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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MONTE RUSSELL, on behalf of himself
and others similarly situated,

Plaintiff,

v.

WELLS FARGO & COMPANY,

Defendant.

No. C 07-3993 CW

ORDER GRANTING
PLAINTIFF'S MOTIONS
FOR LEAVE TO AMEND
THE COMPLAINT AND
FOR CONDITIONAL
COLLECTIVE ACTION
CERTIFICATION

Plaintiff Monte Russell moves for an order conditionally certifying this action as a representative collective action under the Fair Labor Standards Act (FLSA) and directing that notice be distributed to prospective class members. He also moves for leave to file an amended complaint. Defendant Wells Fargo & Co. does not oppose the motion for leave to amend, and that motion is therefore granted. See Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Defendant opposes conditional certification with respect to some, but not all, prospective class members. Defendant also objects to several aspects of the notice plan proposed by Plaintiff. The matter was taken under submission on the papers. Having considered all of the

1 papers submitted by the parties, the Court grants Plaintiff's
2 motion for conditional certification but modifies Plaintiff's
3 proposal for the form of notice and the method of its distribution.

4 BACKGROUND

5 Plaintiff was formerly employed by Defendant in the position
6 of PC/LAN Engineer 3 (PLE-3). He claims that Defendant unlawfully
7 classified his position, as well as the positions of PC/LAN
8 Engineer 4 and 5 (PLE-4 and PLE-5), as exempt from the FLSA's
9 requirements concerning overtime compensation. He sues on behalf
10 of himself and all individuals who served as a PLE-3, 4 or 5 and
11 were treated as exempt at any time since November 1, 2004.

12 Prior to the commencement of this lawsuit in August, 2007,
13 Defendant decided to reclassify all of its PLE-3 and PLE-4
14 employees as non-exempt. Plaintiff alleges that Defendant's
15 decision was made in response to contact by Plaintiff's counsel in
16 April, 2007 informing Defendant of Plaintiff's claim and attempting
17 to determine whether Defendant would be willing to resolve the
18 matter without litigation. Defendant disputes this and states that
19 its review of the classification of the PLE-3 and PLE-4 positions
20 began prior to contact by Plaintiff's counsel.

21 In any event, on July 11, 2007, Defendant sent all of its
22 then-current employees who were working or had worked in these
23 positions an email informing them of its decision to reclassify the
24 positions as non-exempt. It asked these employees to complete a
25 survey about their work hours to determine whether they were owed
26 back pay for overtime. The employees were given two days to
27 complete the survey. See 7/25/08 Snodgrass Dec. Ex. J. Defendant

1 compensated those who responded for hours worked in excess of forty
2 per week during the preceding two year period. Plaintiff claims
3 that Defendant underpaid these employees because it used the
4 "fluctuating work week" formula to calculate back wages in many
5 instances, failed to pay liquidated damages and failed to pay a
6 full three years' worth of back wages. Defendant disputes that its
7 employees are entitled to liquidated damages or three years' worth
8 of back wages, and contends that its use of the fluctuating work
9 week formula was appropriate.

10 Defendant distributed a form entitled, "Release of All Claims
11 for Wages," along with the payments for back wages. A
12 representative release form submitted to the Court states that, in
13 consideration for the payment of back wages, the recipient "hereby
14 releases and forever discharges Wells Fargo . . . from any and all
15 claims, demands, damages, actions and causes of action arising out
16 of or in any way connected with payment of [redacted] compensation,
17 salary, wages, incentive or bonus pay by Wells Fargo as a PC/LAN
18 Engineer 4 up to the date of the signature below." 7/25/08
19 Snodgrass Dec. Ex. O. In addition, employees receiving payment
20 were asked to sign a form entitled, "Payment Advice and
21 Resolution." A representative form states, "Your signature below
22 acknowledges the receipt of this payment [for all overtime hours
23 reported] in the amount of [redacted] . . . and your release of any
24 and all claims related to unpaid wages or other compensation that
25 you now have against Wells Fargo Bank NA up through the date of
26 your signature below." Id.

