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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GABE BEAUPERTHUY, et al.,	)	Case No. 06-715 SC
	)	
Plaintiffs,	)	ORDER RE: MOTIONS FOR
	)	<u>SUMMARY JUDGMENT</u>
v.	)	
	)	
24 HOUR FITNESS USA, INC., a	)	
California corporation dba 24 HOUR	)	
FITNESS; SPORT AND FITNESS CLUBS	)	
OF AMERICA, INC., a California	)	
corporation dba 24 HOUR FITNESS,	)	
	)	
Defendants.	)	
	)	

**I. INTRODUCTION**

This is a collective action filed by employees and former employees of Defendants 24 Hour Fitness USA, Inc. and Sport and Fitness Clubs of America, Inc. (collectively "24 Hour" or "Defendants"). Before the Court are two Motions for Summary Adjudication, both filed by Plaintiffs. Motion for Summary Adjudication Number One is filed on behalf of a class of employees and former employees who worked as managers for Defendants ("Managers Class"). Docket No. 295 ("First Mot."). Motion for Summary Adjudication Number Two is filed on behalf of a class of employees and former employees who worked as personal trainers for Defendants ("Trainers Class"). Docket No. 297 ("Second Mot."). Defendants have filed an Opposition to each Motion. Docket Nos.

United States District Court  
For the Northern District of California

1 307 ("Second Opp'n"), 314 ("First Opp'n"). Plaintiffs have filed  
2 Replies. Docket Nos. 323 ("First Reply"), 327 ("Second Reply").

3 In addition, Defendants have filed a Motion for Denial or  
4 Continuance of Plaintiffs' Motions for Summary Adjudication Under  
5 Rule 56(f). Docket No. 340 ("56(f) Mot."). Plaintiffs have  
6 submitted an Opposition to the 56(f) Motion, Docket No. 341 ("56(f)  
7 Opp'n"), and Defendants have submitted a Reply, Docket No. 342  
8 ("56(f) Reply"). Having considered all of the papers submitted by  
9 both parties, this Court concludes that the matter is appropriate  
10 for decision without oral argument. Because of the current stage  
11 of this litigation, and as detailed below, the Court concludes that  
12 Plaintiffs' Motions must be DENIED. Accordingly, Defendants' 56(f)  
13 Motion is GRANTED.

14  
15 **II. BACKGROUND**

16 The Court has previously issued several orders that detail the  
17 procedural and factual background in this dispute. See Docket Nos.  
18 26 ("Apr. 11, 2006 Order"), 66 ("Nov. 28, 2006 Order"), 124 ("Mar.  
19 6, 2007 Order"), 190 ("Mar. 24, 2008 Order"). This Order will  
20 therefore assume familiarity with the background of this case. In  
21 short, Plaintiffs are alleging that Defendants' employment and  
22 payment policies improperly denied Plaintiffs overtime payments, in  
23 violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.  
24 ("FLSA"). See First Am. Compl. ("FAC"), Docket No. 33, ¶¶ 85-97.  
25 The Court has conditionally certified two classes in this matter:  
26 the Managers Class and the Trainers Class. See Mar. 24, 2008  
27 Order; Mar. 6, 2007 Order. Defendants have raised a number of  
28 affirmative defenses to Plaintiffs allegations. In particular,

1 Defendants claim as their twelfth affirmative defense that:

2 Plaintiffs' claims, and the claims of individuals  
3 on whose behalf Plaintiffs seek relief, are  
4 barred in whole or in part to the extent that the  
5 work performed falls within the exemptions,  
6 exclusions, exceptions, or credits as provided by  
7 the FLSA, including but not limited to 29 U.S.C.  
8 §§ 201 et seq., 207(g), 207(i), 213(a)(1),  
9 213(a)(17), and 213(b)(1).

