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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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|------------------------------|---|---------------------------------------|
| JUAN FRANCO, on behalf of |) | Case No. 09cv1364-LAB (BLM) |
| himself and on behalf of all |) | |
| persons similarly situated, |) | ORDER DENYING IN PART AND |
| |) | GRANTING IN PART PLAINTIFF'S |
| Plaintiff, |) | MOTION TO COMPEL PRODUCTION OF |
| v. |) | CONTACT INFORMATION OF |
| |) | PUTATIVE CLASS |
| BANK OF AMERICA, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

On November 4, 2009, Plaintiff filed a motion to compel production of contact information of the putative class. Pursuant to this Court's briefing schedule, on November 9, 2009, Defendant timely opposed the motion and the Court took the matter under submission pursuant to Civil Local Rule 7.1 (d)(1). Having considered the briefing filed by the parties and the applicable law, and good cause appearing, Plaintiff's motion is **DENIED IN PART AND GRANTED IN PART.**

FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2009, Plaintiff, a former Bank of America employee, filed the present class action lawsuit against Bank of America. As described in the first amended complaint ("FAC") that was filed on November 19, 2009, Plaintiff is seeking damages, restitution and

1 injunctive relief for (1) unfair competition in violation of Cal. Bus.
2 & Prof. Code § 17200 *et seq.*; (2) failure to pay earned wages and
3 overtime compensation in violation of Cal. Lab. Code §§ 204, 210, 218,
4 510, 1194 and 1198; (3) failure to provide accurate itemized statements
5 in violation of Cal. Labor Code § 226; (4) failure to provide meal
6 periods in violation of Cal. Labor Code §§ 226.7 and 512; (5) violation
7 of the Fair Labor Standards Act, 29 U.S.C. § 216 ("FLSA"); and (6) Labor
8 Code Private Attorney General Act. Cal. Labor Code § 2698. Plaintiff
9 alleges that Defendant failed to pay him and other employees for the
10 actual number of hours worked (regular and overtime) during the class
11 period. Plaintiff specifically contends that he and other employees
12 were instructed not to record their overtime hours and that they were
13 required to work during meal breaks to complete mandatory training which
14 could not be completed at any other time. FAC.

15 The Court held a telephonic case management conference ("TCMC") for
16 this matter on September 25, 2009. After the TCMC, the Court ordered
17 the parties to distribute a Belaire notice permitting members of the
18 putative class to opt out of having their identifying information
19 disclosed to Plaintiff's counsel on or before October 30, 2009. Doc.
20 15. On October 29, 2009, Plaintiff's counsel called the Court's
21 chambers and alleged that Defendant's counsel was not cooperating with
22 his efforts to comply with the Court's order to distribute the Belaire
23 notice. A follow up TCMC held on October 30, 2009, revealed that the
24 heart of the dispute is whether the Belaire notice should be sent to
25 Tellers, Senior Tellers and Sales and Service Specialists who work or
26 worked at the two Bank of America branch offices where Plaintiff worked,
27 or to employees in those positions who work or worked at any Bank of
28 America branch office in California.

1 Plaintiff alleges that Defendant has a company-wide policy and
2 practice instituted by Defendant's corporate office that results in the
3 nonpayment of overtime hours to employees. FAC. Because of this
4 alleged company-wide policy and practice, Plaintiff argues that he is
5 entitled to contact information for Tellers, Senior Tellers and Sales
6 and Service Specialists employed in any Bank of America branch office
7 in California. Doc. 20-1.