1 LEGAL STANDARD

2 The FLSA provides for a collective action where the
3 complaining employees are "similarly situated." 29 U.S.C.
4 § 216(b). In contrast to class actions pursuant to Rule 23 of the
5 Federal Rules of Civil Procedure, potential members of a collective
6 action under the FLSA must "opt in" to the suit by filing a written
7 consent with the court in order to benefit from and be bound by a
8 judgment. Centurioni v. City and County of San Francisco, 2008 WL
9 295096, at *1 (N.D. Cal.). Employees who do not opt in may
10 subsequently bring their own action. Id.

11 The FLSA does not define the term, "similarly situated," nor
12 has the Ninth Circuit defined it. As noted by the Tenth Circuit,
13 there is little circuit law defining "similarly situated."
14 Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th
15 Cir. 2001). Although various approaches have been taken to
16 determine whether plaintiffs are "similarly situated," courts in
17 this circuit have used an ad hoc, two-step approach. See Wynn v.
18 Nat'l Broad. Co., Inc., 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002)
19 (noting that the majority of courts prefer this approach);
20 Thiessen, 267 F.3d at 1102-03 (discussing three different
21 approaches district courts have used to determine whether potential
22 plaintiffs are "similarly situated" and finding that the ad hoc
23 approach is arguably the best of the three approaches); Hipp v.
24 Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001)
25 (finding the two-step approach to certification of § 216(b) opt-in
26 classes to be an effective tool for district courts to use). Under
27 this approach, the district court makes two determinations on an ad
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1 hoc, case-by-case basis. The court first makes an initial "notice
2 stage" determination of whether potential opt-in plaintiffs are
3 similarly situated to the representative plaintiffs, determining
4 whether a collective action should be certified for the purpose of
5 sending notice of the action to potential class members. See,
6 e.g., Thiessen, 267 F.3d at 1102. For conditional certification at
7 this notice stage, the court requires little more than substantial
8 allegations, supported by declarations or discovery, that "the
9 putative class members were together the victims of a single
10 decision, policy, or plan." Id. The standard for certification at
11 this stage is a lenient one that typically results in
12 certification. Wynn, 234 F. Supp. 2d at 1082.

13 The second determination is made at the conclusion of
14 discovery, usually on a motion for decertification by the
15 defendant, utilizing a stricter standard for "similarly situated."
16 Thiessen, 267 F.3d at 1102. During this second stage analysis, the
17 court reviews several factors, including the disparate factual and
18 employment settings of the individual plaintiffs; the various
19 defenses available to the defendant which appear to be individual
20 to each plaintiff; fairness and procedural considerations; and
21 whether the plaintiffs made any required filings before instituting
22 suit. Id. at 1103.

23 Notably, collective actions under the FLSA are not subject to
24 the requirements of Rule 23 of the Federal Rules of Civil Procedure
25 for certification of a class action. Id. at 1105. "The requisite
26 showing of similarity of claims under the FLSA is considerably less
27 stringent than the requisite showing under Rule 23 of the Federal
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1 Rules of Civil Procedure. All that need be shown by the plaintiff
2 is that some identifiable factual or legal nexus binds together the
3 various claims of the class members in a way that hearing the
4 claims together promotes judicial efficiency and comports with the
5 broad remedial policies underlying the FLSA." Wertheim v. Arizona,
6 1993 WL 603552, *1 (D. Ariz.) (citations omitted).

7 DISCUSSION

8 Defendant does not oppose sending notice of this action to
9 PLE-3 and PLE-4 employees generally. However, it objects to
10 sending notice to PLE-5 employees and to PLE-3 and PLE-4 employees
11 who received notice of this lawsuit previously. It also objects to
12 the method by which Plaintiff requests notice be distributed and
13 disputes the need for "corrective" notice.

14 I. Notice to PLE-5 Employees

15 Defendant argues that PLE-5 employees are not similarly
16 situated to Plaintiff because the responsibilities of PLE-5s differ
17 significantly from those of PLE-3s and 4s. According to Defendant,
18 PLE-5s are required regularly to exercise discretion and
19 independent judgment. In support of its position, Defendant points
20 to its decision to reclassify all PLE-3 and PLE-4 employees as non-
21 exempt while leaving the exempt status of PLE-5 employees
22 unchanged.

