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

16 RICHARD T. NEWTON; FRANK M.
17 MCNEAL; and SEAN A. BEATON,

18 Plaintiffs/Consenters,

19 v.

20 ARNOLD SCHWARZENEGGER, in his
21 official capacity as Governor of the State
22 of California; DEBBIE ENDSLEY, in her
23 official capacity as the Director of the
24 California Department of Personnel
25 Administration; JOHN CHIANG, in his
26 official capacity as the Controller of the
27 State of California; MATTHEW CATE,
28 in his capacity as the Secretary of the
California Department of Corrections and
Rehabilitation; BERNARD WARNER, in
his official capacity as the Chief Deputy
Secretary of the California Division of
Juvenile Justice; STEPHEN MAYBERG,
in his official capacity as the Director of
the California Department of Mental
Health, and DOES 1 THROUGH 10,
INCLUSIVE,

Defendants/Respondents

CASE NO. CV 09 5887 VRW

REPLY TO DEFENDANT'S OPPOSITIONS
TO PLAINTIFFS' MOTION FOR
CONDITIONAL CERTIFICATION OF
COLLECTIVE ACTION UNDER 29 U.S.C.
§216(b)

DATE: June 3, 2010
TIME: 10:00 a.m.
CTRM: 6 (Hon. V. R. Walker)
TRIAL: none

1 **I. INTRODUCTION / SUMMARY OF ARGUMENT**

2 Plaintiffs seek conditional certification of their collective action, thereby permitting them to
3 provide notice, and the opportunity to join the action, to those similarly situated. The potential
4 consenters, to whom Plaintiffs propose to provide notice of this collective action, consist of those public
5 employees identified as employees in State Bargaining Unit 6 (BU6). All of the approximately 30,000
6 employees in BU6 are similarly situated to Plaintiffs because Defendants' furlough program covers all
7 BU6 employees. As these prospective opt-in members to this action are all subject to a single policy,
8 plan or decision, i.e., the manner in which the furlough program is applied to them in violation of the
9 FLSA, the action should be conditionally certified and notice circulated. Further, Plaintiffs' proposed
10 notice to the prospective opt-in members is appropriate, and they respectfully request that the Court
11 approve it.

12 **II. THE PROPOSED MEMBERS OF THE COLLECTIVE ACTION ARE SIMILARLY**
13 **SITUATED TO PLAINTIFFS AND EACH OTHER**

14 Defendants' argument that members of the proposed opt-in class are not similarly situated to
15 plaintiffs is based on defendants' inaccurate understanding of plaintiffs' claim and focuses on
16 inconsequential statistics. Defendants inaccurately state that "Plaintiffs' primary claim is that the self-
17 directed furlough program does not permit BU6 employees to take off their furlough days within the
18 month." (See Defendants' Opposition brief p.8, lines 26-27, Pacer Document Number 35 (P.D. #35).
19 This is not true. Plaintiffs' claim that they, like all other prospective opt-in members being correctional
20 peace officers in BU6, as a result of being forced to work their furlough days without full pay, are not
21 being paid in a timely manner; are not having the furlough hours they work counted towards overtime
22 worked; and are not having records properly maintained of the work they performed or for payments
23 made to them. (Plaintiffs' Complaint (P.D. #1), p. 7, lines 13 to 23; p, 8, lines 1 to 10). Defendants
24 fixate on the "not being paid in a timely manner" FLSA violation claim, and then attempt to use their
25 questionable statistics to show that varying percentages of the prospective opt-in members have been
26 able to use their accumulated banked furlough days as days off in a manner that differentiates them from
27 Plaintiffs. This distinction is both incorrect and irrelevant.