7 Answer to FAC, Docket No. 35, at 31. In other words, Defendants  
8 are claiming that Plaintiffs' claims are barred because Plaintiffs  
9 were subject to one or more of the exemptions that Congress created  
10 to the FLSA's obligations to pay employees for overtime.

11 The present motions arise in the midst of discovery. When  
12 Plaintiffs filed their Motions for Summary Adjudication, on August  
13 21, 2009, the nonexpert discovery cut-off date was October 30,  
14 2009.<sup>1</sup> See Docket No. 283. Defendants have explained that they  
15 have not yet deposed any of the members of either Class. 56(f)  
16 Mot. Ex. A ("Kloosterman 56(f) Decl.") ¶ 2.<sup>2</sup>

17  
18 **III. LEGAL STANDARD**

19 "The standards and procedures for granting partial summary  
20 judgment, also known as summary adjudication, are the same as those  
21 for summary judgment." Mora v. Chem-Tronics, Inc., 16 F. Supp. 2d  
22 1192, 1200 (S.D. Cal. 1998). Entry of summary judgment is proper

23  
24 <sup>1</sup> This Court has since granted Defendants' request to extend the  
discovery cutoff until January 28, 2010. Docket No. 321.

25 <sup>2</sup> John C. Kloosterman, counsel for Defendants, has filed a  
26 declaration in support of the 56(f) Motion. In it, he explains  
27 Defendants' reasons for not yet completing depositions even though  
28 discovery has been ongoing in this case for several years. In  
particular, he explains that Defendants are waiting to receive  
damage estimates from Plaintiffs, and references recent talks with  
Plaintiffs regarding the establishment of sampling methodology or a  
representative group of Plaintiffs. Kloosterman 56(f) Decl. ¶ 2.

1 "if the pleadings, the discovery and disclosure materials on file,  
2 and any affidavits show that there is no genuine issue as to any  
3 material fact and that the movant is entitled to judgment as a  
4 matter of law." Fed. R. Civ. P. 56(c). Entry of summary judgment  
5 in a party's favor is also appropriate when there are no material  
6 issues of fact as to the essential elements of the party's claim.  
7 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986).

8 "The moving party bears the initial burden to demonstrate the  
9 absence of any genuine issue of material fact." Horphag Research  
10 Ltd. v. Garcia, 475 F.3d 1029, 1035 (9th Cir. 2007). If the moving  
11 party fails to meet its burden, then "the nonmoving party has no  
12 obligation to produce anything, even if the nonmoving party would  
13 have the ultimate burden of persuasion at trial." Nissan Fire &  
14 Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000).  
15 "The evidence of the nonmovant is to be believed, and all  
16 justifiable inferences are to be drawn in his favor." Anderson v.  
17 Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

18 "Where the opposing party has not had sufficient time to  
19 complete discovery or otherwise marshal facts to oppose the motion,  
20 application may be made under Rule 56(f) for a continuance of the  
21 proceedings pending completion of discovery." Thi-Hawaii, Inc. v.  
22 First Commerce Financial Corp., 627 F.2d 991, 994 (9th Cir. 1980).  
23 The Ninth Circuit generally disfavors summary judgment "where  
24 relevant evidence remains to be discovered. The burden is on the  
25 nonmoving party, however, to show what material facts would be  
26 discovered that would preclude summary judgment. If further  
27 discovery could not elicit evidence that would raise genuine issues  
28 of material fact, summary judgment would be appropriate." Klinge

1 v. Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988) (citations  
2 omitted).

3  
4 **IV. DISCUSSION**

5 **A. Plaintiff's First Motion for Summary Adjudication**

6 Plaintiffs' First Motion is based on the adequacy of the  
7 witnesses that Defendants have selected to put forward as their  
8 deponents pursuant to Rule 30(b)(6) of the Federal Rules of Civil  
9 Procedure. First Mot. at 1. Plaintiffs argue that because the  
10 burden of proving their twelfth affirmative defense will fall on  
11 Defendants, and because Defendants' deponents did not adduce facts  
12 to support this defense in their depositions, Defendants will not  
13 be able to meet their burden at trial. Id. In order to succeed at  
14 the summary adjudication stage, however, Plaintiffs must be able to  
15 show that there is no issue of material fact as to this affirmative  
16 defense. Horphag Research, 475 F.3d at 1035.