23 Defendant's assertions contradict the allegations in the
24 complaint. In addition, Plaintiff has submitted five declarations
25 from individuals who have worked as either PLE-3s or PLE-4s. The
26 declarants state that, through their employment with Defendant,
27 they came to know PLE-5s. One declarant who worked as a PLE-3

1 states that, based upon his "training, experience and discussions
2 with other employees,"

3 the work of PC/LAN Engineers 3, 4, and 5 was functionally
4 the same and did not vary significantly from location to
5 location. PC/LAN Engineers 4 and 5 had primary duties
6 similar to the duties of a PC/LAN Engineer 3 The
7 primary work of PC/LAN Engineers 4 and 5 was [] highly
8 structured and constrained by Wells Fargo's predetermined
9 instructions, specifications, policies, and procedures,
10 and did not normally require consistent exercise of
11 discretion and independent judgment.

12 7/25/08 Snodgrass Dec. Ex. A ¶ 8.¹

13 The Court cannot resolve at this time the issue of whether the
14 duties of PLE-5s are sufficiently individualized or distinct from
15 those of PLE-3s and 4s so as to render them not similarly situated.
16 Doing so would require the Court to evaluate the relative strength
17 of the parties' evidence, which would not be appropriate at the
18 first stage of collective action certification. This matter can be
19 resolved after discovery on a motion for decertification. In
20 addition, Defendant's argument against conditional certification is
21 premised on its assertion that Plaintiff's FLSA claim on behalf of
22 PLE-5s is meritless. This goes to the heart of the claim and is
23 not appropriate for adjudication at this early stage.

24 Plaintiff has made a sufficient showing that an "identifiable
25 factual or legal nexus binds together the various claims of the
26 class members," Wertheim, 1993 WL 603552 at *1, including PLE-5s.
27 Accordingly, the Court will conditionally certify a class that
28 includes PLE-3s, 4s and 5s.

¹Defendant objects to the relevant portion of the declarations
as hearsay. However, it is not apparent that the declarants'
knowledge of the duties of PLE-5s is based exclusively on their co-
workers' out-of-court statements.

1 II. Need for Corrective Notice

2 Plaintiff asserts that the class notice should include
3 "strongly worded corrective language" informing potential opt-in
4 plaintiffs that they may join the action despite Defendant's
5 "improper attempts to privately settle FLSA claims, offer partial
6 payments of back wages, and obtain releases of FLSA claims." Pl.'s
7 Mot. at 16. It is not clear that Defendant's offer to compensate
8 its employees for back wages was necessarily improper or that the
9 amount of the compensation Defendant offered was unreasonably low.
10 However, to the extent Defendant attempted to secure a release of
11 the FLSA claims against it, its actions were was improper. The
12 parties agree that releases prohibiting suit under the FLSA are not
13 valid. See O'Brien v. Encotech Const. Servs., Inc., 203 F.R.D.
14 346, 349 (N.D. Ill.). A plain reading of the release provided to
15 Defendant's employees reveals that it is not limited to non-FLSA
16 claims.² Accordingly, the notice should inform potential
17 collective action members that they may opt in to this action even
18 if they have signed a release.

19 III. Additional Notice to PLE-3s and PLE-4s Who Have Already
20 Received Notice

21 Earlier in these proceedings, the parties agreed to send a
22 notice of the action to PLE-3s and PLE-4s who had not already
23 received payment of back wages from Defendant. This group includes
24 potential collective action members who did not receive an hours

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26 ²The parties dispute whether potential collective action
27 members who signed the release should be precluded from pursuing
28 their claims under California law. This issue is not appropriate
for resolution on the present motion.

1 survey because they were no longer employed by Defendant at the
2 time the survey was distributed. The notice gave recipients forty-
3 five days to opt in to this action. Twenty-four individuals chose
4 to opt in.

5 Plaintiff now asserts that the class members who were
6 previously sent notice of the action should be provided with a
7 second notice and given another opportunity to opt in. He claims
8 that this second notice is necessary because, due to the limited
9 availability of information at the time the initial notice was
10 sent, that notice did not contain information about how Defendant's
11 payments to certain members of the class had been calculated.