28 ///

1 The ability of prospective opt-in members to eventually take their “banked” furlough days off is
2 of no import to the case, unless they were able to take all of these furlough days off within the same pay
3 period in which they were worked. Only then would the payment for furlough days worked be made in
4 a timely manner. Defendants’ contention that Plaintiffs are not similarly situated to the small percentage
5 of the prospective opt-in members that have been able to eventually take all their furlough time off is
6 similarly inconsequential as Defendants provide no evidence showing any of the prospective opt-in
7 members were able to take all of their accumulated furlough days off in the same month in which they
8 earned them, or that they were properly timely paid the full wages when due.

9 Defendants are correct in that Plaintiffs have been able to take both more and less furlough days
10 off than some other members of the proposed opt-in class. However, this is not the primary issue
11 regarding whether they are or are not similarly situated to prospective opt-in members for the purpose of
12 being lead Plaintiffs in this collective action. The primary issue is that all of the proposed opt-in
13 members, like the named Plaintiffs, have been subject to their employer’s same single decision, policy,
14 or plan requiring them to work their furlough days with a promise of a day off in the future. The U.S.
15 Supreme Court instructs that a proper collective action encourages judicial efficiency by addressing, in a
16 single proceeding, claims of multiple plaintiffs who share “common issues of law and fact arising from
17 the same alleged [prohibited] activity.” Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989).
18 Courts have distilled this instruction into the requirement that a proponent for conditional certification
19 present the court with “nothing more than substantial allegations that putative class members were
20 together the victims of a single decision, policy, or plan.” Thiessen v. Gen. Elec. Capital Corp., 267 F.3d
21 1095, 1102-03 (10th Cir. 2001)(internal quotations omitted); see also, e.g., Gerlach v. Wells Fargo &
22 Co., No. 05-0585, 2006 WL 824652, at *2 (N.D.Cal. Mar.28, 2006). As a whole, the prospective opt-in
23 members are the victims of a single decision, policy, or plan to force them to work their furlough days
24 without full pay. Defendants do not contest this fact.

25 **III. PLAINTIFFS HAVE MET THEIR MINIMAL BURDEN BY ALLEGING A VIOLATION**
26 **OF THE FLSA**

27 Defendants argue that a collective action cannot be granted because Plaintiffs have failed to
28 show a violation of the FLSA. However, given that a motion for conditional certification usually comes

1 before much, if any, discovery, and is made in anticipation of a later more searching review, a movant
2 bears a very light burden in substantiating its allegations at this stage. Because the court has minimal
3 evidence at the 'notice stage,' this determination "is made using a fairly lenient standard and typically
4 results in 'conditional certification' of a representative class." Reeves v. Alliant Techsystems, Inc., 77
5 F.Supp.2nd 242, 246. (D RI 1999); Kane v. Gage Merchandising Services, Inc., 138 F.Supp.2d 212, 214
6 (D MA 2001). See Pfohl v. Farmers Ins. Group, No. 03-3080, 2004 WL 554834 at *2 (C.D. Cal. June 2,
7 2005). A majority of courts, including district courts in the Ninth Circuit, have adopted a two-stage
8 certification procedure for collective actions brought under the FLSA. "At the first stage, the district
9 court approves conditional certification upon a minimal showing that the members of the proposed class
10 are 'similarly situated'; at the second stage, usually initiated by a motion to decertify, the court engages
11 in a more searching review." Beaupertuy v. 24 Hour Fitness USA, Inc., No. 06-0715, 2007 WL
12 707475 at *5 citing Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 467 (N.D.Cal. 2004).

13 Further, Defendants' argument, that Plaintiffs have failed to meet a minimal burden, is more
14 appropriate for an argument of failure to state a claim for which relief can be granted pursuant to a Rule
15 12(b)(6) motion, which Defendants did not avail themselves of when they had the opportunity.
16 Defendants have not filed a Rule 12(b)(6) motion and should not be permitted to use Plaintiffs'
17 conditional certification motion as a vehicle to do so.

