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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS DAVIS, III et al.,)
)
Plaintiffs,)
)
vs.)
)
WESTGATE PLANET HOLLYWOOD LAS)
VEGAS, LLC et al.,)
)
Defendants.)
_____)

2:08-cv-00722-RCJ-PAL

ORDER

This is a class action brought by former salespersons for Defendants’ alleged failure to pay statutory minimum wages and overtime under Nevada and Florida law, as well as their failure to pay contractual commissions and bonuses. Before the Court is a motion to certify the class. For the reasons given herein, the Court denies the motion.

I. FACTS AND PROCEDURAL HISTORY

Defendants Westgate Planet Hollywood Las Vegas, LLC; Westgate Resorts, Inc.; Westgate Resorts Ltd.; CFI Sales & Marketing, Ltd.; CFI Sales & Marketing, LLC; and CFI Sales & Marketing, Inc. (collectively, “Westgate”) are business entities engaged in the development, marketing, management, and sales of fractional interests in time share condominiums and resorts. Westgate employed Plaintiff Thomas Davis, III as a salesperson in its Las Vegas time share sales business. After several years of employment, Davis, who had

1 been paid on a flat commission system, determined that Westgate had failed to pay him either
2 minimum wage or overtime pay. He also believed Westgate had made improper deductions
3 from his pay and had not paid him commissions he was owed.

4 On May 13, 2008, Davis filed the Complaint in state court, alleging five causes of action:
5 (1) violations of the Fair Labor Standards Act (“FLSA”) for Westgate’s failure to pay minimum
6 wages and overtime; (2) violations of Nevada’s labor laws (Nevada Revised Statutes (“NRS”)
7 sections 608.016, 608.018, 608.109, 608.100, and 608.250) for unpaid wages, unpaid minimum
8 and overtime wages, and unpaid rest periods; (3) violations of NRS section 608.040 for unpaid
9 wages owed after discharge; (4) breach of contract; and (5) conversion. The Complaint alleged
10 there were “at least 1000 putative class members nationwide and over 500 Nevada Subclass
11 members.” In addition to the FLSA collective action, Davis sought class certification of the state
12 law claims. Westgate removed based on both the FLSA claim and the Class Action Fairness
13 Act. The Second Amended Complaint is the operative version of the Complaint.

14 **II. LEGAL STANDARDS**

15 In order to obtain class certification under Rule 23, Plaintiffs must satisfy two sets of
16 criteria. First, Plaintiffs must show each of the following:

- 17 (1) the class is so numerous that joinder of all members is impracticable;
- 18 (2) there are questions of law or fact common to the class;
- 19 (3) the claims or defenses of the representative parties are typical of the claims or
20 defenses of the class; and
- 21 (4) the representative parties will fairly and adequately protect the interests of the
class.

22 *Rodriguez v. Hayes*, 591 F.3d 1105, 1121–22 (9th Cir. 2010) (citing Fed. R. Civ. P. 23(a)). Second,
23 plaintiffs must show at least one of the following:

- 24 (1) prosecuting separate actions by or against individual class members would create
25 a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class

1 members that would establish incompatible standards of conduct for the party
2 opposing the class; or

3 (B) adjudications with respect to individual class members that, as a practical
4 matter, would be dispositive of the interests of the other members not parties
5 to the individual adjudications or would substantially impair or impede their
6 ability to protect their interests;

7 (2) the party opposing the class has acted or refused to act on grounds that apply
8 generally to the class, so that final injunctive relief or corresponding declaratory
9 relief is appropriate respecting the class as a whole; or

10 (3) the court finds that the questions of law or fact common to class members
11 predominate over any questions affecting only individual members, and that a class
12 action is superior to other available methods for fairly and efficiently adjudicating
13 the controversy. The matters pertinent to these findings include:

14 (A) the class members' interests in individually controlling the prosecution
15 or defense of separate actions;

16 (B) the extent and nature of any litigation concerning the controversy already
17 begun by or against class members;

18 (C) the desirability or undesirability of concentrating the litigation of the
19 claims in the particular forum; and

20 (D) the likely difficulties in managing a class action.