12 Plaintiff has not shown that the rights of the class members
13 who received notice but did not opt in will be prejudiced if they
14 are not given a second opportunity to do so. The new information
15 concerning Defendant's payment of back wages is not directly
16 relevant to these class members' claims because they did not
17 receive any such payment. The information in the previous notice
18 was sufficient to inform these class members of the subject of the
19 lawsuit and enable them to make an informed decision about whether
20 it was in their interest to join it. Therefore, notice may not be
21 re-sent class members who received notice previously.

22 IV. Form of Notice

23 The Court has reviewed the proposed notices submitted by the
24 parties. A revised version of the notice, incorporating aspects of
25 each party's proposal, is attached to this order as Exhibit 1. The
26 Court approves this version for distribution to members of the
27 conditional class. A redlined version identifying the differences
28

1 between the approved version of the notice and Plaintiff's version
2 is attached as Exhibit 2. A seventy-five day opt-in period will
3 apply, as agreed to by Plaintiff in his reply.

4 V. Method of Notice

5 Plaintiff asks the Court to order Defendant to provide his
6 counsel with contact information for all putative class members so
7 that he can provide them with the Court-approved notice. He also
8 requests that Defendant be ordered to post the notice in work
9 locations and distribute it through the payroll system.

10 The Court finds that it would be more appropriate to have a
11 third-party claims administrator distribute the collective action
12 notice, as was done with the first notice that was sent to some
13 members of the putative class. Although Plaintiff correctly notes
14 that the Court is authorized to order the production of potential
15 class members' contact information to Plaintiff's counsel, he has
16 not explained why it would be preferable for his counsel to oversee
17 distribution of the notice.³ Contact information for Plaintiff's
18 counsel will be contained in the notice, and potential class
19 members may contact counsel if they wish. In addition, Defendant
20 has agreed to pay for the costs of a third-party administrator, and
21 thus having notice provided through such an administrator will not
22 entail additional cost to Plaintiff.

23 The Court also finds that providing notice by first class mail

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25 ³The Court expresses no opinion as to whether this contact
26 information may be independently subject to production during
27 discovery. Plaintiff's argument that such information is relevant
28 to developing his claims is more appropriately addressed in the
context of a discovery motion; it is not relevant to the issue of
notice.

1 will be sufficient to assure that potential collective action
2 members receive actual notice of this case. See Adams v. Inter-Con
3 Sec. Systems, Inc., 242 F.R.D. 530, 541 (N.D. Cal. 2007) ("First
4 class mail is ordinarily sufficient to notify class members who
5 have been identified."). Plaintiff's only argument to the contrary
6 is based on his conjecture that Defendant's database may not have
7 the most up-to-date contact information for class members.
8 Defendant, however, is unlikely to have obsolete contact
9 information for its current employees, and posting notice in the
10 workplace or distributing it via the payroll system will do nothing
11 to notify those class members who are no longer employed by
12 Defendant. Therefore, Plaintiff's request for an order requiring
13 Defendant to post the notice in work locations and to distribute
14 the notice through the payroll system is denied.

15 CONCLUSION

16 For the reasons set forth above, the Court GRANTS Plaintiff's
17 motion for leave to amend the complaint and GRANTS his motion for
18 conditional certification of a collective action on behalf of all
19 current or former employees of Defendant's who held the position of
20 PC/LAN Engineer 3, PC/LAN Engineer 4 or PC/LAN Engineer 5, who were
21 paid a salary, and who were treated as exempt from the laws
22 requiring overtime for some period of time after November 1, 2004
23 through the date of final disposition of this action.⁴ Defendant
24 shall, within ten days of the date of this order, produce to a

25 _____
26 ⁴To the extent the Court relied upon evidence to which
27 Defendant objected, the objections are overruled. To the extent
28 the Court did not rely on such evidence, Defendant's objections are
overruled as moot.

1 mutually agreed-upon third-party administrator the names,
2 addresses, alternate addresses, social security numbers and
3 telephone numbers of all prospective members of the class. Notice
4 will proceed as detailed in this order.

5 IT IS SO ORDERED.

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7 Dated: 9/3/2008



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CLAUDIA WILKEN
United States District Judge