17 Plaintiffs' First Motion depends upon the purpose of Rule  
18 30(b)(6) of the Federal Rules of Civil Procedure, and the case law  
19 that has developed with respect to parties' discovery obligations  
20 under this Rule. Rule 30(b)(6) allows a party to name an  
21 organization as a deponent, provided that the party describes "with  
22 reasonable particularity the matters for examination." Fed. R.  
23 Civ. P. 30(b)(6). The organization is then required to "designate  
24 one or more officers, directors, or managing agents, or designate  
25 other persons who consent to testify" on the organization's behalf.  
26 Id. "The person designated must testify about information known or  
27 reasonably available to the organization." Id. Because an  
28 individual so designated is speaking for the corporation, and not

1 as an individual, this procedure imposes a significant duty upon  
2 the organization to educate the deponent prior to the deposition.  
3 See Bd. of Trs. of the Leland Stanford Junior Univ. v. Tyco Int'l  
4 Ltd., 253 F.R.D. 524, 526 (C.D. Cal. 2008).

5 Rule 30(b)(6) implicitly requires such persons to  
6 review all matters known or reasonably available  
7 to [the organization] in preparation for the Rule  
8 30(b)(6) deposition. This interpretation is  
9 necessary in order to make the deposition a  
10 meaningful one and to prevent the "sandbagging"  
of an opponent by conducting a halfhearted  
inquiry before the deposition but a thorough and  
vigorous one before the trial. This would  
totally defeat the purpose of the discovery  
process.

11 United States v. Taylor, 166 F.R.D. 356, 362 (M.D.N.C. 1996). In  
12 order to meet the purpose of the Rule, "[i]f a corporation has  
13 knowledge or a position as to a set of alleged facts or an area of  
14 inquiry, it is its officers, employees, agents or others who must  
15 present the position, give reasons for the position, and, more  
16 importantly, stand subject to cross-examination." Id. at 362.

17 Plaintiffs served a Rule 30(b)(6) notice upon Defendants that  
18 listed a number of matters for examination, including:

19 Your Human Resources Information Processing /  
20 Compensation Department from December 31, 1998 to  
the present;

21 The initial determination that a job category /  
22 job description is or is not exempt from December  
31, 1998 to the present;

23 The initial determination that each job category  
24 applicable to the members of the classes is or is  
not exempt from December 31, 1998 to the present.

25 First Karczag Decl. Ex. A ("30(b)(6) Notice") ¶¶ 1, 2, 12-14.<sup>3</sup>

26 Defendants selected Scott White ("White") to serve as their  
27

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28 <sup>3</sup> Justin P. Karczag, attorney for Plaintiffs, submitted a  
declaration in support of the First Motion. Docket No. 296.

1 deponent for the above topics. White had been employed with 24  
2 Hour as a Senior Vice President, First Karczag Decl. Ex. F ("White  
3 Depo. Tr.") at 11:14-16, and Plaintiffs contend that he had only  
4 held that position since March 31, 2008, First Karczag Decl. ¶ 30.

5 Plaintiffs listed the following topics in their 30(b)(6)  
6 notice:

7 Any and all changes in the classification status  
8 of the members of the managers class from  
December 31, 1998 to the present;

9 The decision to change the classification of the  
10 members of the managers class from exempt to non-  
exempt effective 4/1/2006;

11 Your FLSA compliance with regard to members of  
12 the managers class from December 31, 1998 to  
present;

13 Your policies and procedures (written and  
14 unwritten) regarding FLSA compliance from  
December 31, 1998 to the present.