21 Fed. R. Civ. P. 23(b)(1)–(3); *see Hayes*, 591 U.S. at 1122. A district court should not address the
22 merits of the case when determining certification under Rule 23, *Eisen v. Carlisle & Jacquelin*,
23 417 U.S. 156, 177–78 (1974) (holding that a class action plaintiff cannot argue the merits of his
24 case to circumvent the Rule 23 certification requirements), unless the merits at issue concern the
25 requirements of certification under Rule 23, in which case the court must address the issue,
Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1178 n.2 (9th Cir. 2007) (citation omitted). A district
court may dismiss an action on the merits before determining certification. *See Marx v. Centran*
Corp., 747 F.2d 1536, 1552 (6th Cir. 1984).

23 **III. ANALYSIS**

24 **A. The Contracts**

25 Plaintiffs have asked the Court to certify the following classes:

1 **NEVADA WAGE CLAIMS**

2 All persons employed by Defendants as timeshare salespersons or closing officers
3 at Defendants' timeshare resorts in the State of Nevada who were paid on a
4 commission only or flat fee basis[;]

4 **FLORIDA WAGE CLAIMS**

5 All persons employed by Defendants as timeshare salespersons or closing officers
6 at Defendants' timeshare resorts in the State of Florida who were paid on a
7 commission only or flat fee basis[; and]

7 **BREACH OF CONTRACT CLAIMS**

8 All persons employed by Defendants as timeshare salespersons or closing officers
9 at Defendants' timeshare resorts in Nevada or Florida who have a state law wage and
10 hour claim certified by this Court.

10 (Mot. to Certify Class 4–5, Mar. 4, 2011, ECF No. 441). Plaintiffs adduce fifteen exhibits, some
11 of which contain multiple documents, in support of their motion to certify these classes.

12 Exhibit 1 consists of six exemplar contracts between unidentified persons and CFI Sales
13 and Marketing, Ltd. (“CFI, LP”), described in the contracts as a Florida limited partnership. All
14 of the exemplar contracts are between unidentified persons and CFI, LP. The exemplar contracts
15 appear to contemplate work in Nevada. It is not immediately clear which state’s wage and hour
16 laws would apply to which contracts.

17 There are two broad types of contract adduced. Type I contracts are those that appear to
18 be, as they are entitled, independent contractor agreements. Type II contracts are also entitled as
19 independent contractor agreements, but they may in reality constitute direct employment
20 agreements. There are subtypes of each type of agreement.

21 **1. Type I Contracts**

22 **a. Type IA**

23 The Type IA exemplar contract was entered into on April 21, 2005 between a person
24 whose name is redacted and CFI, LP. (See Type IA Contract, Apr. 21, 2005, ECF No. 441, at
25 Bates WEST1090). Compensation under the Type IA contract was to be provided “in the

1 manner specified in Exhibit ‘A,’ attached hereto and incorporated herein” (*Id.* para. 2).¹
2 Exhibit A, entitled “Commission Schedule Las Vegas,” provides for payment of “a base
3 commission” every week. (*See id.* at WEST1092). The base commission is 8% on the sale of
4 any one-, two-, three-, or four-bedroom unit or any half-week stay that is accompanied by a 10%
5 down payment. (*See id.*). It is critical to note that Type I contracts do not appear to require any
6 payment at all on any given week, but only that whatever base commission is earned is payable
7 on a weekly basis. This is the crux of the Type I contracts. They require the periodic (weekly)
8 payment of whatever commission has been earned during the past week, but they do not appear
9 to require any wages or any particular hours of work, which is why they appear to be
10 independent contractor agreements as they proclaim themselves to be.

11 For full-down-payment sales, salespersons receive 50% of their base commission
12 immediately, up to a maximum of \$500, and a salesperson may demand immediate payment of
13 up to 25% of the base commission on any sale. (*See id.* at WEST 1093).² On the other hand,
14 until a salesperson has established a reserve of \$3500, 10% of the commission earned on each
15 sale is retained by CFI, LP in the salesperson’s reserve account. (*See id.*). The reserve account
16 exists so that in the event a customer fails to make six consecutive monthly payments or the
17 minimum 10% down payment after purchase, CFI, LP may charge back the salesperson’s
18 commission on that sale from the salesperson’s reserve account. (*See id.*).

