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

CRELENCIO CHAVEZ and JOSE)	Case No. C-09-04812 SC
ZALDIVAR, as individuals and on)	
behalf of all others similarly)	ORDER DENYING PLAINTIFF'S
situated,)	MOTION FOR CONDITIONAL
)	CLASS CERTIFICATION AND
Plaintiffs,)	FACILITATED NOTICE PURSUANT
)	<u>TO 29 U.S.C. § 216(b)</u>
v.)	
)	
LUMBER LIQUIDATORS, INC., a)	
Delaware corporation; and DOES 1)	
through 20, inclusive,)	
)	
Defendants.)	

I. INTRODUCTION

Before the Court is a Motion by Plaintiff Jose Zaldivar ("Zaldivar" or "Plaintiff") for Conditional Class Certification and Facilitated Notice Pursuant to 29 U.S.C. § 216(b). ECF No. 36 ("Mot."). The Motion seeks conditional certification of a class of current and former employees of Lumber Liquidators, Inc. ("Lumber Liquidators" or "Defendant") under section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. The Motion also seeks tolling of the statute of limitations, approval of the proposed form of notice to potential class members, and an order instructing Defendant to provide names and addresses of all potential class members. See id. Defendant opposed the Motion.

1 ECF No. 38 ("Opp'n"). Plaintiff did not file a reply.

2 Having considered all of the parties' submissions, the Court
3 DENIES Plaintiff's motion.

4
5 **II. BACKGROUND**

6 Lumber Liquidators is a retailer that sells pre-finished and
7 unfinished hardwood flooring for residential and commercial
8 customers. It operates stores throughout the United States,
9 including in California. Joint Case Management Conference
10 Statement ("JCMCS") at 1. ECF No. 26. Zaldivar worked as an
11 Assistant Manager for Lumber Liquidators from July 2007 to June
12 2010. Zaldivar Decl. at 1.¹ He was classified as a non-exempt
13 employee under the FLSA and alleges that he often worked more than
14 forty hours per week but was not paid the proper rate of overtime.
15 Id.

16 Zaldivar and Plaintiff Crelencio Chavez ("Chavez") originally
17 filed this action, as individuals and "on behalf of all others
18 similarly situated," in Alameda County Superior Court on September
19 3, 2009.² Meckley Decl. ¶ 2; Ex. 1 ("Compl.").³ They allege
20 violations of the FLSA and various California labor laws. See
21 Compl. Defendant removed the action to this Court on October 9,
22 2009. Meckley Decl. ¶ 2. The parties have since conducted

23
24 ¹ Zaldivar submitted a declaration in support of the Motion. ECF
No. 34.

25 ² Chavez's FLSA claims differ from those of Zaldivar and are
26 irrelevant to the instant motion. He alleges that he was
27 misclassified as an exempt employee. He would not be a member of
the class that Zaldivar seeks to certify in the instant motion.

28 ³ Eric Meckley, attorney for Defendant, filed a declaration in
support of Defendant's Opposition. ECF No. 39.

1 significant discovery. Defendant has deposed Chavez and Zaldivar,
2 and Plaintiff has deposed Defendant's corporate designee, Robert M.
3 Morrison ("Morrison"). Opp'n at 4. Both sides have produced
4 documents as well. Id.

5 Zaldivar alleges that Defendant deprived him and other non-
6 exempt employees of overtime by miscalculating the overtime pay
7 they were owed. Mot. at 3. The FLSA provides that a non-exempt
8 employee who works in excess of forty hours in one week shall be
9 paid "not less than one and one-half times the regular rate of pay
10 at which he is employed." 29 U.S.C. § 207(a)(1). Zaldivar alleges
11 that Lumber Liquidators failed to include bonuses and commissions
12 earned by non-exempt employees when calculating each employee's
13 "regular rate of pay," which allegedly resulted in the employees
14 receiving a lower rate of overtime pay than that required by the
15 FLSA. Mot. at 11.

16 In the instant motion, Plaintiff asks the Court to
17 conditionally certify, pursuant to section 16(b) of the FLSA, a
18 class of "all present and former non-exempt employees of Lumber
19 Liquidators employed in the United States from September 3, 2006,
20 through the present, who were paid overtime wages and were also
21 paid commission wages and/or other non-discretionary incentive pay
22 or bonuses." Mot. at 11.