15 30(b)(6) Notice ¶¶ 6, 8, 10, 16.<sup>4</sup>

16 Defendants selected Todd Bruhn ("Bruhn") to speak for them  
17 with regard to these topics. Bruhn held the title of Senior  
18 Director of Staffing, and had previously held various positions  
19 within 24 Hour since he had started with the company in September  
20 of 2003. First Karczag Decl. Ex. E ("Bruhn Depo. Tr.") at 11:4-  
21 12:6.<sup>5</sup>

22  
23 <sup>4</sup> Defendants objected to these matters as being vague and  
24 ambiguous. See First Karczag Decl. Ex. B. Because of the Court's  
25 disposition of the First Motion, it makes no findings regarding  
26 these objections at this time. However, the Court does note that  
27 of the thirty-two matters noticed for examination by Plaintiff that  
the Court has before it, Defendants objected to thirty-one as being  
vague and ambiguous. See *id.*; First Karczag Decl. Ex. D. Although  
28 Defendants refer to these objections as reasons to deny Plaintiffs'  
Motions, Defendants have not provided any explanation as to why the  
matters are so vague or ambiguous as to warrant objection.

<sup>5</sup> Defendants imply, without explicitly arguing, that Rule 30(b)(6)  
required them to select current employees as deponents. Opp'n at

1 Neither deponent demonstrated a substantial amount of  
2 preparation. Bruhn Depo. Tr. at 18:8-22:18; White Depo. Tr. at  
3 22:2-21:11. As it turns out, both White and Bruhn showed  
4 significant deficiencies during the course of their depositions.  
5 For example, White professed ignorance in response to a wide  
6 variety of questions with respect to the company's decisions prior  
7 to his employment with 24 Hour. White Depo. Tr. at 67:15-24.  
8 Bruhn did not know which of the FLSA overtime exemptions Defendants  
9 are claiming applies to the Managers Class. Bruhn Depo. Tr. at  
10 94:6-15. White similarly professed to not have "any information as  
11 to what type of exemption was utilized for" the Managers Class.  
12 White Depo. Tr. at 68:5-12, 69:2-17. Plaintiffs contend that  
13 neither deposition offers a basis to conclude that the Managers  
14 Class was exempt from the overtime entitlements of the FLSA. First  
15 Mot. at 1.

16 Plaintiffs are now seeking summary adjudication based on their  
17 contention that the deponents' professed ignorance is Defendants'  
18 "official position" for the purpose of this suit, and that there is  
19 therefore no issue of material fact with respect to whether the

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20 9; See Decl. of Kathleen Deibert ("Deibert"), Counsel for  
21 Defendants, in Opp'n to First Motion, Docket No. 315, ¶ 2 (claiming  
22 only that Deibert has tried to locate "a current 24 Hour Fitness  
23 employee" with knowledge of the specific exemptions relied upon by  
24 Defendants). Defendants note that a former employee, David Brent  
25 ("Brent") "oversaw compensation issues" during much of the class  
26 period, and left the company around the time that White joined.  
27 Opp'n at 9. Defendants did not name Brent as a 30(b)(6) deponent,  
28 and they fault Plaintiffs for not deposing him on their own  
initiative. *Id.* However, the text of Rule 30(b)(6) leaves no  
doubt that a former employee can and should be designated as a Rule  
30(b)(6) deponent, if the former employee is the most knowledgeable  
individual and as long as the former employee consents. An  
organization may designate any "persons who consent to testify on  
its behalf." Fed. R. Civ. P. 30(b)(6). Defendants do not indicate  
whether they ever requested that Brent act as a Rule 30(b)(6)  
deponent.

