

1 week. 29 U.S.C. § 207(a)(1); Cal. Labor Code § 510(a). However,
2 neither the FLSA nor the California Labor Code overtime
3 protections apply to “any employee employed in a bona fide . . .
4 administrative . . . capacity.” 29 U.S.C. § 213(a)(1); 8 Cal.
5 Code Regs. § 11040(1) (stating that California’s overtime
6 requirements do “not apply to persons employed in administrative
7 . . . capacities.”). Under both federal and California law, the
8 employer bears the burden of proving that the administrative
9 exemption applies to its employees. Bothell v. Phase Metrics,
10 Inc., 299 F.3d 1120, 1124 (9th Cir. 2002) (“An ‘employer who
11 claims an exemption from the FLSA has the burden of showing that
12 the exemption applies.’”) (quoting Donovan v Nekton, Inc., 703
13 F.2d 1148, 1151 (9th Cir. 1983)); Ramirez v. Yosemite Water Co.,
14 Inc., 20 Cal.4th 785, 794-95 (1999) (“[T]he assertion of an
15 exemption from [California’s] overtime laws is considered to be
16 an affirmative defense, and therefore the employer bears the
17 burden of proving the employee’s exemption.”). This exemption is
18 “to be narrowly construed against [an] employer[]” asserting it.
19 Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392
20 (1960) (referencing the FLSA); Eicher v. Advanced Bus.
21 Integrators, Inc., 151 Cal. App. 4th 1363, 1370 (2007) (“[U]nder
22 California law, exemptions from statutory mandatory overtime
23 provisions are narrowly construed.”).

24 **II. UNCONTROVERTED FACTS¹**

25 The following facts concerning the motions are either

26
27 ¹ Provident requests judicial notice be taken of documents Plaintiffs
28 filed in state court. The request is denied since Provident does not explain
in the request for judicial notice what relevance these documents have to its
summary judgment motion.

1 admitted or "deemed" uncontroverted since they have not been
2 controverted with specific facts as required by Local Rule
3 260(b).²

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

9 To initiate a mortgage, Provident "loan officers[,]
10 [who are not underwriters,] . . . discuss the loan products with
11 [the] borrower." (Pl. SUF ¶ 51.) "A loan processor then runs a
12 credit check, gathers further documentation, assembles the file
13 for the underwriter, and runs the loan through an automated
14 underwriting system [("AUS").]" (Pl. SUF ¶ 4.) The AUS "applies
15 certain guidelines to a loan and returns a preliminary decision
16 (approval, refer, or ineligible.)" (Pl. SUF ¶ 5.) "The loan . . .
17 goes to the underwriter after this processing is finished." (Pl.
18 SUF ¶ 4.)

19 An "underwriter has to make sure that the [loan]
20 processor put the correct information into the AUS and . . . that
21 the AUS is applying the correct rules to the facts of a
22

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 Secretary has formulated a test, known as the 'short duties
2 test,' to determine whether employees . . . qualify for the
3 administrative exemption." In re Farmers Ins. Exch., 481 F.3d
4 1119, 1127 (9th Cir. 2006). Federal courts "must give deference
5 to [Department of Labor's] regulations interpreting the FLSA."
6 Webster v. Public Sch. Emp. of Wash, Inc., 247 F.3d 910, 914 (9th
7 Cir. 2001). The "short duties test" states:

8 The term "employee employed in a bona fide
9 administrative capacity" . . . shall mean any
10 employee:

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

15 (2) Whose primary duty is the performance of
16 office or non-manual work directly related to
17 the management or general business operations
18 of the employer or the employer's customers;
19 and

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

23 29 C.F.R. § 541.200(a) (emphasis added).

24 It is undisputed that the salary requirement is
25 satisfied. Provident seeks summary judgment on the second and
26 third requirements and Plaintiffs cross move on the second
27 requirement.

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

 Plaintiffs argue Provident cannot satisfy the second
requirement of the administrative exemption, which involves
determination of whether Plaintiffs' "primary duty is[,] [or
was,] the performance of office or non-manual work directly

1 related to the management or general business operations of
2 [Provident] or [Provident's] customers." 29 C.F.R. §
3 541.200(a)(2).

