

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

LOLA LINT, et al.,  <p style="text-align: center;">vs.</p> NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,  <div style="border-top: 1px solid black; width: 100%; margin-top: 5px;"></div>	Plaintiffs,          Defendant.
--	---

CASE NO. 09CV1373 DMS (RBB)

**ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT AS TO  
PLAINTIFF DAVID YANG**

[Doc. 71]

Pending before the Court is Defendant’s motion for summary judgment as to Plaintiff David Yang (herein, “Plaintiff”). For the following reasons, Defendant’s motion is granted as to Plaintiff Yang’s individual claims.

**I.  
BACKGROUND**

Plaintiffs David Yang, Lola Lint, and Normal Waddell filed a Complaint alleging, individually and on behalf of all other similarly situated sales and financial representatives, violations of the Fair Labor Standards Act (“FLSA”), the California Labor Code, and the California Business and Professions Code by Defendant Northwestern Mutual Life Insurance Company. (Doc. 1.) Plaintiff Yang brought only the action under the FLSA, which was brought as an opt-in collective action pursuant to 29 U.S.C. § 216(b). (Complaint ¶¶ 9, 24.) On July 2, 2009, Plaintiff Yang filed a consent

1 to participate in the FLSA collective action and elected to be represented by the named Plaintiffs’  
2 counsel: Sanford Wittels & Heisler, LLP. (Doc. 5.) However, on April 16, 2010, named Plaintiffs’  
3 counsel filed a motion to withdraw as counsel for Plaintiff Yang, which the Court granted. (Docs. 35,  
4 54.) In its Order of May 27, 2010, the Court stated “Mr. Yang . . . can not appear *pro se* and maintain  
5 an action as a representative for others. . . . Accordingly, if Mr. Yang Desires to proceed as a potential  
6 representative for a collective action, he must retain new counsel.” (Doc. 54 at 2.) On June 25, 2010,  
7 the Court issued an Order granting Plaintiff Yang until August 13, 2010 to locate counsel and stating  
8 “[i]f Mr. Yang is unable to locate counsel by that time, he shall proceed on his individual claims but  
9 will not be able to represent any other potential class members.” (Doc. 68 at 1.) Mr. Yang was unable  
10 to locate counsel by August 13, 2010 and elected to proceed *pro se* on his individual claims. (Doc.  
11 78.)

12 On July 23, 2010, Defendant filed the instant motion for summary judgment as to Plaintiff  
13 Yang. (Doc. 71.) Plaintiff did not file an opposition to the motion. On September 24, 2010,  
14 Defendant filed a notice of Plaintiff’s non-opposition to the motion. (Doc. 83.)<sup>1</sup>

## 15 II.

### 16 LEGAL STANDARD

17 Summary judgment is appropriate when “the pleadings, the discovery and disclosure materials  
18 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
19 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2). A fact is material when,  
20 under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty*  
21 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue as to a material fact is genuine if “the evidence is  
22 such that a reasonable jury could not return a verdict for the nonmoving party.” *Id.* at 248. When a  
23 motion for summary judgment is properly made and supported, it is not sufficient for an opposing  
24 party to “rely merely on allegations or denials in its own pleading; rather, its response must—by  
25 affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial.  
26

---

27 <sup>1</sup> In conjunction with its notice of non-opposition, Defendant requested the Court to take  
28 judicial notice of an opinion issued in *Bouder v. Prudential Financial, Inc.*, No. 06-cv-4359 (DMC)  
(D. N.J. Aug. 30, 2010). As court documents are properly subject to judicial notice pursuant to Federal  
Rule of Evidence 201, Defendant’s request is granted.

1 If the opposing party does not so respond, summary judgment should, if appropriate, be entered against  
2 that party.” Fed. R. Civ. P. 56(e)(2).

3 **III.**

4 **DISCUSSION**

5 Plaintiff Yang alleges Defendant violated the minimum wage and overtime pay requirements  
6 set forth in the FLSA. Defendant asserts there is no genuine issue of material fact as to these claims  
7 and it is entitled to judgment as a matter of law because Plaintiff Yang is subject to the outside sales  
8 exemption of the FLSA.

9 The FLSA requires employers to pay each employee engaged in commerce a mandated  
10 minimum wage per hour worked. 29 U.S.C. § 206(a). It further requires employers to compensate  
11 those employees engaged in commerce who work more than forty hours per week “at a rate not less  
12 than one and one-half times the regular rate” at which they are employed for those hours worked in  
13 excess of forty hours per week. 29 U.S.C. § 207(a)(1). The FLSA, however, exempts certain  
14 employees from the above provisions, including those employed “in the capacity of outside salesman”.  
15 29 U.S.C. § 213(a)(1) (“[t]he provisions of section 206 . . . and section 207 of this title shall not apply  
16 with respect to (1) any employee employed . . . in the capacity of an outside salesman (as such terms  
17 are defined and delimited from time to time by regulations of the Secretary . . . )”). “[E]mployee  
18 employed in the capacity of outside salesman” is defined as any employee:

- 19 (1) Whose primary duty is: (i) making sales within the meaning of section 3(k)  
20 of the Act, or (ii) obtaining orders or contracts for services or for the use of  
21 facilities for which a consideration will be paid by the client or customer;  
22 and  
23 (2) Who is customarily and regularly engaged away from the employer’s place  
24 or places of business in performing such primary duty.