8 Defendant, on the other hand, argues that contacting all such
9 employees from every Bank of America branch office in California would
10 be unreasonable, over broad, and unduly harassing to the Defendant and
11 overly intrusive to Defendant's current and former employees. Doc. 23.
12 In support of its position, Defendant notes that the difference in the
13 number of involved employees varies from less than 100 at the two banks
14 to approximately 27,000 throughout California. Doc. 23. Defendant
15 also asserts that there is no company-wide policy or practice related
16 to the unlawful withholding of overtime payments from employees, and,
17 in fact, provided a written policy requiring the payment of all overtime
18 worked by overtime-eligible associates. Doc. 23, Exhibit 1. Defendant
19 argues that because Plaintiff has failed to provide any evidence
20 supporting his company-wide policy theory, contact information should
21 only be provided for Tellers, Senior Tellers and Sales and Service
22 Specialists who work or worked at the two Bank of America branch offices
23 where Plaintiff worked. Doc. 23.

24 As will be discussed more fully below, the Court **DENIES IN PART AND**
25 **GRANTS IN PART** Plaintiff's motion to compel production of contact
26 information of the putative class.

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1 notice was not found to present a serious invasion of potential class
2 members' privacy interests. Id.

3 **DISCUSSION**

4 The parties already have agreed¹ on all aspects of the Belaire
5 notice with the exception of whether the notice should be sent to the
6 designated employees who work or worked at the two Bank of America
7 branch offices where Plaintiff worked, or at any Bank of America branch
8 office in California. Doc. 19. Therefore, Plaintiff's right to a
9 portion of the contact information he is seeking is not at issue. What
10 remains to be determined, is whether Plaintiff's desire to compel
11 production of contact information for all of Defendant's California
12 branch offices should be limited at this juncture because it is overly
13 broad, burdensome and does not outweigh the likely benefits.

14 While courts generally allow plaintiffs to obtain discovery from
15 defendants related to class certification issues, plaintiffs bear the
16 burden of showing that such discovery is likely to produce
17 substantiation of the class allegations. Mantolete V. Bolger, 767 F.2d
18 1416, 1424 (9th Cir. 1985). If a plaintiff is unable to meet this
19 burden, a court's refusal to allow discovery is not an abuse of
20 discretion. Id.

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23 ¹In its opposition, Defendant raises a concern that there is no longer an
24 agreement between the parties on which employee positions and what time period should
25 be covered by the Belaire Notice. Initially, as discussed in the October 30, 2009
26 Telephonic Case Management Conference, the parties had reached an agreement on all
27 aspects of the Belaire Notice with the exception of whether the notice should be sent
28 to two branch offices or to any branch office in California. Doc. 19. This agreement
established the time frame of the Belaire notice from January 31, 2007 to present day.
Doc. 23-3, Exhibit 3. The parties now indicate that there has been some movement away
from the previous agreements. Doc. 23. However, the Court has considered the facts
and finds that the previous agreement was appropriate. Therefore, the Belaire notice
will be sent to employees and former employees working as Tellers, Senior Tellers and
Sales and Service Specialists at any time between January 31, 2007 and the present.

1 Here, Plaintiff supports his request for state-wide contact
2 information by providing a declaration stating that he was told by the
3 manager at the West Glendale branch office where he worked, and the
4 manager at the Los Angeles branch office where he is currently working,
5 that Defendant is shorthanded and cannot pay overtime wages due to a
6 shortage of Full Time Equivalent Hours ("FTE"). Doc. 20-2. Plaintiff
7 also states that he observed that other Sales Service Specialists,
8 Tellers and Personal Bankers at the two branch offices where he has
9 worked, were subjected to the same violations of the California Labor
10 Code that he experienced. Id. Finally, Plaintiff's declaration states
11 that he spoke with or knew of at least five other Bank of America
12 employees in different branch offices in California who did not receive
13 payment for overtime hours worked. Id. Two of those employees worked
14 as Personal Bankers in the West Glendale branch office where Plaintiff
15 used to work. One of the employees was a Teller in the Los Angeles
16 branch office where Plaintiff is currently working, and the other two
17 employees held positions that Plaintiff cannot recall and worked in
18 branch offices in California where Plaintiff never worked.
19 Additionally, Plaintiff has submitted copies of two class action
20 complaints (Harris v. Bank of America Corp., Case No. BC357822 and
21 Anderson v. Bank of America Corp., Case No. BC350582) filed in Los
22 Angeles against Defendant alleging similar California Labor Code
23 violations.

