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

AYISHA COMBS,

No. C 09-03242 SI

Plaintiff,

**ORDER DENYING PLAINTIFF'S
MOTION FOR COLLECTIVE ACTION
CERTIFICATION**

v.

JENNIFER CONVERTIBLES,

Defendant.

Plaintiff has filed a motion to certify a collective action under 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA"). Having considered the papers submitted, and for good cause shown, the Court hereby DENIES plaintiff's motion as currently framed.

BACKGROUND

On July 16, 2009, plaintiff Ayisha Combs filed a complaint against her former employer, Jennifer Convertibles, Inc. ("JCI"). The complaint alleges, *inter alia*, that during their employment with JCI, plaintiff and the putative collective action members were required to work in excess of forty hours per week without the payment of overtime wages and other benefits. First Amended Complaint ("FAC") at 9 [Docket No. 23]. Plaintiff alleges that she worked as a non-exempt sales representative for JCI at various stores throughout the San Francisco Bay Area from approximately March 14, 2007 to March 24, 2009. Plf's Memo at 2 [Docket No. 20]. JCI stores were open Monday through Friday from 10:00 AM until 9:00 PM, Saturday from 10:00 AM until 6:00 PM, and Sunday from 11:00 AM until 6:00 PM. *Id.* Evidence submitted by plaintiff shows that stores were often staffed by a single individual who worked more than eight hours per day. *Id.* at 3; FAC Ex. 2.

1 Plaintiff alleges that JCI had a general policy and practice of requiring sales personnel to remain
2 on duty at the store during the entire time the store was open to the public. Plf’s Memo at 3. To support
3 this allegation, plaintiff submitted a portion of the JCI sales training manual which contained policies
4 requiring that the store remain open all operating hours without exception, and stated that when working
5 alone, employees must bring food or drink or order for delivery to ensure they remained on duty at all
6 times. *Id.*; FAC Ex. 1.

7 In the motion now before the Court, plaintiff seeks conditional certification of a nationwide
8 collective class under the FLSA based on defendant’s alleged failure to pay overtime compensation.
9 The group to be certified for the purposes of this collective action is described as follows: “all
10 individuals nationwide who, at any time during the three years preceding the filing of the Complaint in
11 this action, were, or have been employed by JCI to work in its stores.” Plf’s Memo at 1, 3. Plaintiff
12 estimates that JCI employed approximately 1100 in-store personnel in approximately 191 stores
13 nationwide, and of these employees, approximately 200 were employed in California. *Id.* at 4.

14 15 LEGAL STANDARD

16 Section 216(b) of the FLSA provides that one or more employees may bring a collective action
17 “on behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b).
18 “[P]laintiffs need show only that their positions are similar, not identical, to the positions held by the
19 putative class members.” *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996). Plaintiffs bear
20 the burden of demonstrating a “reasonable basis” for their claim of class-wide discrimination. *Id.* at
21 1097. “The plaintiffs may meet this burden, which is not heavy, by making substantial allegations of
22 class-wide discrimination, that is, detailed allegations supported by affidavits which successfully engage
23 defendants’ affidavits to the contrary.” *Id.*

24 Certification of a collective action under the FLSA involves a two-tiered analysis with a lenient
25 threshold for conditional certification during the first stage.¹ *Id.*; *Wynn v. NBC*, 234 F. Supp. 2d 1067,

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27 ¹ 29 U.S.C. § 216 (b) does not define “similarly situated” and district courts have applied various
28 approaches to the certification process. Although the Ninth Circuit has not definitively chosen a method
of analysis, the court has emphasized the distinction between Rule 23 class actions and FLSA collective

1 1082 (C.D. Cal. 2002). At the initial “notice stage,” the court determines whether the plaintiffs are
2 similarly situated, deciding whether a collective action should be certified for the purpose of sending
3 notice of the action to potential class members. *See Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095,
4 1102 (10th Cir. 2001). For conditional certification at this “notice stage,” the court requires substantial
5 allegations, supported by declarations or discovery, that “the putative class members were together the
6 victims of a single decision, policy, or plan.” *Id.*; *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392,
7 406 (D.N.J. 1988). “[U]nsupported assertions of widespread violations are not sufficient to meet
8 Plaintiff’s burden.” *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 990 (C.D. Cal. 2006) (internal
9 citations omitted). Upon conditional certification, notice is given to potential class members who must
10 “opt in” to be bound by the suit. 29 U.S.C. § 216(b). The defendant may then move to decertify.

11 12 DISCUSSION

13 Plaintiff seeks certification of a collective action for her FLSA overtime pay claim. In support
14 of the certification motion, plaintiff has submitted a declaration describing her work experience with
15 JCI and documents relating to her work, including copies of her pay stubs and timecards, evidence of
16 store policies, and JCI’s SEC filing. *See* FAC Ex. 1 & 2; Harris Decl. Ex. 1. Plaintiff alleges that she
17 is similarly situated with the collective action members in that: (a) plaintiff and the proposed class
18 members were employed by JCI; (b) plaintiff and the proposed class members were not paid overtime
19 and minimum wages for all hours worked; (c) JCI knowingly and willfully violated provisions of the
20 FLSA by not paying plaintiff and the proposed class members all wages due; and (d) as a result of JCI’s
21 practice, plaintiff and the proposed class members have been similarly damaged in that they have not
22 received timely payment in full of all wages earned. FAC ¶ 56. Plaintiff has also submitted the
23 declaration of Evelyn Carlson, an expert in evaluating payroll systems, who asserts that the identity of
24 each proposed collective action member and the overtime compensation owed to him or her are readily
25 ascertainable, making the management of this collective action efficient. *See* Carlson Decl. ¶¶ 9-11.