1 members of the Managers Class were exempt from overtime under the  
2 FLSA. First Mot. at 17-20. According to Plaintiffs, by claiming  
3 that they did not know which exemption categories apply to the  
4 Managers Class, the deponents were in effect claiming that  
5 Defendants had no position as to which FLSA exemptions apply, and  
6 possess no information to support any particular exemption. Id.  
7 Defendants have, by and large, not attempted to cite specific  
8 evidence to show a disputed issue of material fact in their  
9 Opposition -- instead, they argue that Plaintiffs have not shown an  
10 absence of disputed facts, and have sought to continue or dismiss  
11 the Motion until discovery is complete. Opp'n at 11.

12 As the moving party, Plaintiffs bear the initial burden of  
13 proving that there are no issues of material fact with respect to  
14 Defendants' affirmative defense -- even though Defendants will bear  
15 the burden of proving this affirmative defense at trial. See  
16 Nissan Fire & Marine Ins, 210 F.3d at 1102. Of course, "the burden  
17 on the moving party may be discharged by 'showing' -- that is,  
18 pointing out to the district court -- that there is an absence of  
19 evidence to support the nonmoving party's case." Celotex Corp. v.  
20 Catrett, 477 U.S. 317, 325 (1986). Nevertheless, the Court  
21 concludes that Plaintiffs cannot meet their summary adjudication  
22 burden by simply pointing to Defendants' apparently inadequate  
23 depositions. Plaintiffs' have brought this Motion before the end  
24 of discovery. The Motion is, in essence, a categorical objection  
25 to all evidence that Defendants might bring to support their  
26 affirmative defense. It is an objection to hypothetical evidence  
27 that the Court has had no opportunity to review in light of the  
28 deposition testimony. Plaintiffs have shown, at best, that

1 Defendants will face difficulties should they seek to meet this  
2 burden with certain evidence in the future. However the Court will  
3 not accept that the Bruhn and White depositions have precluded  
4 Defendants from bringing any evidence whatsoever in support of one  
5 of the FLSA exemptions, and that there will therefore be no issues  
6 of material fact as to Defendants' twelfth affirmative defense.

7 Plaintiffs' preemptive methods contrast sharply with the  
8 procedures used in the case upon which Plaintiffs primarily rely.  
9 In Rainey v. American Forest & Paper Association, a plaintiff cited  
10 the defendant's failure to prepare a Rule 30(b)(6) deponent to  
11 overcome a specific affidavit upon which the defendant relied. 26  
12 F. Supp. 2d 82 (D.D.C. 1998). Rainey involved a plaintiff who  
13 claimed to have been misclassified as "exempt" under the FLSA, and  
14 improperly denied overtime payments. Id. at 86-87. The defendant  
15 corporation had designated a Rule 30(b)(6) deponent who was  
16 incapable of answering many questions about the plaintiff's duties,  
17 and whose answers suggested that the FLSA overtime exemption  
18 claimed by the defendant was inapplicable. Id. at 92. Because of  
19 this inadequate deposition, the district court refused to accept a  
20 more detailed and knowledgeable affidavit from the plaintiff's  
21 former supervisor (who had since left the defendant company), which  
22 purported to offer additional evidence of the plaintiff's exempt  
23 status. Id. at 92-96. The Court held that to allow the affidavit  
24 would contradict the purpose of Rule 30(b)(6), since the defendant  
25 could have either designated the former employee as a deponent or  
26 prepared its designee to represent what the former employee knew.  
27 Id.

