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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA
6

7 GINA MCKEEN-CHAPLIN,
8 individually, on behalf of
9 others similarly situated,
and on behalf of the general
public,

10 Plaintiff,

11 v.

12 PROVIDENT SAVINGS BANK, FSB,
13 and DOES 1-50, inclusive,

14 Defendant.

2:12-cv-03035-GEB-JFM

ORDER DECERTIFYING PLAINTIFF'S
CLASS UNDER FEDERAL RULE OF
CIVIL PROCEDURE 23(c)(1)(C) AND
DENYING DEFENDANT'S MOTION TO
STAY AS MOOT

15
16 Defendant moves "for an Order staying the proceedings
17 in this case . . . until the Ninth Circuit Court of Appeals
18 decides Defendant's Rule 23(f) Petition for Permission to Appeal
19 this Court's Order Granting Conditional Certification and Class
20 Certification." (Def.'s Notice of Mot. and Mot. for Stay ("Def.'s
21 Stay Mot.") 2:3-11¹, ECF No. 30.) Defendant further argues that
22 "[i]n the event . . . the Ninth Circuit grants Defendant's
23 Petition, . . . all proceedings [should be stayed] until the
24 Ninth Circuit issues a final decision on the appeal and remands
25 the case back to this Court." (Id. at 2:7-14.)

26 After considering Defendant's stay argument that class
27 certification was inappropriate in light of the factual record on

28 ¹ All citations to Def.'s Stay Mot. utilize CM/ECF's pagination.

1 “(1) a common policy or practice with respect to alleged overtime
2 work or (2) a damages measurement method that can be applied on a
3 classwide basis,” (id. at 7:11-13), the district court decides
4 for the reasons stated below to decertify Plaintiff’s state
5 claims.

6 I. BACKGROUND

7 Plaintiff filed a motion on June 17, 2013, to certify
8 her state claims under Federal Rule of Civil Procedure (“Rule”) 23
9 on behalf of a class of “all persons who have been employed by
10 [Defendant] as mortgage underwriters in the State of California
11 from December 17, 2008 until the trial of this action.” (Pl.’s
12 Notice of Mot. for Conditional Certification and Class
13 Certification (“Pl.’s Class Mot.”) 2:14-15, ECF 16.) Plaintiff’s
14 motion was granted, and a class certification order issued on the
15 following claims: (1) failure to pay overtime compensation under
16 Cal. Lab. Code §§ 510, 1194, 1198, and the Industrial Welfare
17 Commission (“IWC”) Wage Orders; (2) waiting time penalties under
18 Cal. Lab. Code §§ 201-203; (3) failure to provide itemized wage
19 statements under Cal. Lab. Code § 226; (4) failure to provide
20 and/or authorize second meal periods under Cal. Lab. Code §
21 226.7; and (5) unfair business practices under Cal. Bus. & Prof.
22 Code §§ 17200 et seq. (Order Granting Conditional Certification
23 and Class Certification (“Class Certification Order”), ECF No.
24 25.)

25 II. LEGAL STANDARD

26 “A district court may decertify a class at any time.”
27 Rodriguez v. W. Publ’g Corp., 563 F.3d 948, 966 (9th Cir. 2009)
28 (citing Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160

(1982)); see United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied, 593 F.3d 802, 809 (9th Cir. 2010) (“[A] court retains the flexibility to address problems with a certified class as they arise.”); Fed. R. Civ. P. 23(c)(1)(C) (“An order that grants or denies class certification may be altered or amended before final judgment.”). When deciding whether proof on a class certification “question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.” In re Wells Fargo Home Mortg. Overtime Pay Litig., 268 F.R.D. 604, 610 (N.D. Cal. 2010) (citations and quotation marks omitted).

III. DISCUSSION

Reconsideration of the factual record reveals that Plaintiff’s class certification motion failed to satisfy the predominance requirement of Rule 23(b)(3). The pertinent part of this rule prescribes: “questions of law or fact common to class members [must] predominate over any questions affecting only individual members.” Fed. R. Civ. Pro. 23(b)(3). “The predominance inquiry focuses on ‘the relationship between the common and individual issues’ and ‘tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.’” Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 944 (9th Cir. 2009) (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998)).