4 It is uncontroverted that each Plaintiff's primary duty
5 is, or was, "to underwrite home mortgage loan applications for
6 one- to four-family residential units," and that this duty
7 constitutes "office work" as the phrase is used in 29 C.F.R. §
8 541.200(a)(2). (Pl. SUF ¶ 1; see also Def. SUF ¶ 10.) However,
9 Plaintiffs argue this duty does not, or did not, constitute work
10 directly related to Provident's general business operations.

11 29 C.F.R. § 541.201(a) defines the phrase "directly
12 related to management or general business operations" as it is
13 used in the administrative exemption in relevant part as follows:

14 The phrase "directly related to . . . general
15 business operations" refers to the type of
16 work performed by the employee. To meet this
17 requirement, an employee must perform work
18 directly related to assisting with the
running or servicing of the business, as
distinguished, for example, from working on a
manufacturing production line or selling a
product in a retail or service establishment.

19 (emphasis added).

20 The distinction between "running or servicing
21 of the business" and "working on a
22 manufacturing production line or selling a
23 product in a retail or service
24 establishment," has given rise to what many
25 courts refer to as the
26 "administrative/production dichotomy." Under
27 the dichotomy, "production employees (whose
28 job it is to generate the product or service
the business offers to the public) will not
qualify for the exemption." Stated
differently, if a court determines that an
employee generates, or "produces" the
product/service that the employer offers to
the public, then that employee is a
"production" employee who cannot qualify for
the administrative exemption. If, on the

1 other hand, the employee does not "produce"
2 the employer's product or service, the court
3 must undertake an additional analysis to
4 determine whether the employee performs an
"administrative" function within the meaning
of 29 C.F.R. § 541.201.

5 Lutz v. Huntington Bankshares, No. 2:12-cv-01091, 2014 WL
6 2890170, at *8 (S.D. Ohio June 25, 2014).

7 [T]he administration/production dichotomy
8 [is] . . . one piece of the larger inquiry,
9 recognizing that a court must "constru[e] the
10 statutes and applicable regulations as a
11 whole." Indeed, some cases analyze the
12 primary duty test without referencing the ...
13 dichotomy at all. This approach is sometimes
appropriate because . . . the dichotomy is
but one analytical tool, to be used only to
the extent it clarifies the analysis. Only
when work falls "squarely on the 'production'
side of the line," has the
administration/production dichotomy been
determinative.

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

16 Plaintiffs argue they are part of Provident's
17 production line since they produce loans that Provident sells to
18 third-party investors, and rely on the Second Circuit's opinion
19 in Davis v. J.P. Morgan Chase & Co., 587 F.3d 529 (2d Cir. 2009)
20 as support for this argument. Provident counters its underwriters
21 "do not 'sell' mortgage loans" and instead "service Provident's
22 mortgage . . . business by assessing the risk associated with
23 loan applications and deciding whether to approve them." (Def.
24 Mot. 1:21-25.)

25 However, Plaintiffs' reliance on Davis is misplaced
26 since "Davis relied on the pre-2004 [CFR] example of
27 'production,' which had no qualifications. The current example
28 equates production with physical manufacturing, and its

1 usefulness is limited [in light of the nature of each Plaintiff's
2 duties]." Bollinger v. Residential Capital, LLC, 863 F. Supp. 2d
3 1041, 1047 (W.D. Wash. 2012). Plaintiffs' work is not similar to
4 "work on a manufacturing production line or selling a product in
5 the retail or service establishment," 29 C.F.R. § 541.201(a),
6 since Plaintiffs' do not "produc[e] anything in the literal
7 sense." Bollinger at 1047. "To place them [on the production side
8 because they 'produce' loans that are sold to third-party
9 investors] would elevate form . . . over substance." In re
10 Farmers Ins. Exch., 481 F.3d at 1132. Therefore, the
11 administrative/production dichotomy does not resolve the question
12 of whether Provident satisfies the second prong of the
13 administrative exemption.

