwriter's job fell "under the category of production rather
11 than of administrative work," concluding:

12 [the] Underwriters . . . performed work that
13 was primarily functional rather than
14 conceptual. They were not at the heart of the
15 company's business operations. They had no
16 involvement in determining the future
17 strategy or direction of the business, nor
18 did they perform any other function that in
19 any way related to the business's overall
20 efficiency or mode of operation. [They]
21 played no role in the establishment of [their
22 employer's] credit policy. Rather, they were
23 trained only to apply the credit policy as
24 they found it, as it was articulated to them
25 through the detailed Credit Guide.

26 Id. at 536.

27 Plaintiffs work as Provident underwriters was not
28 similar to "work on a manufacturing production line or selling a
29 product in the retail or service establishment," 29 C.F.R. §
30 541.201(a), since Plaintiffs' did not "produc[e] anything in the
31 literal sense." Bollinger v. Residential Capital, LLC, 863 F.
32 Supp. 2d 1041, 1047 (W.D. Wash. 2012). "To place them [on the
33 production side because they 'produce[d]' loans that [were] sold
34 to third-party investors] would elevate form . . . over

1 substance." In re Farmers Ins. Exch., 481 F.3d at 1132.
2 Therefore, the administrative/production dichotomy does not
3 resolve the question of whether Provident satisfies the second
4 prong of the administrative exemption.

5 Provident argues Plaintiffs' primary duty was related
6 to Provident's general business operations since Plaintiffs role
7 was analogous to work in quality control prescribed in 29 C.F.R.
8 §541.201(b), which states in relevant part: "[w]ork directly
9 related to . . . general business operations includes . . .
10 control . . . and similar activities."

11 Plaintiffs counter they did not perform quality control
12 work since "Provident has at least three quality control programs
13 [that are] distinct from Plaintiffs' underwriting work."
14 (Pl. Opp'n 6:27-7:6.) Plaintiffs contend their work should not be
15 characterized as quality control because while "all [Provident]
16 employees are responsible for 'quality,'" it is the "Corporate
17 Loan Committee" that performs "a quality control function by
18 reviewing errors identified in quality control audits and
19 addressing performance issues causing those errors[;]" and "an
20 underwriter who denies a loan for not meeting guidelines is not
21 transformed into a quality control worker any more than a
22 carpenter who refuses to use an unsafe saw becomes a safety
23 inspector." (Pl. Supp'l Mem. Cross Mot. Summ. J., 4:2-3; 4:20-
24 22; 4:27-28, ECF No. 96.)

25 The uncontroverted facts establish that "Provident uses
26 an outside company to perform quality control functions" and that
27 Provident has an internal Corporate Loan Committee that
28 "completely re-underwrite 10% of loans." (Pl. SUF ¶¶ 47, 49.) The

1 uncontroverted facts also establish that Provident underwriters
2 "must apply Provident's guidelines or lending criteria as well as
3 agency guidelines . . . to determine whether [a] particular loan
4 falls within the level of risk Provident is willing to accept,"
5 and this review comprises most of Plaintiffs' job duties. (Def.
6 SUF ¶¶ 10-11.) This evidence evinces that the work tasks in which
7 an underwriter engages for the purpose of determining whether a
8 particular loan falls within the level of risk Provident is
9 willing to accept "makes [the underwriter's] duties analogous to
10 a quality control employee who prevents a defective product from
11 being sold" notwithstanding Provident's use of other quality
12 controls. Lutz, No. 2:12-cv-01091, 2014 WL 2890170, at *13. Since
13 Provident has shown Plaintiffs' primary duty included "quality
14 control . . . [or] other similar activities," Plaintiffs' work
15 was directly related to Provident's general business operations.
16 29 C.F.R. §541.201(b)

17 Therefore, Provident's motion on this requirement is
18 granted and Plaintiffs' motion denied.

19 **2. Primary Duty Includes the Exercise of Discretion**
20 **and Independent Judgment With Respect to Matters**
21 **of Significance**

22 Provident argues it should prevail on its motion
23 concerning the third administrative requirement because each
24 Plaintiff's "primary duty include[d] the exercise of discretion
25 and independent judgment with respect to matters of
26 significance," that is prescribed in 29 C.F.R. § 541.200(a)(3);
27 specifically, Provident argues the mortgage loan underwriters
28 could "'waiv[e] or deviat[e] from [the guidelines] without prior

1 approval' by declining to approve a loan that met lending
2 criteria and/or request[] exceptions in order to approve a loan
3 that d[id] not [meet the lending criteria]." (Def. Mot. 21:5-10.)

4 Plaintiffs counter that there is a question of fact
5 regarding how often Plaintiffs performed these duties. Plaintiffs
6 cite in support of their position deposition testimony evincing
7 that underwriters rarely requested exceptions. Plaintiff Clayton
8 testified she requested exemptions "maybe once a month," Ludwig
9 Decl. Ex. 7 ("Clayton Dep. Tr.") 109:11-15, ECF 73-5), and
10 Provident's Vice President of Mortgage Operations testified that
11 she "wouldn't say [exceptions] happen[] often." (Ludwig Decl. Ex.
12 10 ("Baker April 2013 Dep. Tr." 73:14-16, ECF No. 73-6.)

13 Provident responds:

14 [Plaintiffs' position] d[oes] not take into
15 account that Plaintiffs' discretion and
16 independent judgment was manifested not only
17 when they chose to act, but also in each
18 circumstance where they chose not to act....
19 Plaintiffs exercise[d] discretion and
independent judgment every time they
underwr[o]te a loan file and decide[d] not
only to request an exception to the
guidelines, but also when they decide[d] not
to request an exception.