“Where the issues of a case ‘require the separate adjudication of each class member’s individual claim or defense, a Rule 23(b)(3) action would be inappropriate.’” Casida v. Sears

1 Holdings Corp., No. 1:11-cv-01052 AWI JLT, 2012 WL 3260423, at *7
2 (E.D. Cal. Aug. 8, 2012) (quoting Zinser v. Accufix Research
3 Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001)).
4 "Consider[ation of] whether 'questions of law or fact common to
5 class members predominate' begins . . . with the elements of the
6 underlying cause of action," Erica P. John Fund, Inc. v.
7 Halliburton Co., 131 S. Ct. 2179, 2184 (2011), and "may 'entail
8 some overlap with the merits of the plaintiff's underlying
9 claim.'" Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct.
10 1184, 1194 (2013) (citing Wal-Mart Stores, Inc. v. Dukes, 131
11 S.Ct. 2541, 2551 (2011)).

12 The Class Certification Order found that common
13 issues would predominate the litigation, stating, "Underwriters'
14 overtime hours may also be proven with common proof and
15 representative testimony." (Class Certification Order 5:25-26.)
16 Defendant argues this ruling raises "serious legal questions"
17 justifying a stay of the proceedings because "Plaintiff did not
18 describe the testimony on which she would rely or the means of
19 extrapolating the amounts of overtime worked by 58 class members
20 dispersed among 13 different locations by anecdotal evidence from
21 three individuals working in only 3 locations." (Def.'s Stay Mot.
22 6:9-12.) Plaintiff rejoins that the Court will not have to engage
23 in individualized inquiries to determine whether Underwriters
24 worked overtime, since she can establish liability through
25 representative testimony, such as the declaration and deposition
26 testimony she submitted in her class certification motion. (Pl.'s
27 Reply in Supp. of Class Mot. 6:1-7:21, ECF No. 20.)
28

1 However, closer examination of Plaintiff's
2 representative evidence evinces Plaintiff has not sustained her
3 burden of showing it would be reasonable to infer that each class
4 member worked overtime. Defendant counters Plaintiff's
5 representative evidence with evidence from which inferences could
6 be drawn that individual issues predominate, "the resolution of
7 which depends upon how employees spend their time at work." In re
8 Wells Fargo Home Mortg. Overtime Pay Litig., 268 F.R.D. at 611;
9 Keller v. Tuesday Morning, Inc., 179 Cal. App. 4th 1389, 1396
10 (2009) (affirming decertification for lack of predominance where
11 "the question of mandated management policies was subject to
12 class-wide proof, yet the amount of time a manager spent
13 performing these acts and his or her exercise of discretion are
14 matters of individual inquiry"); cf. Espenscheid v. DirectSat
15 USA, LLC, 705 F.3d 770, 774 (7th Cir. 2013) ("To extrapolate . .
16 . would require that all [employees] . . . have done roughly the
17 same amount of work, including the same amount of overtime work,
18 and had been paid the same wage.").

19 Here, Plaintiff has not shown that Defendant's
20 Underwriters worked the same approximate hours. Plaintiff gave
21 deposition testimony that she did not keep records of the hours
22 she worked, that she occasionally worked more than ten hours a
23 day, regularly worked evenings and weekends, and never received
24 second meal periods. (Dep. of Gina McKeen-Chaplin 13:6-9, ECF No.
25 19-3 ("McKeen-Chaplin Dep. #1"); Dep. of Gina McKeen-Chaplin
26 79:3-6, 80:10-24, ECF No. 17-11 ("McKeen-Chaplin Dep. #2").²)

27 ² Plaintiff's deposition has not been filed on the docket by either party
28 in its entirety. The cited portions of Plaintiff's deposition are contained in
two different filings made by the parties in connection with Plaintiff's class

1 Underwriter Karen Honour testified in deposition that she
2 regularly worked ten or more hours a day and worked without a
3 single meal period. (Dep. of Karen Honour 237:3 - 238:21, ECF No.
4 20-2; Decl. of Matthew C. Helland in Supp. of Pl.'s Class Mot.
5 ("Helland Decl."), Ex. 5, ECF No. 17-5.) Underwriter Kristi
6 Suarez declares that she also worked between ten and twelve hours
7 a day without receiving two meal periods. (Suarez Decl. ¶ 4, ECF
8 16-3.) However, Plaintiff has not demonstrated that the
9 referenced hours worked are similar to the hours Underwriters
10 worked at Defendant's other offices.