25 29 C.F.R. § 541.500(a). Section 3(k) of the Act in turn defines “sale” or “sell” as including “any sale,  
26 exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C.  
27 § 203(k). An employee’s primary duty is determined by identifying “the principal, main, major, or  
28 most important duty that the employee performs. Determination of an employee’s primary duty must  
be based on all the facts in a particular case, with the major emphasis on the character of the  
employee’s job as a whole.” 29 C.F.R. § 541.700(a). Work performed “incidental to and in

1 conjunction with the employee's own outside sales or solicitations . . . [and] work that furthers the  
2 employee's sales efforts . . . shall be regarded as exempt work." 29 C.F.R. § 541.500(b). Furthermore,  
3 "[t]he phrase 'customarily and regularly' means a frequency that must be greater than occasional but  
4 which, of course, may be less than constant." 29 C.F.R. § 541.701. "The outside sales employee is  
5 an employee who makes sales at the customer's place of business or, if selling door-to-door, at the  
6 customer's home." 29 C.F.R. § 541.502.

7 "Courts applying the outside salesperson exemption consider whether sales are made by the  
8 employee but also look for hallmark activities including (1) whether the employee generates  
9 commissions for himself through his work, (2) the level of supervision of the employee, (3) the amount  
10 of work done away from the employer's place of business, (4) whether the employee independently  
11 solicits new business, and (5) the extent to which the employee's work is unsuitable to an hourly  
12 wage." *Chenensky v. N.Y. Life Ins. Co.*, No. 07cv11504 (WHP), 2009 WL 4975237, at \*5 (S.D.N.Y.  
13 Dec. 22, 2009). Additional relevant factors include whether the job for which the employee was hired  
14 was advertised as a sales position and whether the employee receives specialized sales training. *See*  
15 *Nielsen v. DeVry, Inc.*, 302 F. Supp. 2d 747, 756-57 (W.D. Mich. 2003).

16 In support of its motion, Defendant submits evidence indicating Plaintiff Yang's status as an  
17 outside salesman within the meaning of the FLSA. Plaintiff Yang signed contracts with Worrell and  
18 Bullock, both general agents of Defendant, in 2001 and 2006, respectively, which indicated the parties'  
19 understanding that he was an independent sales agent. (Miller Decl. Ex. E; Ex. F.) Plaintiff Yang self-  
20 described the nature of his job for Defendant as insurance sales. (*Id.* at Ex. B at 325-26; Ex. I at 2; Ex.  
21 J.) He also received sales training and sales training materials in connection with his employment.  
22 (*Id.* at Ex. B at 387-89; Ex. S; Ex. T.) Plaintiff Yang did not receive a salary from Worrell, Bullock,  
23 or Defendant for his work. (Complaint ¶ 15; Miller Decl. Ex. B at 139.) Rather, he received  
24 commissions and renewal commissions for his sales of life insurance and his compensation stemmed  
25 entirely from his sales. (Miller Decl. Ex. E; Ex. F.) He was also required to meet minimum selling  
26 standards. (Miller Decl. Ex. E; Ex. F; Complaint ¶ 15.) On his tax returns, he represented himself as  
27 having his own business, which was involved in sales, and reported his earned commissions as  
28 business income derived from sales. (Miller Decl. Ex. J.)

1 As to whether he was customarily and regularly engaged away from his employer's place of  
2 business in connection with making sales, Plaintiff Yang stated that approximately 10-20 percent of  
3 his time was spent meeting with clients or prospective clients outside of the office and that the  
4 remaining 80 percent of his time was spent making calls in order to generate additional sales or  
5 training other sales agents. (*Id.* at Ex. B at 254, 257.) He was responsible for building his own client  
6 base and used various methods to do so, including searching the Yellow Pages and the internet, cold  
7 calling prospective clients, attending meetings of targeted organizations, making appointments with  
8 and dropping in on small business owners, and purchasing advertising. (*Id.* at Ex. B at 89, 145-47,  
9 150, 192; Ex. D at 3-6, 9-10.) Plaintiff Yang engaged in travel to generate business and consummate  
10 sales and determined his own schedule, often working during the weekday, in the evenings, and on  
11 weekends. (*Id.* at Ex. B at 145-46, 362.) When he first started in the business, he would see  
12 approximately 50 clients per week and would drive approximately 4,000 miles each month in doing  
13 so. (*Id.* at Ex. B at 150-52, 256; Ex. D at 9.)

14 These factors, taken as a whole, support the conclusion that Plaintiff Yang was employed in  
15 the capacity of outside salesman for purposes of the FLSA. Accordingly, there is no genuine issue as  
16 to any material fact with respect to Plaintiff Yang's individual claims under the FLSA and Defendant  
17 is entitled to summary judgment on these claims as a matter of law.

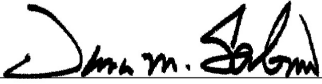
18 **IV.**

19 **CONCLUSION**

20 For the reasons stated above, Defendant's motion for summary judgment as to Plaintiff  
21 Yang with respect to his individual claims is granted.<sup>2</sup>

22 **IT IS SO ORDERED.**

23 DATED: November 19, 2010

24   
25 \_\_\_\_\_  
26 HON. DANA M. SABRAW  
27 United States District Judge

28 <sup>2</sup> Because the Court herein grants Defendant's motion for summary judgment as to Plaintiff Yang, Plaintiff Yang's motion to unseal the affidavit filed in support of counsel's motion to withdraw as counsel for Plaintiff Yang is denied as moot. (Doc. 62.)