23

24 **III. Legal Standard**

25 The FLSA provides that "no employer shall employ any of his
26 employees . . . for a workweek longer than forty hours unless such
27 employee receives compensation for his employment in excess of the
28 hours above specified at a rate not less than one and one-half

1 times the regular rate at which he is employed." 29 U.S.C. §
2 207(a)(1). Section 16(b) of the FLSA provides employees with a
3 private right of action to sue an employer for violations of the
4 Act "for and in behalf of himself or themselves and other employees
5 similarly situated." 29 U.S.C. § 216(b). The latter sort of
6 action, often referred to as a "collective action," works somewhat
7 differently than a Rule 23 class action: an employee who wishes to
8 join a FLSA collective action must affirmatively opt-in by filing a
9 written consent to join in the court where the action was brought.
10 Id. In Hoffman-La Roche Inc. v. Sperling, the Supreme Court
11 recognized the discretion of district courts to facilitate the
12 process by which potential plaintiffs are notified of FLSA
13 collective actions into which they may be able to opt. 493 U.S.
14 482, 486 (1989).⁴ Building on this, a majority of courts,
15 including district courts in the Ninth Circuit, have adopted a two-
16 stage certification procedure. E.g., Leuthold v. Destination
17 America, Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004); Wynn v.
18 National Broadcasting Co., 234 F. Supp. 2d 1067, 1082-84 (C.D. Cal.
19 2002); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1106
20 (10th Cir. 2001). At the first stage, the district court approves
21 conditional certification upon a minimal showing that the members
22 of the proposed class are "similarly situated"; at the second
23 stage, usually initiated by a motion to decertify, the court
24 engages in a more searching review. Leuthold, 224 F.R.D. at 467.

25 The FLSA does not define "similarly situated," and the Ninth
26

27 ⁴ Sperling addressed a collective action brought under the Age
28 Discrimination in Employment Act, which, the Court recognized,
incorporates § 16(b) of the FLSA. 493 U.S. at 486.

1 Circuit has not spoken to the issue. Reed v. County of Orange, 266
2 F.R.D. 446, 449 (C.D. Cal. 2010) ("The FLSA does not define the
3 term 'similarly situated,' and there is no Ninth Circuit precedent
4 interpreting the term.") (citations omitted). The Supreme Court,
5 in Sperling, also left the term undefined, but indicated that a
6 proper collective action encourages judicial efficiency by
7 addressing, in a single proceeding, claims of multiple plaintiffs
8 who share "common issues of law and fact arising from the same
9 alleged [prohibited] activity." 493 U.S. at 486. This has been
10 distilled by courts into a lenient standard for step one -- the
11 conditional certification stage -- requiring "nothing more than
12 substantial allegations that putative class members were together
13 victims of a single decision, policy, or plan." Thiesen, 267 F.3d
14 at 1102 (internal quotations omitted); see also, e.g., Gerlach v.
15 Wells Fargo & Co., No. C-05-0585, 2006 WL 824652, at *2 (N.D. Cal.
16 Mar. 28, 2006). Given that a motion for conditional certification
17 usually comes before much, if any, discovery, and is made in
18 anticipation of a later more searching review, a movant bears a
19 very light burden in substantiating its allegations at this stage.
20 See, e.g., Leuthold, 224 F.R.D. at 467; Aguayo v. Oldenkamp
21 Trucking, No. C-04-6279, 2005 U.S. Dist. LEXIS 22190, *12 (E.D.
22 Cal. Oct. 3, 2005) (disregarding hearsay and foundational
23 challenges to declarations submitted in support of motion for
24 conditional certification); Ballaris v. Wacker Silttronic Corp.,
25 No. C-00-1627, 2001 U.S. Dist. LEXIS 13354, *8 (D. Or. Aug. 24,
26 2001) (granting motion for conditional certification on basis of
27 two affidavits while explicitly refusing to consider other
28 documentary evidence). However, the movant still must provide at

1 least some evidence that putative class members are similarly
2 situated. "[U]nsupported assertions of widespread violations will
3 not suffice to satisfy the plaintiff's burden of showing
4 substantial similarity." Delgado v. Ortho-McNeil, Inc., No. CV-07-
5 263, 2007 WL 2847238, 1 (C.D. Cal. Aug. 7, 2007) (internal
6 citations omitted).