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27 actions. *See, e.g., McElmurry v. U.S. Bank, Nat’l Ass’n*, 495 F.3d.1136, 1139 (9th Cir. 2007).
28 Additionally, the majority of courts, including district courts within this circuit, prefer an ad hoc, two-
tiered approach to certification. *See Wynn*, 234 F. Supp. 2d at 1082.

1 Plaintiff seeks conditional certification of the proposed class so that all individuals employed by
2 defendant in its stores during the class period may be given notice and be allowed to give their consent
3 in writing, or “opt in” to the collective action, pursuant to 29 U.S.C. § 216(b). *Id.* ¶ 58.

4 Defendant opposes certification on several grounds, including that plaintiff has not demonstrated
5 that she is similarly situated to the proposed class members and that plaintiff has identified an
6 unmanageable and overbroad class. Specifically, defendant asserts that the class is not limited to any
7 particular position, job duties or geographic region; moreover, the class as proposed includes employees
8 who are exempt from overtime eligibility. In support of these assertions, defendant has submitted
9 nineteen declarations from JCI employees attesting to the variation in job duties and rate of
10 compensation based upon variables including position, experience, location and size of store, sales
11 volume, and merchandise.² *See* App’x of JCI Employees [Docket No. 29]. Defendant further asserts
12 that even if conditional certification is granted, it should be limited in scope.

13 Taking plaintiff’s allegations as true, plaintiff’s declaration and the supporting evidence are
14 sufficient to support a cause of action under the FLSA on plaintiff’s own behalf. However, the issue
15 presented by this motion is whether plaintiff’s papers and supporting evidence satisfy the “similarly
16 situated” requirement for certification of a collective action under the FLSA. Plaintiff contends that the
17 evidence provided and accompanying memo satisfy the similarly situated test in that “JCI categorically
18 failed to pay overtime compensation to its in store workers while simultaneously requiring them to work
19 more than eight hours a day and forty hours a week.”

20 The Court concludes that the class, as presently defined, is not appropriate for certification.
21 First, and most significantly, plaintiff does not limit the proposed class in any meaningful way. For
22 example, the proposed class presently includes all JCI employees, regardless of their job title and
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24 ² Plaintiff objects to these declarations on the ground JCI failed to disclose these witnesses
25 pursuant to Fed. R. Civ. P. 26(a)(1)(A) & 37(c)(1). Under Federal Rule of Civil Procedure 26, parties
26 are under a duty to supplement or correct their initial Rule 26 disclosures at appropriate intervals. *See*
27 Fed. R. Civ. P. 26(e)(1). Defendant’s initial disclosures named two individuals (one of which was
28 plaintiff) along with “other witness—current and former JCI employees” but did not provide any
additional names. Defendant did not supplement its disclosures before submitting the declarations of
nineteen JCI employees in support of its opposition to plaintiff’s current motion. Plaintiff is correct that
this is a violation of Fed. R. Civ. P. 26. The Court did not consider the substance of these declarations
when ruling on the present motion.

1 responsibilities. Under the FLSA, however, exempt commissioned salespersons are not entitled to
2 overtime compensation. *See* 29 U.S.C. 207(I). Accordingly, a class that includes such exempt
3 salespersons cannot be certified for the purpose of a trying a claim based on failure to pay overtime.
4 In addition, the plaintiff's own evidence seems to indicate that at times, plaintiff was paid commissions
5 for her sales. Thus, it is unclear if plaintiff is in fact a non-exempt employee, raising doubts as to
6 plaintiff's propriety as a class representative. Even assuming plaintiff can serve as a class
7 representative, plaintiff does not limit the proposed class to include only those employees who in fact
8 were not paid for overtime hours.

9 Second, plaintiff submits very little evidence in support of her motion. Plaintiff's complaint,
10 affidavits and supporting exhibits establish that she routinely worked unpaid overtime. What is not
11 established by plaintiff's submission, however, is that plaintiff's experiences are shared by any of the
12 proposed members of the collective action. The evidence of a storewide policy requiring employees
13 working a shift alone to remain on the premises at all times supports plaintiff's proposition that other
14 store employees were not permitted adequate breaks. Had plaintiff defined the proposed class more
15 narrowly to include only non-exempt salespersons who in fact did not receive overtime pay and/or
16 proper breaks, the Court may have been inclined to grant certification based on evidence of JCI's policy.
17 Under the broad class definition plaintiff has advanced, however, the Court must conclude that plaintiff
18 has not met her burden of proof with respect to the similarly-situated requirement. Plaintiff's motion
19 for collective action certification, as presently framed, is therefore DENIED.³

20 The Court denies plaintiff's motion without prejudice, so that plaintiff may proceed on her
21 individual claims or may renew the certification motion at a later time with a revised class definition
22 and additional supporting evidence. The Court expresses no view at this time on the merits of such a
23 motion.

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26 ³ As a final matter, plaintiff objects to Defendant's Statement of Recent Decision [Docket No.
27 34] on the ground the decision referenced in defendant's filing was actually published prior to the date
28 on which defendant filed its opposition brief. Plaintiff objects that, under Civil Local Rule 7-3(d), a
party may not purport to submit a "new" authority under such circumstances. Plaintiff's objection is
proper. In any event, the Court did not rely on the authority referenced by defendant in ruling on
plaintiff's motion.


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CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES plaintiff's motion for conditional certification. [Docket No. 190].

IT IS SO ORDERED.

Dated: February 26, 2010



SUSAN ILLSTON
United States District Judge