UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

| Case No.: | CV 14-02900-AB (Ex) | Date: | October 30, 2014 |
|---|---|---|---|

Title: Lorraine Flores v. Swift Transportation Company et al.

Present: The Honorable ANDRÉ BIROTTE JR.

| Carla Badirian | N/A |
|---|---|
| Deputy Clerk | Court Reporter |

| Attorneys Present for Plaintiff: | Attorneys Present for Defendants: |
|---|---|
| None Appearing | None Appearing |

**Proceedings:** **[In Chambers] Order Granting the Motion to Conditionally Certify FLSA Collective Action**

Pending before the Court is a Motion to Certify the FLSA Collective Action filed by Plaintiff, Lorraine Flores, on July 25, 2014. (Dkt. No. 29.) Defendants, Swift Transportation Company, filed their Opposition on August 18, 2014. (Dkt. No. 35.) Plaintiff filed a Reply on September 15, 2014. (Dkt. No. 55.) Oral argument was heard before this Court on October 27, 2014. (Dkt. No. 66.) Having considered the materials and oral argument submitted by the parties, the Court **GRANTS** the Motion to Conditionally Certify the Collective Action.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Defendants operate an interstate shipping corporation that engages in the shipping of goods and products to different customers. (Dkt. Nos. 41, 56.) Defendants operate their transportation services in thirty (30) different terminals around the country including California, Tennessee, Texas, Utah Virginia, Washington, and Wisconsin. (Dkt. No. 1.) At these terminals, Defendants staff terminal leaders, fleet drivers, safety coordinators, and a number of customer service representatives. (Dkt. No. 1, p. 2 ¶ 2.) Plaintiff is employed as a customer service representative. (*Id.*)

Customer service representatives formulate customer bill process forms, truck

pickup and drop off schedules, monitor the status of deliveries, and oversee any other responsibilities that are associated with assisting customers with their orders. (*Id*.) In performing these duties, Defendants provide Plaintiff with a salary based income. (*Id*. at p.4 ¶ 1.)

Based on claims of unpaid overtime wages, Plaintiff filed a class action complaint on April 15, 2014 against Defendants alleging Fair Labor Standards Act ("FLSA") violations. (Dkt. No. 1.) Proceeding with its complaint, Plaintiff moved to conditionally certify class under FLSA on July 25, 2014. (Dkt. No. 23.) Defendants opposed conditional certification on August 18, 2014. (Dkt. No. 37.) Plaintiff filed its reply on September 15, 2014. (Dkt. No. 55.)

## II. LEGAL STANDARD

### A. Fair Labor Standards Act

Section 16(b) of the FLSA provides that an employee may bring a collective action on behalf of himself and other "similarly situated" employees. 29 U.S.C. §216(b). FLSA requires covered employers to compensate non-exempt employees for time worked in excess of statutorily-defined maximum hours. *See* 29 U.S.C. §207(a). In a §216(b) collective action, employees wishing to join the suit must "opt-in" by filing a written consent with the court. *Id.* If an employee does not file a written consent, then that employee is not bound by the outcome of the collective action. *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 466 (N.D. Cal. 2004). The court may authorize the named §216(b) plaintiffs to send notice to all potential plaintiffs, and may set a deadline for those plaintiffs to "opt-in" to the suit. *Id.*; *see also Pfohl v. Farmers Ins. Group.*, No. CV03-3080 DT(RCx), 2004 WL 554834 at *2 (C.D. Cal. 2004).

It is within the discretion of the district court to determine whether certification of a §216(b) collective action is appropriate. *Leuthold*, 224 F.R.D. at 466. Although the FLSA does not require certification for collective actions, certification in a §216(b) collective action is an effective case management tool, allowing the court to control the notice procedure, the definition of the class, the cut-off date for opting-in, and the orderly joinder of the parties. *See Hoffmann-La Roche Inc., v. Sperling*, 493 U.S. 165, 170-72 (1989).