20 (Def. Supp'l Br. ISO Mot. Summ. J., 4:8-13, ECF No. 97.)

21 Plaintiffs reply that deciding not to request an
22 exception to the guidelines cannot be considered part of a
23 Provident underwriter's primary duty since "there [was] no
24 'decision' about requesting an exception from the guidelines when
25 the loan satisfie[d] the guidelines." (Pls.' Supp'l Reply 3:19-
26 23, ECF No. 98.)

27 29 C.F.R. § 541.202 states in pertinent part, "the
28 exercise of discretion and independent judgment involves the

1 comparison and the evaluation of possible courses of conduct....

2 [T]he term 'matters of significance' refers to the level of
3 importance or consequence of the work performed." 29 C.F.R. §
4 541.700 prescribes:

5 The term 'primary duty' means the principal,
6 main, major or most important duty that the
7 employee performs. Determination of any
8 employee's primary duty must be based on all
9 the facts in a particular case, with the
10 major emphasis on the character of the
11 employee's job as a whole.

12 The uncontroverted facts establish that underwriters
13 could place "conditions" on a loan application that satisfied
14 Provident's guidelines, and could decline to approve a loan
15 unless or until the borrower satisfied those conditions. (Def.
16 SUF ¶¶ 16, 19.) It is also uncontroverted that Plaintiffs could
17 "request that Provident make an exception to the guidelines" so
18 that an underwriter could "make a loan that d[id] not . . .
19 [satisfy the] guidelines." (Def. SUF ¶ 24.) Performance of these
20 duties required the exercise of discretion and independent
21 judgment since they "involved the comparison and the evaluation
22 of possible courses of conduct," and concerned matters of
23 significance since they could influence whether Provident would
24 approve a loan. 29 C.F.R. § 541.202. Further, Provident has shown
25 Plaintiffs' duty to make decisions about when—and when not—to
26 decline to approve a loan that met the lending criteria, and when
27 to request an exception to the lending criteria, were part of
28 Plaintiffs' primary duty in performance of their underwriting
 function, since the responsibilities were "the ... most important
 duty . . . [Provident underwriters] perform." 29 C.F.R. §
 541.700; see (Def. SUF ¶¶ 10-11 (setting out an underwriter's

1 role in Provident's loan business as consideration of a
2 borrower's income, assets, debts, and investments in order to
3 determine if the loan falls within the level of risk Provident is
4 willing to accept); see also Webster's II New College Dictionary
5 (1995) (defining duty as "an act or a course of action required
6 of one by position, custom, law, or religion"); Mtoched v. Lynch,
7 786 F.3d 1210, 1217 (9th Cir. 2015) (applying Webster's
8 dictionary to define a statutory term)). Therefore, Provident's
9 motion is granted.

10 **B. State Law Claims**

11 Provident argues McKeen-Chaplin was administratively
12 exempt from California's overtime laws and seeks summary judgment
13 on this affirmative defense to her state law overtime claims.

14 The California Labor Code, which imposes overtime
15 compensation requirements on employers, authorizes California's
16 Industrial Welfare Commission to establish exemptions from the
17 requirements for administrative employees. The phrases "primarily
18 engaged in duties that meet the test of the exemption" and
19 "discretion and independent judgment" are "construed in [the
20 state administrative exemption] in the same manner as such terms
21 are construed in" the FLSA's administrative exemption. 8 Cal. ADC
22 § 11040(1)(A)(2). (emphasis added). The Industrial Welfare
23 Commission's exemption defines an administrative employee as one:

24 (a) Whose duties and responsibilities involve
25 . . . The performance of non-manual work
26 directly related to management policies or
27 general business operations of his/her
28 employer or his employee's customers . . .
and

(b) Who customarily and regularly exercises
discretion and independent judgment; . . .

1 and

2 (d) Who performs under only general
3 supervision work along specialized or
4 technical lines requiring special training,
experience, or knowledge; . . . and

5 (f) Who is primarily engaged in duties that
6 meet the test of the exemption. . . .

7 (g) Such employees must also earn a monthly
8 salary equivalent to no less than two (2)
9 times the state minimum wage for full-time
10 employment.

11 Cal. Code. Regs. § 11040 ("Wage Order 4"). Satisfaction of the
12 wage requirement concerning this exemption is undisputed.

13 Provident argues McKeen-Chaplin is administratively
14 exempt since her work as an underwriter satisfies the FLSA's
15 administrative exemption and she "primary engaged in duties that
16 met the [California law exemption]" because she testified at her
17 deposition that she spent most of her time reviewing loan
applications. (Ludwig Decl. Ex. 1 ("McKeen-Chaplin Dep. Tr.")
113:19-115:15, ECF No. 73-4.)

18 McKeen-Chaplin argues summary judgment is inappropriate
19 since there is a genuine issue of material fact regarding whether
20 she was administratively exempt under the FLSA. This conclusory
21 assertion is McKeen-Chaplin's only argument in opposition to
22 Provident's motion on her state claims.

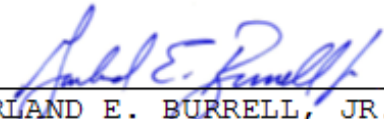
23 Provident made a factual showing under the applicable
24 state law standard that McKeen-Chaplin was administratively
25 exempt and McKeen-Chaplin has not presented facts from which a
26 reasonable inference can be drawn that she is not
27 administratively exempt. Therefore, Provident's motion on this
28 issue is granted.

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IV. CONCLUSION

For the stated reasons, each Plaintiff's summary judgment is DENIED and Provident's motion is GRANTED. Judgment shall be entered in favor of Defendant.

Dated: August 12, 2015



GARLAND E. BURRELL, JR.
Senior United States District Judge