11 According to Defendant's Vice President of Operations,
12 Debra Baker, Defendant currently employs thirty to thirty-two
13 Underwriters in approximately thirteen different offices. (Dep.
14 of Debra B. Baker ("Baker Dep.") 16:15-17, 21:14, ECF No. 19-2.)
15 Plaintiff's class consists of at least an additional twenty-four
16 former Underwriters. (Pl.'s Class Mot. 19:3-10.) Underwriters'
17 workloads and production standards vary by office, depending on
18 the amount of business per location and size of the staff. (Baker
19 Dep. 74:5-75:13.) The record also indicates that Underwriters
20 have considerable autonomy in scheduling their work. Defendant's
21 Human Resources Director, Deborah Hill, testified that
22 Underwriters took meal and rest periods as they saw fit. (Dep. of
23 Deborah L. Hill ("Hill Dep.") 35:14-15, ECF No. 19-1.) Plaintiff
24 McKeen-Chaplin averred that she did not have day-to-day
25 supervision, (McKeen-Chaplin Dep. #2 74:23), was never instructed
26 as to an arrival time (id. at 73:24-74:2), and regularly worked
27 from home (id. at 80:14-18). Since Defendant classifies all
28 certification motion.

1 Underwriters as exempt, it does not record Underwriters' hours or
2 track their meal periods. (Hill Dep. at 31:24 - 34:1; Helland
3 Decl., Ex. 3, ECF No. 17-3.)

4 Apart from representative testimony, Plaintiff has not
5 suggested how the district court could determine liability for
6 overtime on a class-wide basis. (Pl.'s Reply in Supp. of Class
7 Mot. 7:15-21). Plaintiff has shown a common question concerning
8 whether Defendant misclassified Underwriters. (See Class
9 Certification Order 5:16-17.) Nonetheless, reconsideration of the
10 class certification decision reveals that, based on the present
11 record, determining whether all Underwriters actually worked
12 overtime will require an individualized inquiry into the work
13 schedules of each class member. Without a showing that Plaintiff
14 can prove class-wide liability via representative testimony or
15 otherwise, individualized issues will predominate the litigation.
16 See Purnell v. Sunrise Senior Living Mgmt., Inc., SA CV10-00897
17 JAK, 2012 WL 1951487, at *8 (C.D. Cal. Feb. 27, 2012) ("Because
18 class members have had such different experiences regarding how
19 they kept track of and took their meal breaks . . . questions of
20 law or fact common to class members do not predominate.").


21 Plaintiff's class fails predominance not only on the
22 unpaid overtime claim alleged under Cal. Lab. Code §§ 510, 1194,
23 1198, and the IWC Wage Orders, but also on the claims for failure
24 to provide and/or authorize second meal periods under Cal. Lab.
25 Code § 226.7, waiting time penalties under Cal. Lab. Code §§ 201-
26 203, and unfair business practices under Cal. Bus. & Prof. Code
27 §§ 17200 et seq. Plaintiff has not shown that employees in all of
28 Defendant's offices worked a sufficient number of hours to

1 entitle them to second meal periods. Nor has Plaintiff shown that
2 common questions predominate the waiting time penalties claim,
3 since this claim is derivative of Plaintiff's overtime claim. For
4 the same reason, Plaintiff has not established predominance on
5 the unfair competition claim.

6 Since four of Plaintiff's five state claims have not
7 been shown suitable for class resolution, the district court
8 decertifies all class claims. Although common questions may
9 predominate Plaintiff's wage statement claim alleged under Cal.
10 Lab. Code § 226, Plaintiff has not shown that the claims, as a
11 whole, satisfy predominance, and Plaintiff premised her class
12 motion on certifying all state claims, (Pl.'s Class Mot. 2:12-
13 18). See Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1238 (9th
14 Cir. 2001) (quoting U.S. Parole Comm'n v. Geraghty, 445 U.S. 388,
15 408 (1980)) ("The district court is not 'to bear the burden of
16 constructing subclasses' . . . ; rather, the burden is on
17 Plaintiffs to submit proposals to the court."). Since
18 "Plaintiff[] ha[s] not met [her] burden of showing that common
19 questions predominate, which is fatal to class certification
20 under Rule 23(b)(3)," the Court need not address the
21 "requirements of Rule 23(a) or the Rule 23(b)(3) requirement of
22 superiority." Moua v. Jani-King of Minn., Inc., No. 08-4942
23 ADM/JSM, 2010 WL 935758, at *2 (D. Minn. Mar. 12, 2010) (citing
24 Steering Comm. v. Exxon Mobile Corp., 461 F.3d 598, 601, 604 (5th
25 Cir. 2006)); see also Edwards v. Ford Motor Corp., No. 11-CV-
26 1058-MMA(BLM), 2012 WL 2866424, at *2, 4-11 (S.D. Cal. June 12,
27 2012) (declining to address other elements relevant to class
28 certification when predominance under Rule 23(b)(3) not met).

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Dated: October 29, 2013


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