Most courts have applied a two-step approach to determining whether certification of a §216(b) collective action is appropriate. *See Leuthold*, 224 F.R.D. at 466. Under the two-step approach, the first step is for the court to decide, "based primarily on the pleadings and any affidavits submitted by the parties, whether the potential class should be given notice of the action." *Id.* at 467; *see also Pfohl*, 2004 WL 554834 at *2. Given the limited amount of evidence generally available to the court at this stage in the proceedings, this determination is usually made "under a fairly lenient standard and typically results in

conditional class certification." *Id.*

To obtain conditional certification, the plaintiffs must show that "the proposed lead plaintiffs and the proposed collective action group are 'similarly situated' for purposes of §216(b)." *Leuthold*, 224 F.R.D. at 466. "Plaintiff need not show that his position is or was identical to the putative class members' positions; a class may be certified under the FLSA if the named plaintiff can show that his position was or is similar to those of the absent class members. However, unsupported assertions of widespread violations are not sufficient to meet Plaintiff's burden." *Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003) (internal citations omitted); *see also Bernard v. Household Intern., Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va. 2002) ("Mere allegations will not suffice; some factual evidence is necessary.").

The second step occurs once discovery is complete and the case is nearing readiness for trial. At that time, the party opposing §216(b) collective action treatment may move to decertify the class. *Leuthold*, 224 F.R.D. at 466 (citing *Kane v. Gage Merchandising Svcs., Inc.*, 138 F. Supp. 2d 212, 214 (D. Mass. 2001)). Whether to decertify is a factual determination, made by the court, based on the following factors: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendants with respect to the individual plaintiffs; and (3) fairness and procedural considerations. *Id.* (citing *Pfohl*, 2004 WL 554834 at **2-3). If after examining the factual record the court determines that the plaintiffs are not similarly situated, then the court may decertify the collective action and dismiss the opt-in plaintiffs without prejudice. *Id.* (citing *Kane*, 138 F. Supp. 2d at 214).

## III. DISCUSSION

### A. The Court Will Adhere to the Two-Step Analysis

Where substantial discovery has been completed, some courts have skipped the first-step analysis and proceeded directly to the second step. *See Pfohl*, 2004 WL 554834 at *3 (noting that the parties agreed that there had been extensive discovery, and finding that it was therefore appropriate to proceed directly to the second step analysis; denied certification); *Ray v. Motel 6 Operating, L.P.*, 1996 WL 938231 at 4 (D. Minn. 1996) (declining to apply "lenient standard at the notice stage" because "the facts before the Court are extensive"); *see also Hinojos v. Home Depot*, 2006 WL 3712944 (D. Nev. 2006) (applying second step analysis, noting that it was clear that the named plaintiffs were not similarly situated, and that the action would not be manageable); *but see Leuthold*, 224 F.R.D. at 468 (holding that "[a]lthough it is a close question, given that extensive discovery has already taken place, the Court agrees with plaintiffs that the court ought to begin the FLSA class certification analysis with the question whether notice should be sent to the prospective class.").

Defendants argue that the Court should skip the first step in this case and instead apply a more stringent step in determining if the case is manageable as it did in *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 267 (D. Minn. 1991).

The Court finds that it is appropriate to decide the motion under the first-tier analysis. The Court further believes that the analysis in *Severtson* is inapplicable to this case. In *Severtson*, the Court reversed the magistrate's ruling because the allegations standing alone were insufficient in determining whether notice should be authorized in a collective action. *Severtson*, 137 F.R.D. at 266. The complaint in *Severtson* alleged ADEA claims under FLSA of a pattern of "eliminating older, more highly paid employees and replacing them with younger, lesser paid employees" and nothing more. *Id*. Thus, in *Severtson*, the factual record was not extensive. This case, by contrast, is still in its early stages, but still has declarations from a number of employees (three of which have been compelled to arbitration (Dkt. No. 63)) confirming the overtime wage violations in the complaint. (Dkt. No. 29, Decl. Flores, Miller, Cecil, Raiford.) Nothing in the record suggests that allegations were as vague as *Severtson*.