24 Defendant responded to Plaintiff's evidence of an alleged company-
25 wide policy and practice of unlawfully withholding overtime payments by
26 providing copies of its time keeping policy, manager and associate
27 training materials regarding timekeeping compliance, screen shots of the
28 time entry system, and Plaintiff's timekeeping compliance training

1 record. Doc. 23, Exhibits 1-5. Defendant also provided a declaration
2 from its Vice President and Human Resources Manager, Rai Otero, stating
3 that Defendant's corporate policies require that all overtime eligible
4 employees be paid for all hours actually worked, and that FTEs do not
5 impact or modify Defendant's corporate timekeeping policies. Doc. 23-2.
6 Defendant also provided a declaration from another of its Vice
7 Presidents, Lori McCarthy Lopez, stating that Defendant's timekeeping
8 policy is included in training materials for managers and overtime
9 eligible employees in all of the Bank's retail banking centers in
10 California, and that retail bank managers in California are required to
11 take a course on the matter annually. All associates in California are
12 also required to complete annual timekeeping training. Doc. 23-1.

13 At this stage in the proceedings, the Court finds that the scope
14 of the Belaire notice proposed by Plaintiff is overly broad and unduly
15 burdensome. Plaintiff has not provided sufficient facts to support his
16 claim of a company-wide policy and practice by Defendant to withhold
17 regular and overtime wages from its employees, especially in light of
18 Defendant's evidence of contrary company-wide policies. While the
19 allegations in Plaintiff's declaration support his request for the
20 contact information of the approximately 100 current and former
21 employees in the branch offices where Plaintiff worked, it does not
22 support his request for the contact information of the approximately
23 27,000 such employees located throughout California. See, e.g., Tracy
24 v. Dean Witter Reynolds, 185 F.R.D. 303, 305-313 (D. Col. 1998) (denying
25 plaintiff's request for discovery from other offices where evidence did
26 not substantiate plaintiff's allegations that class extended beyond
27 local office and stating "[c]lass plaintiffs are not permitted to send
28 notices to prospective members of a class if the only evidence of a

1 class action consists of the bare allegations of the complaint, or of
2 counsel.") Additionally, the Harris and Anderson complaints that
3 Plaintiff provided are not sufficient to show that broader discovery
4 will substantiate his class allegations. See Mantolete, 767 F.2d at
5 1425 (finding that plaintiff's submission of two additional complaints
6 filed against defendant in other locations with similar claims did not
7 "provide a likelihood that discovery measures will produce persuasive
8 information substantiating class allegations." (quoting Doninger v,
9 Pacific Northwest Bell Inc., 564 F.2d 1304, 1313 (9th Cir. 1977))).

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1 **CONCLUSION**

2 Based on the Court's review of the briefing submitted, and for the
3 reasons set forth herein, Plaintiff's motion to compel production of
4 contact information of the putative class is **DENIED IN PART AND GRANTED**
5 **IN PART** as follows:

- 6 (1) Plaintiff's request for an order compelling the production of
7 contact information for Tellers, Senior Tellers and Sales and
8 Service Specialists employed in the two Bank of America branch
9 offices where Plaintiff worked (6400 San Fernando Road,
10 Glendale, California and 4510 Franklin Avenue, Los Angeles,
11 California) is **GRANTED**;
- 12 (2) Plaintiff's request for an order compelling the production of
13 contact information for Tellers, Senior Tellers and Sales and
14 Service Specialists employed in all Bank of America branch
15 offices in California is **DENIED**; and
- 16 (3) **It is further ordered** that the relevant time period is January
17 31, 2007 to the present.

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20 DATED: December 1, 2009

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22 BARBARA L. MAJOR
23 United States Magistrate Judge
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