14 Provident argues Plaintiff's primary duty is, or was,
15 related to Provident's general business operations since their
16 role is analogous to work in quality control, as prescribed in 29
17 C.F.R. §541.201(b), which states in relevant part: "[w]ork
18 directly related to . . . general business operations includes...
19 quality control. . . and similar activities." Plaintiffs counter
20 they do not perform quality control work since "Provident has at
21 least three quality control programs [that are] distinct
22 from Plaintiffs' underwriting work." (Pl. Opp'n 6:27-7:6.)

23 It is uncontroverted that "Provident uses an outside
24 company to perform quality control functions" and that Provident
25 has internal quality control employees that "completely re-
26 underwrite 10% of loans." (Pl. SUF ¶¶ 47, 49.) However, it is
27 also uncontroverted that Provident underwriters "must apply
28 Provident's guidelines or lending criteria as well as agency

1 guidelines . . . to determine whether the particular loan falls
2 within the level of risk Provident is willing to accept," and
3 this review comprises most of Plaintiffs' job duties. (Def. SUF
4 ¶¶ 10-11.) The task of determining whether a particular loan
5 falls within the level of risk Provident is willing to accept
6 "makes [an underwriter's] duties analogous to a quality control
7 employee who prevents a defective product from being sold,"
8 notwithstanding Provident's use of additional quality controls.
9 Lutz, No. 2:12-cv-01091, 2014 WL 2890170, at *13.

10 Since the primary duty of a Provident underwriter
11 includes "quality control . . . [or] other similar activities,"
12 prescribed in 29 C.F.R. §541.201(b), Plaintiffs have not shown
13 that their work is not or was not directly related to Provident's
14 general business operations. Therefore, Plaintiffs' summary
15 judgment motion is denied.

16 **2. Primary Duty Includes the Exercise of Discretion**
17 **and Independent Judgment With Respect to Matters**
18 **of Significance**

19 Provident argues it should prevail on its motion
20 because each Plaintiff's "primary duty [includes, or] include[d,]
21 the exercise of discretion and independent judgment with respect
22 to matters of significance," 29 C.F.R. § 541.200(a)(3);
23 specifically, Provident argues solely that underwriters can
24 "'waiv[e] or deviat[e] from [the guidelines] without prior
25 approval' by declining to approve a loan that meets lending
26 criteria and/or request[] exceptions in order to approve a loan
27 that does not [meet lending criteria]." (Def. Mot. 21:5-10.)

28 29 C.F.R. § 541.700 prescribes: "The term 'primary

1 duty' means the principal, main, major or most important duty
2 that the employee performs. Determination of any employee's
3 primary duty must be based on all the facts in a particular case,
4 with the major emphasis on the character of the employee's job as
5 a whole."

6 It is uncontroverted that underwriters may place
7 "conditions" on a loan application that satisfies Provident's
8 guidelines, and may decline to approve a loan unless or until the
9 borrower satisfies those conditions. (Def. SUF ¶¶ 16, 19.) It is
10 also uncontroverted that Plaintiffs may "request that Provident
11 make an exception to the guidelines" to "make a loan that does
12 not . . . [satisfy the] guidelines." (Def. SUF ¶ 24.) However,
13 Provident has not met its burden under the summary judgment
14 standard of establishing that imposing conditions or requesting
15 exceptions to the guidelines is, or was, part of Plaintiffs'
16 primary duty. Therefore, Provident's motion is denied.

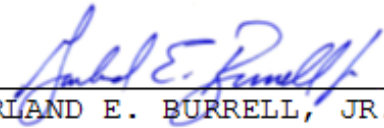
17 **B. State Law Claims**

18 Provident's summary judgment motion on its defense to
19 McKeen-Chaplin's state law claim is premised on the argument that
20 it would be granted summary judgment on its FLSA affirmative
21 defense. However, since its motion concerning the FLSA was
22 denied, the state law portion of its motion is also denied.

23 **IV. CONCLUSION**

24 For the stated reasons, Plaintiffs' summary judgment is
25 DENIED and Provident's motion is DENIED.

26 Dated: April 17, 2015

27
28


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