Therefore, this Court will proceed in following the two-step analysis for this case. *See Pfohl*, 2004 WL 554834 at *3; *Wren v. RGIS Inventory Specialists*, No. C06-05778 JCS, 2007 WL 4532218 (N.D. Cal. 2007).

### B. Plaintiff Have Shown that they are "Similarly Situated" to the Members of the Proposed Group.

It appears that some discovery has been conducted on up to seven (7) class members.[1] The collective action could consist of potentially three hundred and fifty (350) customer service representatives according to Defendants.[2] (Dkt. No. 35, p. 14 ¶ 2.) Therefore, the Court is presented with a sample size that represents less than one percent (1%) of the total plaintiffs.

Defendants take the position that conditional certification is inappropriate here because a majority, nearly eighty percent (80%), of the potential opt-in plaintiffs have entered into binding arbitration agreements. (*Id*. at pp. 3-4.) However, during the hearing on October 27, 2014, references were made to one particular opt-in member, Angel Jackson, who Defendants initially thought had entered into a binding arbitration

1 The Court acknowledges that a majority of the class members in the record have been compelled to arbitrate their claims. (Dkt. No. 63.)

2 Defendants have noted that one of the opt-in class members, Ronald E. Wimer, was never employed as a customer service representative and therefore is not a potential putative member of the class in question. (Dkt. No. 35, p. 3 fn 3.)

agreement. (Dkt. No. 66.) Further investigation revealed that Angel Jackson had not in fact entered into such an agreement. (*Id*.) As such, there is a possibility that the minimal discovery conducted to date is insufficient to provide an accurate profile of the potential plaintiffs who may or may have not signed this arbitration agreement.

Therefore, the Court cannot scrutinize whether the plaintiffs are in fact similarly situated. This Court may ultimately come to the conclusion of decertifying the collective class, based on Defendants' assertions, after discovery has been conducted, but the Court will not assume at this stage that all the potential opt-in plaintiffs are ones who have entered into these binding arbitration agreements. Especially since Defendants acknowledge that there are a number of potential opt-in plaintiffs that have not signed this agreement, including the collective action representative, Lorraine Flores ("Plaintiff"). (Dkt. No. 35, p. 7.) Absent significant discovery in this case, the Court cannot seriously entertain simply skipping this step of conditional certification without more factual support set forth by Defendants. Accordingly, the Court will apply the lenient first-tier analysis.

Applying the lenient standard used in the first step of the analysis, the Court finds that conditional certification of a §216(b) collective action is appropriate.

Here, applying the lenient standard used in the first step of the analysis, the Court finds that conditional certification of a §216(b) collective action is appropriate. Plaintiff's complaint, declarations, and supporting exhibits proclaim that Plaintiff and other potential class members routinely worked in similar capacities as customer service representatives. (Dkt. No. 29.) Also, in that capacity, Plaintiff and other potential class members routinely were unpaid for working overtime. (*Id*.) The proposed class members are employed in positions similar to the named Plaintiff's position, and those members of the proposed group were likely to have experienced similar alleged non-payment of overtime and wages.[3] Furthermore, Plaintiff have pointed to evidence – Lorraine Flores' declaration – that these alleged violations of the FLSA were committed as a result of Defendants' company decision in paying salaries exempt from overtime wages. (*Id*. at Flores Decl., p. 5 ¶ 10.) The factual allegations and supporting evidence that potential class members were not paid the overtime wages they earned, coupled with the allegation and evidence that not paying overtime is a company decision of Defendants, is sufficient to establish the common legal theory necessary to show that "there is a colorable claim that [consist of] a similarly situated group of people." *Ray v. Motel 6 Operating, Ltd. Partnership*, 1996 WL 938231, *4 -5 (D. Minn. 1996).