19 In addition to the base commissions, a contractor under a Type I contract may earn
20 monthly bonuses. (*See id.* at WEST1092). To calculate a monthly bonus, one first calculates the
21 “good sales volume” for a given month, which equals the amount in full-down-payment sales for

22
23 ¹All six of the exemplar contracts refer to their respective exhibits A for incorporation of
24 the manner of compensation, and the similarity or dissimilarity of the various exhibits A are
therefore critical to the determination of class certification.

25 ²Presumably, the remaining commission would be paid at the end of the sales week, but
the example in the contract indicates it would be paid “in 21–28 days.” (*See id.*). This ambiguity
would likely have to be construed against the drafter, CFI, LP.

1 the month plus the amount in previous partial-down-payment sales that customers pay in full
2 during the month. (*See id.*). If a salesperson’s good sales volume for a given month exceeds
3 \$39,999,³ the salesperson is entitled to a bonus of 1% to 5% of the good sales volume for that
4 month, based on a chart provided in Exhibit A. (*See id.*). The bonus for a given month is
5 calculated on the 15th of the following month and paid at the last weekly pay period of the
6 following month. (*See id.*).

7 Finally, a salesperson is entitled to a \$40 commission for the sale of each full-down-
8 payment, full-week vacation occupancy agreement (“VOA”). (*See id.* at WEST1094). If a VOA
9 is later converted to a sale, the salesperson is entitled to only 50% of the base commission (4%)
10 that would otherwise be due on the sale, but if the VOA is converted to a sale before the
11 customer occupies the unit under the VOA, the full 8% commission rate applies. (*See id.*).
12 VOAs converted to sales are included in the good sales volume for the month in which the
13 customer makes full payment on the sale. (*See id.*).

14 **b. Type IB**

15 The Type IB exemplar contract was entered into on September 21, 2005 between a
16 person whose name is redacted and CFI, LP. (*See* Type IB Contract, Sept. 21, 2005, ECF No.
17 441, at Bates WEST0855). The Type IB contract is the same as the Type IA contract, except for
18 four differences. First, the base commission is 8% for regular sales but only 7% for “any VOA
19 upgrade to a sale.” (*See id.* at WEST0857). Second, the good sales volume required to obtain a
20 monthly bonus is \$59,999, and the bonus range is 2% to 5.5%. (*See id.*). Third, there appears to
21 be no ability for a salesperson to demand immediate payment of 25% of the commission on any
22 sale. (*See id.* at WEST0858). Fourth, for VOAs later converted to sales, the salesperson is
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24
25 ³The text indicates “exceeds \$39,999.00,” but the table begins at “\$40,000,” leaving open
whether a bonus would apply to a monthly good sales volume of \$39,999.50, for example. (*See*
id.). The ambiguity would likely have to be construed against the drafter.

1 entitled to a 7% base commission. (*See id.* WEST0859).⁴

2 **c. Type IC**

3 The Type IC exemplar contract was entered into on May 25, 2007 between a person
4 whose name is redacted and CFI, LP. (*See* Type IC Contract, Sept. 21, 2005, ECF No. 441, at
5 Bates WEST0906). The Type IC contract is the same as the Type IB contract, except for one
6 difference: the good sales volume required to obtain a monthly bonus is \$75,000, and the bonus
7 range is 2% to 6%. (*See id.* WEST0908).

8 **d. Type ID**

9 The Type ID exemplar contract was entered into on January 21, 2009 between a person
10 whose name is redacted and CFI, LP. (*See* Type ID Contract, Jan. 21, 2009, ECF No. 441, at
11 Bates WEST0956). The Type ID contract is the same as the Type IC contract, except for four
12 differences: (1) as opposed to the other Type I contracts, which appear to contemplate sales in
13 Las Vegas, the Type ID contract appears to contemplate sales throughout Florida; (2) base
14 commissions range from 7% to 13% and depend on the category of customer; (3) self-generated
15 sales approved by the Director of Sales and accompanied by a down payment (of unspecified
16 amount) earn a base commission of 15%; and (4) bonuses are not contemplated. (*See id.*
17 WEST0958–WEST0959). The Type ID contract is the most unique of the Type I contracts.