28 Rainey demonstrates that Defendants may well be precluded from

1 relying on certain evidence in the future, should they seek to rely  
2 upon particular pieces of evidence to establish an issue of  
3 disputed fact.<sup>6</sup> However, Rainey does not suggest that an  
4 inadequate Rule 30(b)(6) deposition may categorically preclude a  
5 party from bringing any evidence -- indeed, the Rainey court found  
6 only that a single, specific affidavit was inappropriate, and  
7 discussed a variety of other types of evidence that Defendants  
8 offered to support their affirmative defense without suggesting  
9 that they were precluded by the inadequate deposition. Id. at 88-  
10 91, 92-93. Other cases cited by Plaintiffs provide similar  
11 instances in which parties invoke inadequate deposition testimony  
12 to object to particular evidence offered by the other party, rather  
13 than to preclude the other party from presenting any and all  
14 evidence. See Radobenko v. Automated Equipment Corp., 520 F.2d  
15 540, 544 (9th Cir. 1975) (finding that particular "proofs" that  
16 were offered by Plaintiff did not create "genuine" issues of fact  
17 because they directly contradicted deposition testimony); Casas v.  
18 Conseco Fin. Corp., No. 00-1512, 2002 U.S. Dist. LEXIS 5775, \*32-34  
19 (D. Minn. Mar. 31, 2002) (rejecting declaration that directly  
20 contradicted deposition testimony of Rule 30(b)(6) deponent).

21 The Bruhn and White depositions, standing alone, do not  
22 provide Plaintiffs with a basis for halting discovery and

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23 <sup>6</sup> Some examples of evidence that may be precluded include  
24 affidavits from former employees who were apparently more  
25 knowledgeable than either Bruhn or White -- such as Brent -- with  
26 respect to a topic upon which Bruhn or White was properly selected  
27 to expound upon. Defendants may be foreclosed from offering an  
28 internal report or study that justifies a particular exemption  
category after the Rule 30(b)(6) deponents have claimed to be  
ignorant of such reports. See Bruhn Depo. Tr. at 105:14-106:19.  
On the other hand, Defendants may offer evidence that they can  
establish was not "known or reasonably available to" Defendants  
when the depositions took place. See Fed. R. Civ. P. 30(b)(6).

1 precluding Defendants from offering any and all evidence in support  
2 of their affirmative defense. Whatever evidence Defendants  
3 ultimately rely upon will need to be evaluated in light of these  
4 depositions, and the Court may examine whether each piece of  
5 evidence was precluded or obfuscated by the depositions, whether  
6 the deposition left open or referred to the existence of the  
7 specific evidence, or whether the Rule 30(b)(6) notice properly  
8 framed the issue so that the Defendants could be bound by their  
9 designation. These are inquiries that are best performed after  
10 Defendants have put forward specific evidence -- rather than  
11 hypothetically or categorically -- and the Court will not require  
12 Defendants to submit their evidence until after discovery is  
13 complete (or at least until class members have been deposed). By  
14 denying the First Motion, the Court is not indicating that the  
15 Defendants met all of their obligations under Rule 30(b)(6) with  
16 respect to the White and Bruhn depositions -- instead, the Court  
17 finds only that it would be proper to evaluate each piece of  
18 evidence that Defendants eventually offer individually, and not  
19 hypothetically, in light of these depositions. Because Defendants  
20 are not categorically precluded from bringing evidence to support  
21 their twelfth affirmative defense, Plaintiffs have failed to  
22 persuade this Court that there are no issues of disputed fact with  
23 respect to this defense.

24 Plaintiffs argue that Defendants' failure to prepare its  
25 deponents leaves Plaintiffs vulnerable to "trial by ambush." First  
26 Mot. at 15-16. However, Plaintiffs need not proceed in ignorance  
27 as to which of the FLSA's exemptions Defendants will assert at  
28 trial or the evidence that Defendants will use to support there

1 position. Discovery is not yet over, and Plaintiffs may seek to  
2 retake the depositions. Plaintiffs may still seek to pursue  
3 discovery of Defendants' legal position through standard discovery  
4 procedures, such as motions to compel or contention  
5 interrogatories. If discovery proves futile, Plaintiffs may object  
6 to the specific evidence that Defendants later attempt to rely  
7 upon, provided that Plaintiffs have a good faith argument that the  
8 evidence has been precluded by Bruhn's or White's deposition.