18 Discovery is open, and Defendants have yet to provide Plaintiffs' work and pay records, as
19 promised in their initial disclosure. (Declaration of James Harrison (Harrison Decl.) ¶ 4). While
20 Defendants state that "Plaintiffs provide no documentation, such as their own pay stubs or time sheets,
21 to support these factually-driven claims," (Defendants' Opposition Brief (P.D. #35) page 13, lines 17-
22 19). Defendants fail to acknowledge that they, as Plaintiffs' employer, are the custodians of these
23 records. The only work and pay records formally provided to Plaintiffs' counsel by Defendants in the
24 course of this litigation have been selective, incomplete, and made available only as attachments to
25 declarations made in support of Defendants' Opposition to Plaintiffs' Motion for Conditional
26 Certification. (Harrison Decl. ¶ 4). Only after a full disclosure of all work and pay records of all named
27 Plaintiffs and Consenters is provided by Defendants, and full discovery be conducted on the matter,
28 would any further motion to dismiss be appropriate.

1 **IV. THE OVERTIME REQUIREMENT IS NOT MET UNLESS ALL STRAIGHT-TIME**
2 **WAGES ARE PAID**

3 Federal law unequivocally dictates that State employees who work overtime must receive the
4 requisite overtime wages plus their full straight time pay. The State of California, as their employer,
5 must adhere to this requirement. (See Garcia v. San Antonio Metro. Trans. Auth. 469 U.S. 528 (1984);
6 Biggs v. Wilson, 1 F.3d 1537, 1543 (9th Cir. 1993); White v. Davis, 30 Cal.4th 528, 577 (Cal. Sup. Ct.
7 2003)).

8 Overtime compensation, at a rate not less than one-and-one-half times the regular rate of pay,
9 must be paid for each hour worked in the work week in excess of the applicable maximum hour
10 standard. This extra compensation for excess hours of overtime work under the Act cannot be said to
11 have been paid to an employee unless **all** the straight-time compensation due him for the non-overtime
12 hours under his contract (express or implied) or under any applicable statute has been paid. (29 C.F.R. §
13 778.315.) This section codifies the only meaningful interpretation of the FLSA's overtime pay
14 requirement; plainly, an employer would evade that requirement by failing to pay an overtime worker's
15 base compensation while purporting to pay for his excess hours.

16 The Ninth Circuit addressed this regulation in Donovan v. Crisostomo 689 F.2d 869 (9th Cir.
17 1982) holding that employers may not frustrate the FLSA by purporting to pay overtime while
18 withholding part of an employee's straight-time wages. In Crisostomo, a company based in Guam hired
19 residents of the Philippines to work construction for 48 hours per week and deducted \$32 a week for
20 lodging from their paychecks. (Id. at p. 871.) Upon the Secretary of Labor's complaint, the district court
21 held the employer liable for unpaid overtime compensation as a result of this "kickback." (Id. at p. 872.)
22 The employer argued on appeal that the Secretary had no authority to seek underpaid wages when the
23 wages paid exceed the minimum wage. (Id. at p. 876.) The Ninth Circuit rejected this contention and
24 affirmed the judgment against the employer. Citing 29 C.F.R. § 778.315, the Court reasoned that an
25 employer could effectively eliminate the overtime premium by reducing an employee's straight time
26 wages, and that to do so would be an impermissible evasion of the FLSA's requirements. (Crisostomo,
27 *supra*, 689 F.2d at 876.)

28 Acknowledging these authorities, the California Supreme Court in Davis held that, "in order to

1 comply with the FLSA, the state ... must timely *pay nonexempt employees who work overtime their full*
2 *salary for all straight time worked plus one and one-half times their regular rate of pay for overtime.*"

3 (Davis, *supra*, 30 Cal.4th at p. 578 [emphasis added].)