18 **2. Type II Contracts**

19 **a. Type IIA**

20 The Type IIA exemplar contract was entered into on January 21, 2009 between a person
21 whose name is redacted and CFI, LP. (*See* Type IIA Contract, Jan. 21, 2009, ECF No. 441, at
22 Bates WEST1474). The essential difference between Type I and Type II contracts is the use in
23 Type II contracts of an alternative, complex method of compensation called a “daily draw.” (*See*
24 *id.* WEST1476). Under this system, the salesperson receives as compensation the greater of: (1)

25 ⁴This is perhaps redundant with the first difference.

1 an 8% commission for the sale of any one-, two-, three-, or four-bedroom unit or any half-week
2 stay accompanied by a 15% down payment; or (2) a daily draw. (*See id.*). The contract does not
3 explain the daily draw system well. Under section I of the contract, the salesperson's
4 compensation is described as the greater of certain commissions or the daily draw. However,
5 section II states, "Once engaged by Westgate, Independent Contractor shall receive commission
6 through a daily draw." (*Id.*). Section II appears to conflate what section I had previously referred
7 to separately in the disjunctive: "commission" and "daily draw." (*See id.*).

8 The daily draw resembles a wage system on its face. (*See id.* ("The draw available to the
9 Independent Contractor on a daily basis shall be based on the number of days Independent
10 Contractor shall work in a given week[, and] shall be deducted from Independent Contractor's
11 total commission once said commission becomes due. Daily draw shall be paid on a weekly
12 basis according to Westgate's policies.")). However, the daily draw system also could be fairly
13 interpreted as a system for distributing earned commissions evenly over time to help ensure
14 steady income to salespersons whose weekly sales success fluctuates. The daily draw is set at
15 \$80 or \$120, depending on the salesperson's "VPG," which does not appear to be defined in the
16 contract. (*See id.*). If a sale upon which a daily draw was credited is cancelled, the amount is
17 charged against future commissions. (*See id.*). It is not clear whether a daily draw is
18 contemplated when a salesperson has no earned commission from which to subtract it. If not,
19 the system is not like a wage system. And even if a daily draw is contemplated where there is no
20 earned commission from which to subtract it, if any negative balance is charged against future
21 commissions, the system still does not necessarily resemble a wage system. Type II contracts
22 contain charge back and reserve clauses similar to those contained in Type I contracts. In
23 summary, Type II contracts might constitute direct employment contracts for wages in some
24 cases.

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1 **b. Type IIB**

2 The Type IIB exemplar contract was entered into on October 25, 2005 between a person
3 whose name is redacted and CFI, LP. (*See* Type IIB Contract, Oct. 25, 2005, ECF No. 441, at
4 Bates WEST1106). The Type IIB contract is similar to the Type IIA contract, except that it
5 provides for a “weekly draw” against earned commissions at the salesperson’s option in lieu of
6 the “half-check” system used under Type I contracts. (*See id.* at WEST1110–WEST1111). The
7 weekly draw is based on \$60 to \$120 per day, depending on volume per guest (“VPG”), which is
8 defined as the weekly total net sales volume divided by the number of tours given. (*See id.* at
9 WEST1109–WEST1111). The base commission ranges from 5.5% to 12.5% during the first
10 year and from 6% to 13% thereafter, depending on the salesperson’s closing percentage (“CP”),
11 which is defined as the number of sales divided by the number of tours given over the past four-
12 month rolling period. (*See id.* at WEST1108–WEST1109). Self-generated sales always earn
13 15% commission, and certain other categories of sales always earn 9% or 10% commission,
14 regardless of the salesperson’s current CP. (*See id.* at WEST1109). This is just an overview.
15 The compensation system under the Type IIB contract is detailed and complex.

16 **B. Other Evidence**

17 Exhibit 2 consists of the declarations of Plaintiffs Davis, Lois Tiger, and Emmanuel
18 Wiest, who all attest that they were employed by Westgate as salespersons in Nevada and/or
19 Florida, that they worked more than forty hours per week without overtime pay, and that they
20 were treated like direct employees who would be terminated if they did not show up to work,
21 often for more than forty hours per week.