9 Plaintiffs' First Motion is DENIED because Plaintiffs have  
10 failed to persuade this Court that there are no disputed issues of  
11 material fact. Additionally, because discovery is not yet  
12 complete, and particularly because Defendants have not yet deposed  
13 any members of the Managers Class, the Court finds that Defendants  
14 should have an opportunity to complete discovery. Defendants' Rule  
15 56(f) Motion is GRANTED.<sup>7</sup>

16 **B. Plaintiffs' Second Motion For Summary Adjudication**

17 Plaintiffs' Second Motion has been brought on behalf of the  
18 Trainers Class. Plaintiffs seek a finding that Defendants are  
19 liable to the Trainers Class for breaches of the FLSA, based on two  
20 distinct theories. First, Plaintiffs claim that, prior to November  
21 of 2003, Defendants excluded the time that trainers spent in  
22 training sessions, and only considered time spent performing other

23 <sup>7</sup> The parties spend a considerable amount of space arguing over the  
24 propriety of Defendants' Rule 56(f) Motion, which was formally  
25 filed after Plaintiffs' Motions for Summary Adjudication had been  
26 fully briefed. Nevertheless, Defendants invoked Rule 56(f) in  
27 their First Opposition. First Opp'n at 11. Moreover, given the  
28 context of Plaintiffs' First Motion, which makes no affirmative  
showing as to the exemption status of the Managers Class and  
attempts to categorically preclude all further discovery on this  
topic, Defendants' plans to depose members of the Managers Class  
are sufficiently particular to meet Defendants' burden under Rule  
56(f).

1 duties, when calculating the amount of time that trainers worked.  
2 Second Mot. at 18-19. Plaintiffs claim that this violated the  
3 FLSA, which requires overtime compensation for time worked in  
4 excess of forty hours per week, 29 U.S.C. § 207(a)(1). Id.  
5 Second, Plaintiffs claim that even when Defendants did pay the  
6 trainers overtime, they initially paid only a portion of the  
7 overtime amount, and later paid the rest of the overtime amount  
8 through a "recalculation" that was added to the following pay  
9 check. Id. at 19-20. Plaintiffs claim that this violated the  
10 provisions of 29 C.F.R. § 778.106, which requires overtime  
11 compensation be paid on the employees' "regular payday." Id.

12 The Court does not reach the merits of the Second Motion.  
13 Instead, it concludes that it would be premature to reach a  
14 conclusion as to Defendants' liability to a class of employees that  
15 has only been conditionally certified. See Mar. 24, 2008 Order at  
16 15. As this Court has previously outlined, and as Plaintiffs  
17 themselves initially requested, this Court has adopted a two-step  
18 process for certification. Id. at 4-5. At this stage, Plaintiffs  
19 have only been required to make a "minimal showing" that the  
20 members of the Trainers Class were "similarly situated," in  
21 accordance with the procedures adopted by the district courts of  
22 this circuit to handle collective actions under the FLSA. Id. at  
23 4. The purpose of this first-step review is to "determine whether  
24 a collective action should be certified for the purpose of sending  
25 notice to potential class members." Wren v. RGIS Inventory  
26 Specialists, 256 F.R.D. 180, 211-12 (N.D. Cal. 2009). This Court  
27 explicitly stated that it would conditionally certify the class  
28 only as the first step in a two-step process, "in anticipation of a

1 later more searching review." Id. at 4-5. The Tenth Circuit has  
2 described the second step as follows:

3 At the conclusion of discovery (often prompted by  
4 a motion to decertify), the court then makes a  
5 second determination, utilizing a stricter  
6 standard of "similarly situated." During this  
7 second stage analysis, a court reviews several  
8 factors, including (1) disparate factual and  
9 employment settings of the individual plaintiffs;  
10 (2) the various defenses available to defendant  
11 which appear to be individual to each plaintiff;  
12 (3) fairness and procedural considerations; and  
13 (4) whether plaintiffs made the filings required  
14 by the ADEA before instituting suit.