3 On October 3, 2014, this Court granted Defendants' Motion to Compel Individual Arbitration as to the other named plaintiffs on the record. (Dkt. No. 63.) This Court acknowledges such plaintiffs have signed binding arbitration agreements. However, evidence of the arbitration agreements was provided to the Court in a separate Motion (Dkt. No. 41) and after this Motion to Conditionally Certify Class was already filed. Therefore, the Court will still consider the declarations of those plaintiffs compelled to arbitration in determining this Motion.

In its opposition, Defendants focus on potential opt-in plaintiffs likely being bound to an arbitration agreement. (Dkt. No. 35.) However, such arguments are better suited for the more stringent second step of the §216(b) collective action certification analysis, that is, Defendants' arguments are better suited for a motion to decertify the §216(b) collective action once notice has been given and the deadline to opt-in has passed. Moreover, Defendants' citation to *Renton v. Kaiser Foundation Health Plan Inc.*, No. C00-5370 RJB, 2001 WL 1218773 (W.D. Wa. 2001), does not persuade the Court. The Court in that case followed the traditional Rule 23(a) analysis of the Federal Rules of Civil Procedure. *Id*. at *2. Conversely, this Court is applying the two-step analysis to which Defendants' issues are better addressed in connection with any second-stage motion to decertify or redefine the class. *See Leuthold*, 224 F.R.D. at 466.

Lastly, Defendants argue that Plaintiff fails to bring a uniform policy that demonstrates that the Plaintiff is similarly situated with the other proposed class members. (Dkt. No. 35.) As mentioned, Plaintiff need not show identical positions to the potential opt-in plaintiffs, but provide "a common policy or plan that violated the law." Mitchell v. Acosta Sales, LLC, 841 F. Supp. 2d 1105, 1117 (C.D. Cal. 2011); *Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003) (internal citations omitted) ("Plaintiff need not show that his position is or was identical to the putative class members' positions; a class may be certified under the FLSA if the named plaintiff can show that his position was or is similar to those of the absent class members….") Defendants' argument goes to the merits of the claims and is therefore not a proper ground for denying a motion for certification. *See, e.g., Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (stating that the court should not judge the ultimate merits of the case at the class certification stage.)

Consequently, the Court finds that Plaintiff have made the threshold showing that the potential members of the §216(b) collective action are "similarly situated," and that the collective action should be certified for purposes of notifying potential opt-in members of the pendency of the suit.

### C. Notice

The Court has considered the proposed formats of notifying potential opt-in plaintiffs. Plaintiff and Defendants agree that the name of the presiding judge should be omitted from notice forms. Moreover, the Parties agree that a statement of neutrality at the top of the notice form shall be added.

The points of contention include appointing a third party administrator to issue notice, having Defendants produce dates of birth, partial social security numbers, telephone numbers for returned notices, and provisions that mention costs of litigation and other discovery obligations if one were to opt-in to the collective action.

After considering the pleadings and the arguments presented to the Court during the hearing on October 27, 2014, the Court agrees with Plaintiff in their proposed notice method. Notice shall be conducted using Plaintiff's counsel, not a third party administrator. Moreover, a few modifications will be set forth in notifying the opt-in members. Defendants will provide Plaintiff with the names, addresses, and email addresses of the customer service representatives in question. However, if notice is returned due to a faulty address on file for a particular customer service representative, Defendants shall proceed to use the information they have to skip trace the particular customer service representative. Once the proper address is gathered, Defendants shall inform Plaintiff of the proper updates. Therefore, Plaintiff's proposed notice procedures shall be followed accordingly with the modifications made by the Court.

## IV. CONCLUSION

Based on the foregoing, the Court hereby **GRANTS** Plaintiff's §216(b) Motion and conditionally certifies the proposed collective action for purposes of notifying proposed opt-in members of the pendency of the suit.

**IT IS SO ORDERED.**