22 Exhibit 3 is Tiger’s deposition, wherein she testified to the effect that Westgate’s
23 independent contractors are in fact treated like direct employees and that Westgate made it
24 difficult for her to obtain monies due to her under her contract. (*See* Tiger Dep. *passim*, Jan. 4,
25 2010). Tiger identified her signed July 12, 2005 “independent contractor agreement” during the

1 deposition. (*See id.* 76:2–13). This date does not match any of the exemplar contracts, and it is
2 not clear from the deposition what type of contract Tiger signed.

3 Exhibit 4 is John Willman’s deposition. Willman testified on behalf of Westgate and CFI
4 as their designated deponent. (*See Willman Dep.* 7:8–20, Nov. 19, 2010). Willman clarified that
5 Westgate Resorts, Ltd. was the single member of CFI Sales & Marketing, LLC. (*See id.* at 25).
6 He also testified that CFI Sales & Marketing, Ltd. no longer existed, but was consolidated into
7 CFI Sales & Marketing, LLC, which itself ceased operations in June 2010. (*See id.* at 26–27, 34).
8 CFI Sales & Marketing, Inc. did not directly participate in timeshare sales but was involved in
9 related business. (*See id.* at 27). Westgate Resorts, Ltd. was also the single member of Westgate
10 Marketing, LLC and Westgate Planet Hollywood Las Vegas, LLC. (*See id.* at 34–35). Westgate
11 Resorts, Inc. is wholly owned by the DAS Revocable Trust and has a 0.5% partnership interest
12 in Westgate Resorts, Ltd. (*See id.* at 35). The DAS Revocable Trust itself has a 0.5% partnership
13 interest in Westgate Resorts, Ltd., and Central Florida Investments, Inc. has a 99% partnership
14 interest. (*See id.* at 36). Westgate Marketing, LLC pays and supervises the independent
15 contractors involved in the present lawsuit. (*See id.* at 55). There had been between 5000 and
16 6000 independent contractors over the last decade. (*See id.* at 57). Willman did not testify as to
17 the number of different types of contracts used for independent contractors or how many
18 salespersons were employed under each type.

19 Exhibits 5 and 6 are the reports of an expert witness, Robert A. Taylor, a California CPA.
20 Taylor has estimated hours worked by Westgate employees and damages based on unpaid wages
21 in both Nevada and Florida. The exhibits to his reports are attached via DVD-R and indicate
22 approximately \$15 million in unpaid wages for the Florida salespersons and approximately \$3
23 million in unpaid wages for the Nevada salespersons. The reports also indicate approximately
24 \$500,000 in commissions due and approximately \$140,000 in bonuses due. There are thousands
25 of pages of charts.

1 Exhibit 7 is the deposition of Clifford “Earl” Collins, Jr., a software architect at
2 Westgate. (*See Collins Dep. 5–7, Nov. 18, 2010*). He testified as to Westgate’s automated
3 calculations of bonuses. (*See id. passim*).

4 Exhibit 8 is the deposition of Garrett Stump, the Executive Director of Enterprise at CFI
5 Westgate Reports. (*See Stump Dep. 4, Apr. 28, 2010*). He manages CFI Westgate’s software
6 personnel. (*See id. at 5*). He also testified as to Westgate’s automated record keeping. (*See id.*
7 *passim*).

8 Exhibit 9 is the deposition of Lisa Hemphill, Westgate’s representative to testify as to
9 software issues. (*See Hemphill Dep. 6, Nov. 18, 2010*). She began working for Westgate as a
10 “contracts processor,” inputting contracts for the sale or lease of property into Westgate’s
11 computers. (*See id. at 7–8*). In 1989, she became an office manager for contracts. (*See id. at 8*).
12 She eventually became an administrative assistant, an executive administrative assistant, and
13 then sales operation manager, which is her current title. (*See id. at 9–10*). She does not deal with
14 Westgate employees with respect to their employment. (*See id. at 11*). She noted that she knew
15 there were different kinds of contracts with different commission structures. (*See id. at 23*). She
16 believed that persons hired in the same “track” would have the same commission structure. (*See*
17 *id. at 31*). If the commission structure were changed at a particular location, the employee would
18 sign a new contract. (*See id. at 32*). Hemphill was unable to explain exactly what she meant by
19 “track.” (*See id. at 65*). However, she subjectively believed that all independent contractors at
20 any given resort were paid the same based on her belief that the resort would contact all
21 salespersons upon any change in commission structure so that the change would apply to
22 existing salespersons retroactively without them signing a new contract. (*See id. at 65–66*).