15 Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102-03 (10th  
16 Cir. 2001); See also Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d  
17 1208, 1219 (11th Cir. 2001) (approving two-tier approach); Wren,  
18 256 F.R.D. at 211-12 (noting that district courts within Ninth  
19 Circuit have adopted this approach).

20 Plaintiffs themselves explicitly relied upon this two-step  
21 certification process, and claimed to be only subject to the  
22 relaxed standards applicable at the first stage of certification.  
23 See Motion to Certify Class of Personal Trainers, Docket No. 160,  
24 at 4, 15-17 (acknowledging that "at the second stage . . . the  
25 court engages in a more searching review"). Defendants have  
26 claimed that they intend to move for decertification at the close  
27 of discovery. Kloosterman 56(f) Decl. ¶ 4. Plaintiffs have not  
28 stated any reason to depart from the procedures set out in this  
Court's previous Order.

Given the fact that a stricter review of the Trainers Class is  
still pending, it would be inappropriate to enter a judgment as to  
the liability of Defendants to this Class at this time. The Court  
has not received briefing from either party on the issues of final

1 certification, and it is not currently in a position to reach a  
2 conclusion on this issue. The Court finds only that it would be  
3 inappropriate to enter judgment as to Defendants' liability to the  
4 Trainers Class before the second stage of certification is  
5 complete. Plaintiffs' Second Motion is therefore DENIED WITHOUT  
6 PREJUDICE. Plaintiffs may move for summary adjudication on this  
7 issue at a later time.<sup>8</sup>

8  
9 **V. CONCLUSION**

10 Plaintiffs' Motion for Summary Adjudication Number One is  
11 DENIED. This denial is without prejudice as to Plaintiffs' ability  
12 to later object to particular evidence that is submitted by  
13 Defendants, or to move for summary adjudication with respect to  
14 Defendants' twelfth affirmative defense after discovery is  
15 complete. In accordance with the denial of Plaintiffs' first  
16 Motion, Defendants' Motion for Denial or Continuance of Plaintiffs'  
17 Motions for Summary Adjudication Under Rule 56(f) is GRANTED.

18 Although this Court has concluded that Defendants' conduct is  
19 not grounds for summary adjudication with respect to Defendants'  
20 affirmative defense, the Court orders Defendants to show cause why  
21 they should not face other sanctions for failure to comply with  
22 Rule 30(b)(6) of the Federal Rules of Civil Procedure. Defendants

23  
24 <sup>8</sup> Because the Court does not reach the merits of the Second Motion,  
25 and because it does not rely upon the substance of Defendants'  
26 declarations to reach its conclusions with respect to the First  
27 Motion, it is unnecessary for this Court to resolve Plaintiffs'  
28 voluminous evidentiary objections, submitted by Plaintiffs in  
response to Defendants' declarations in opposition to either  
Motion. Docket Nos. 325, 326, 329, 330, 331, 332, 333, 334, 336.  
The Court notes in passing that many of these objections were  
simply rote recitations of the rules of evidence, unsupported by  
explanations or reasoned justifications.

1 shall show cause in writing no later than Friday, November 30,  
2 2009. Defendants' response shall not exceed fifteen (15) pages.  
3 The Show-Cause Hearing is scheduled for Friday, December 4, 2009,  
4 at 10:00 a.m. in Courtroom 1, on the 17th floor, U.S. Courthouse,  
5 450 Golden Gate Avenue, San Francisco, CA 94102. All parties are  
6 ordered to appear at the Show-Cause Hearing.

7 Plaintiffs' Motion for Summary Adjudication Number Two is  
8 DENIED WITHOUT PREJUDICE as to Plaintiffs' ability to file a motion  
9 for summary adjudication on this same issue in the future.  
10 However, this Court will not resolve any such motion until it is  
11 satisfied that the Trainers Class is appropriate for final  
12 certification.

13  
14 IT IS SO ORDERED.

15  
16 Dated: November 10, 2009

17   
18 UNITED STATES DISTRICT JUDGE