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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

VLADIMIR A. BALAREZO and OSMIN AVILA
Plaintiffs,
v.
NTH CONNECT TELECOM, INC. and STEVEN
CHEN
Defendants.

Case Number 5:07-CV-05243 JF (PSG)
**ORDER¹ DENYING MOTION TO
EXTEND TIME WITHIN WHICH
TO SEEK CLASS
CERTIFICATION**
Re: Docket No. 157

On October 12, 2007, Plaintiffs Vladimir A. Balarezo and Osmin Avila filed the instant putative class action against Defendants Nth Connect Telecom, Inc. (“Nth Connect”) and Steven Chen, alleging violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219, and related federal and state labor laws. Almost twenty-two months after the motions deadline established by this Court’s case management order, Plaintiffs move for an extension of time within which to seek class certification. For the reasons set forth below, the motion will be denied.

¹ This disposition is not designated for publication in the official reports.

I. BACKGROUND

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2 Plaintiffs allege that Nth Connect, their employer for the last four years, failed to pay
3 them and others similarly situated overtime wages as required by the FLSA and related federal
4 and state labor laws. Am. Compl. ¶ 1. Nth Connect is a California corporation hired by non-
5 party Comcast to install cable equipment. *Id.* ¶¶ 2, 3. Steven Chen is the owner and CEO of Nth
6 Connect. *Id.* ¶ 4.

7 On May 2, 2008, the Court granted Plaintiffs' motion for precertification of the FLSA
8 class claim under 29 U.S.C. § 216(b) and provided a period of sixty days during which potential
9 class members could opt in. Seventeen individuals opted into this action, including Plaintiffs and
10 Jose Hernandez, who is the class representative in a parallel class action pending in the San
11 Francisco Superior Court against Comcast, Nth Connect, and several other Comcast
12 subcontractors for alleged violations of federal and state labor laws. Pls.' Mot. at 3; Defs.' Resp.
13 at 7. After participating in mediation, the parties reached a settlement and conditionally
14 dismissed the instant action on February 18, 2010. The parties subsequently moved to vacate the
15 conditional dismissal because not all of the individual plaintiffs had affirmed the tentative
16 settlement agreement. On September 23, 2010, the Court dismissed the claims of six opt-in
17 plaintiffs with prejudice for lack of prosecution.

18 The motions deadline in the instant case was February 27, 2009. Plaintiffs claim that they
19 "made a conscious decision" not to seek certification before the deadline based on information
20 they obtained regarding Nth Connect's financial condition. Pls.' Mot. at 3. Plaintiffs seek an
21 extension of time for two reasons. First, they assert that Nth Connect's revenue has increased
22 significantly as a result of a recent contract with Comcast. *Id.* at 2. Second, they claim that the
23 plaintiffs in the state action have agreed to dismiss Nth Connect as a defendant in that case and to
24 join this action if the Court grants the instant motion and allows them "reasonable time" to
25 conduct class certification discovery. *Id.* at 3-4. Plaintiffs cite no legal authority to support their
26 request for an extension.

27 Defendants oppose Plaintiffs' motion on several grounds. First, they argue that extending
28 the motions deadline and reopening discovery would cause them prejudice, because discovery

1 has been closed for more than two years and the case is set for trial. Def.’s Resp. at 9, 2.
2 Second, they claim that the state court action will continue to be litigated even if Nth Connect is
3 dismissed as a defendant, because the plaintiffs in that case are “primarily suing Comcast.” *Id.* at
4 2-3. Third, they contend that Plaintiffs’ counsel cannot represent the class adequately based on
5 their handling of the case so far, as the claims of six opt-in plaintiffs have been dismissed for
6 lack of prosecution. *Id.* at 3. Finally, they argue that the claims of the class members who have
7 not opted into this action will continue to be litigated in the state court action. *Id.* at 4.

8 **II. STANDARD OF REVIEW**

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10 Fed. R. Civ. P. 23(c)(1)(A) requires a court to determine by order whether to certify an
11 action as a class action “at an early practicable time.”

12 **III. DISCUSSION**

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14 When a motion to certify a class is filed late in the litigation, a court must determine
15 whether (1) there is a reasonable explanation for the delay, and (2) whether the defendant will be
16 prejudiced by the delay.² *See* 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS §
17 3:43 (4th ed. 2010); *see also Probe v. State Teachers’ Retirement System*, 780 F.2d 776, 780 (9th
18 Cir. 1986) (holding that an eighteen-month delay in moving for class certification was reasonable
19 because plaintiffs used that time to conduct discovery to determine the number of potential class
20 members and the defendants did not claim that they were prejudiced by the delay). District
21 courts in the Ninth Circuit give particular weight to the second factor, noting that motions for
22 class certification should be denied as untimely when the defendant would be prejudiced by the
23 delay. *See, e.g., Arnold v. Arizona Dept. of Public Safety*, 233 F.R.D. 537, 541 (D. Ariz. 2005)
24 (“Courts applying Rule 23, as amended, do not deny class certification based on timeliness unless

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26 ² The Ninth Circuit has not adopted a specific rule concerning the timeliness of motions
27 for class certification, as Rule 23 gives courts discretion in this regard. The Advisory
28 Committee’s notes to Rule 23 recognize a number of valid reasons for deferring an initial
certification decision, such as conducting discovery to determine the issues likely to be presented
at trial, ruling on dispositive motions, and exploring the designation of class counsel. *See* Fed. R.
Civ. P. 23(c)(1)(A) Advisory Committee Notes.

1 the delay has prejudiced a defendant.”). Additionally, “the failure to move for class certification
2 in a timely manner constitutes a failure to protect the interests of class members, and surely bears
3 strongly on the adequacy of the representation that those class members might expect to receive.”
4 *Yapuna v. Global Horizons Manpower Inc.*, 254 F.R.D. 407, 412 (E.D. Wash. 2008) (citations
5 omitted).

6 Here, it is apparent that Defendants will suffer prejudice if Plaintiffs are permitted to
7 move for certification at this late stage in the litigation. In the almost twenty-two months since
8 the expiration of the motions deadline, Defendants have acted under the reasonable assumption
9 that they would be required to defend this action against only the eleven remaining opt-in
10 plaintiffs. Additional discovery is likely to be burdensome and costly for Defendants. Moreover,
11 the explanations offered by Plaintiffs to justify their delay are unpersuasive. First, even if
12 Plaintiffs’ strategic decision not to seek certification in light of Nth Connect’s financial position
13 were justified, Plaintiffs made no effort to seek an extension of time at the time they made that
14 decision nor have they explained why they did not do so. Second, Plaintiffs do not identify the
15 additional evidence they would seek in discovery. Third, Plaintiffs do not explain how granting
16 the instant motion would promote judicial economy, because it is apparent that the state court
17 action will continue to be litigated regardless of how this action is resolved. Finally, the Court
18 has serious doubts as to whether Plaintiffs’ counsel would represent the interests of the class
19 adequately based on counsels’ delay in seeking class certification.

20 **ORDER**

21
22 Good cause therefor appearing, IT IS HEREBY ORDERED that Plaintiffs’ motion to
23 extend time within which to seek class certification is DENIED.

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26 DATED: 04/04/11

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28 JEREMY FOGEL
United States District Judge