23 Exhibit 10 is the deposition of Jennifer Richards, a human resources employee for
24 Westgate responsible for inprocessing new employees. (*Richards Dep. 6–9, Nov. 18, 2010*). She
25 began working at Westgate as a salesperson. (*See id. at 11–12*). She testified that whenever

1 Westgate changed the commission structure, it would hold a meeting of sales representatives and
2 either have them sign new contracts or just hand out a memorandum explaining the new structure
3 and have everyone sign an amendment. (*See id.* at 14). Some salespersons with more
4 experience, however, could have better commission scales than other salespersons. (*See id.* at
5 27–28).

6 Exhibit 11 is the deposition of David Siegel, the founder of Westgate. (Siegel Dep. 5,
7 Dec. 14, 2010). He testified that the salespersons are trained by Westgate on Westgate’s
8 property, perform most of their work on Westgate’s property, and only have to provide “[a] pen
9 or pencil” themselves. (*See id.* at 15–18). Siegel himself crafted the reserve and charge back
10 rules in the contracts, and “probably” approved the advance commission system. (*See id.* at
11 20–21). He testified that he hadn’t seen any of the contracts “in many, many years.” (*See id.* at
12 25). He noted that Westgate does employ salaried salespersons who earn no commissions but
13 that most of Westgate’s salespeople worked for commission. (*See id.*). Siegel believed that the
14 commissioned salespersons were paid the minimum wage because they were paid a daily wage.
15 (*See id.* at 26). The salespersons had no part in recruiting customers who visited the resort
16 locations or screening their creditworthiness, but were expected to attempt to sell to everyone
17 who walked through the door. (*See id.* at 28). Siegel testified that Westgate considered it
18 unacceptable for a salesperson to be absent several days in a row. (*See id.* at 30–31).

19 Exhibits 12, 13, and 14 are expert reports from Robert A. Taylor concerning
20 commissions that should have been paid to salespersons in Florida and Tennessee. The exhibits
21 are attached in electronic form on a DVD-R. Taylor notes that the analysis is preliminary, based
22 on exemplar contracts.

23 Exhibit 15 consists of the firm resumes of Wexler Wallace LLP, Sommers Schwartz,
24 P.C., Greg Coleman Law PC, and Avanti Law Group, PLLC.

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1 **C. Certification**

2 **1. Commonality**

3 The evidence Plaintiffs adduce, particularly the exemplar contracts, fails to show
4 commonality between the putative class members. Like with the many anti-foreclosure actions
5 currently pending before the Court, there are at least six, and potentially many more, versions of
6 the relevant contracts at issue in the present case, and each of them is complex enough to merit
7 separate consideration based on each separate Plaintiff's claims thereunder. If there were only
8 one type of contract, and each Plaintiff claimed essentially identical breaches or statutory
9 violations by Defendants with only particular variations in unpaid wages and commissions, there
10 would be a commonality of claims. And there would be internal commonality within six (or
11 more) subclasses if the exemplar contracts adduced represented the only six types of contract in
12 dispute. But Plaintiffs ask the Court to certify broad categories of classes, without distinguishing
13 between the types of contract at issue:

14 **NEVADA WAGE CLAIMS**

15 All persons employed by Defendants as timeshare salespersons or closing officers
16 at Defendants' timeshare resorts in the State of Nevada who were paid on a
commission only or flat fee basis[;]

17 **FLORIDA WAGE CLAIMS**

18 All persons employed by Defendants as timeshare salespersons or closing officers
19 at Defendants' timeshare resorts in the State of Florida who were paid on a
commission only or flat fee basis[; and]

20 **BREACH OF CONTRACT CLAIMS**

21 All persons employed by Defendants as timeshare salespersons or closing officers
22 at Defendants' timeshare resorts in Nevada or Florida who have a state law wage and
hour claim certified by this Court.