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8 **IV. DISCUSSION**

9 **A. Conditional Certification Is Not Appropriate**

10 Defendant argues that conditional certification should be
11 denied for four reasons. First and foremost, Defendant notes that
12 the FLSA requires plaintiffs who wish to pursue a collective action
13 to file a written consent with the court, which Zaldivar has not
14 done. Opp'n at 1. Second, Defendant contends that Zaldivar's
15 failure to file a written consent has now placed him and his
16 attorneys in an irremediable conflict of interest because different
17 statutes of limitations apply to individual versus collective
18 actions under the FLSA.⁵ Id. Third, Defendant contends that
19 Plaintiff has not presented admissible evidence that he was not
20 correctly paid overtime under the FLSA or that other similarly
21 situated employees exist. Id. Lastly, Defendant argues that even
22 though this case has been pending for nearly eighteen months and

23 _____
24 ⁵ The limitations period on an individual action extends back from
25 the filing of the complaint, while the limitations period on a
26 collective action extends back from the filing of the plaintiff's
27 written consent with the court. 29 U.S.C. § 256. In this case,
28 Plaintiffs filed their Complaint on September 3, 2009,
approximately eighteen months ago. Thus, if Plaintiffs now file
written consents to proceed with a collective action, they would
lose about eighteen months of potential monetary recovery on their
individual FLSA claims. Defendants therefore contend that
Plaintiffs' counsel cannot now ethically advise Plaintiffs to
proceed with a collective action. Opp'n at 1.

1 Plaintiff claims to have spoken with many other employees about his
2 allegations, Plaintiff has not submitted any evidence that other
3 employees desire to opt in to the collective action. Id.

4 The Court agrees with Defendant's first argument and denies
5 conditional certification on that basis. Section 16(b) of the FLSA
6 provides that "[n]o employee shall be a party plaintiff to [a
7 collective action] unless he gives his consent in writing to become
8 such a party and such consent is filed in the court in which the
9 action is brought." 29 U.S.C. § 216(b). The plain language of the
10 statute thus makes clear that a FLSA collective action cannot
11 proceed unless and until the named plaintiff files a written
12 consent with the court. Courts have consistently enforced this
13 statutory requirement. In Bonilla v. Las Vegas Cigar Co., for
14 instance, a court in this circuit explained:

15 The statutory language is clear. When plaintiffs
16 have filed a "collective action" under Section
17 216(b), all plaintiffs, including named
18 plaintiffs, must file a consent to suit with the
19 court in which the action is brought.

20 61 F. Supp. 2d 1129, 1132-33 (D. Nev. 1999). In Ketchum v. City of
21 Vallejo, the court explained the reason for this statutory
22 requirement:

23 The statute is unambiguous: if you haven't given
24 your written consent to join the suit, or if you
25 have but it hasn't been filed with the court,
26 you're not a party. It makes no difference that
27 you are named in the complaint, for you might
28 have been named without your consent. The rule
requiring written, filed consent is important
because a party is bound by whatever judgment is
eventually entered in the case, and if he is
distrustful of the capacity of the "class"
counsel to win a judgment he won't consent to the
suit.

1 523 F. Supp. 2d 1150, 1155 (E.D. Cal. 2007) (internal citation
2 omitted).

3 Here, Zaldivar did not file a written consent in the Alameda
4 County Superior Court, where the action was originally filed.
5 Meckley Decl. ¶ 3; Ex. 2 (Case docket sheet from Alameda County
6 Superior Court). Nor has he filed a written consent with this
7 Court. Because no consent to suit form has been filed, this action
8 has not been properly commenced. See Ketchum, 523 F. Supp. 2d at
9 1156. Accordingly, Plaintiff's Motion is DENIED.

10 **B. Tolling and Form of Notice**

11 Because the Court declines to certify the proposed class, the
12 Court need not consider whether the statute of limitations should
13 be equitably tolled for potential opt-in plaintiffs. Consideration
14 of Plaintiff's proposed form of notice is also unnecessary at this
15 time. However, should Plaintiff renew his motion after filing the
16 proper written consent, the Court agrees with Defendant that the
17 parties should meet and confer regarding the language of the notice
18 prior to seeking the Court's approval. The Court therefore orders
19 that, in the event Plaintiff chooses to file a renewed motion for
20 conditional class certification, the parties attempt to reach
21 consensus on the form of the notice.

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V. CONCLUSION

For the foregoing reasons, the Court DENIES WITHOUT PREJUDICE Plaintiff Jose Zaldivar's Motion for Conditional Collective Action Certification and Facilitated Notice.

IT IS SO ORDERED.

Dated: March 2, 2011



UNITED STATES DISTRICT JUDGE