23 (Mot. to Certify Class 4–5, Mar. 4, 2011, ECF No. 441). The third class would consist of the
24 combination of the first two classes. The gravamen of the claims are twofold: (1) Defendants
25 failed to pay wages as required under state law; and (2) Defendants failed to pay commissions

1 and bonuses as required under the contracts. As discussed, although all six types of exemplar
2 contracts purport to be independent contractor agreements, Type I contracts appear in reality to
3 be independent contractor agreements, whereas Type II contracts may in fact be employment
4 contracts disguised as independent contractor agreements. It is likely that no wage claims lie
5 under Type I agreements, but wage claims may lie under Type II agreements. Breach of contract
6 claims may lie under either type of agreement, because commissions and bonuses are payable
7 whether any particular contract is for independent services versus direct employment. Based on
8 the exemplar contracts, there is an insufficient commonality of claims among the broad putative
9 classes Plaintiffs ask the Court to certify. Although Taylor is capable of making a damages
10 calculation manageable, he apparently made his present calculations without knowing which
11 employees were under which types of contract for which periods of time, which premises are
12 critical to a proper calculation.

13 **2. Numerosity and Typicality**

14 It is not clear from the evidence attached to the motion how many named Plaintiffs or
15 putative class members claim to have entered into which type of contract. Plaintiffs simply
16 adduce six types of exemplar contracts. Plaintiffs have not shown or alleged how many putative
17 class members entered into which types of contract. Nor have Plaintiffs shown that any named
18 Plaintiffs entered into any of the particular types of exemplar contracts adduced.⁵ Plaintiffs have
19 therefore failed to show either numerosity or typicality.

20 It is possible that there are many more types of contract beyond the six exemplar
21 contracts produced. Any particular type of exemplar contract (or other, unattached type of
22 contract) may have been signed by a small number of Plaintiffs and putative class members. A
23 class action would not be appropriate for such a putative class or subclass. And no class action
24 is appropriate to adjudicate claims arising under contracts of types that no named Plaintiff

25 ⁵In fact, Plaintiffs have redacted the names of the signatories to the exemplar contracts.

1 entered into.

2 Because Plaintiffs have failed to satisfy three of the four requirements of Rule 23(a)—the
3 Court assumes without deciding that Plaintiffs satisfy the adequacy-of-representation
4 requirement—it need not analyze the case under Rule 23(b). Plaintiffs may be able to cure the
5 deficiencies noted herein, but the Court will not conditionally certify the class in the meantime.
6 *See* Fed. R. Civ. P. (c)(1) advisory committee’s note to 2003 amendments. It is possible many
7 Plaintiffs and putative class members have valid claims against Defendants on the merits, but
8 Plaintiffs have not met their burden of showing that certification of the broad classes they
9 identify is appropriate.

10 Because the type of contract will largely control the relevant issues of law, it is the
11 critical dividing line between putative subclasses in this case. Type I contracts indicate
12 independent contractors who likely have no wage claims but may have commission and bonus
13 claims. Type II contracts more likely indicate direct employees who may have wage claims, as
14 well. In any case, until putative subclasses are sorted out by type of contract, the Court will not
15 be able to efficiently adjudicate pretrial motions, much less manage a trial. Plaintiffs should
16 demonstrate which named Plaintiffs worked under which type of contract, in which locations,
17 and for which periods of time, preferably according to the type system identified herein. They
18 should then demonstrate, or at least fairly estimate, how many other Westgate employees worked
19 under the same types of contract, in which locations, and for which periods of time. Such a
20 demonstration will go far towards demonstrating typicality, numerosity, and commonality.

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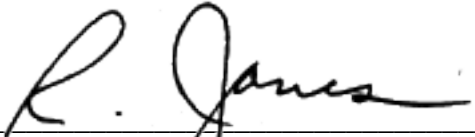
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1 **CONCLUSION**

2 IT IS HEREBY ORDERED Motion to Certify Class (ECF No. 441) is DENIED.

3 IT IS SO ORDERED.

4 Dated this 9th day of May, 2011.

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6 _____
7 ROBERT C. JONES
8 United States District Judge

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