4 All of the named Plaintiffs regularly work overtime. (See declarations of Newton (P.D. #25) ¶¶
5 11, 14.; McNeal (P.D. #26) ¶¶ 8, 10; and Beaton (P.D. #27) ¶¶ 12, 14, in support of Plaintiffs' Motion
6 for Conditional Certification. See also Declaration Patricia Ordez in Support of Defendants' Opposition
7 to Plaintiffs' Motion for Conditional Certification (P.D. #44) ¶¶ 8, 9, 10, 11, 12, 13). Historically,
8 Defendant CDCR has paid hundreds of millions of dollars a year in overtime wages to the prospective
9 opt-in members. In fiscal year June 30, 2008 to June 30, 2009, approximately \$365,000,000 in overtime
10 wages were paid to state employees in BU6. (Harrison Decl. ¶ 9). Defendants' furlough program was
11 implemented at the beginning of February, 2009. Only discovery will reveal how many prospective opt-
12 in members, who worked overtime between February 2009 and the present, have not been compensated
13 for their straight time wages, in violation of the FLSA, in the pay period in which they earned them in.

14 **V. DEFENDANTS' ATTEMPT TO DISTRACT THE COURT WITH PROCEDURALLY**
15 **AND SUBSTANTIVELY IMPROPER MOTIONS TO STRIKE PORTIONS OF**
16 **PLAINTIFFS' DECLARATIONS**

17 Historically, motions to strike are disfavored because they are seen as a drastic remedy and are often
18 used as a delay tactic. Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000); RDF Media Ltd.
19 v. Fox Broadcasting Co., 372 F.Supp.2d 556, 566 (CD CA 2005). As a result motions to strike are
20 granted infrequently. Stanbury Law Firm, *supra*. Even when a motion to strike is technically correct
21 the motion may be denied by the Court unless it can be shown that the pleadings under attack are
22 somehow prejudicial to the moving party. William Schwarzer, A. Wallace Tashima and James M.
23 Wagstaffe, Cal. Practice Guide: Federal: Civil Procedure Before Trial (The Rutter Group 2010) § 9:376,
24 p. 9-116 (rev. #1 2010). Further, this Court's Local Rules require that a motion contain, "the points and
25 authorities in support of the motion." Northern District Local Rules 7-2(b)(4). Defendants' Motions to
26 Strike filed concurrently with their Opposition fail to properly comply with this Court's procedural
27 requirements.

28 Defendants' five (5) motions to strike portions of Plaintiffs' Declarations should be disregarded
as procedurally and substantively improper. Defendants' list eleven (11) specific objections to portions

1 of the Plaintiffs' Declarations, but Defendants' fail to provide any analysis or legal authority for their
2 assertions, as required by the rules of this Court. As Defendants' have failed to provide any authority
3 for their objections to the cited portions of Plaintiffs' Declarations in Support of the Collective Action,
4 Defendants' motions to strike should be denied. Further, Plaintiffs bear a very light burden in
5 substantiating their allegations at this stage. See, e.g., Aguayo v. Oldenkamp Trucking, No. 04-6279,
6 2005 WL 2436477 (E.D.Cal. Oct. 3, 2005) (disregarding hearsay and foundational challenges to
7 declarations submitted in support of motion for conditional certification).

8 **VI. PLAINTIFFS' PROPOSED NOTICE IS APPROPRIATE**

9 Defendants argue that prospective opt-in members are not required to accept the Plaintiffs'
10 counsel as their own and must be informed that they may retain their own counsel. Plaintiffs' proposed
11 notice contains this provision. (P.D. #24, Attachment #1, page. 5, line 4). Defendants next argue
12 Plaintiffs' proposed notice is improper as the court's name is in the heading and on the signature line.
13 However, Plaintiffs' proposed notice, once accepted and issued, was not intended to be circulated in
14 pleading format with the Judges signature line. As such, this objection raised by Defendants should be
15 disregarded. Use of the term "class" in the body of the notice was an inadvertent error on Plaintiffs'
16 part, and the terms exclusion from the notice is acceptable. Defendants' other edits to Plaintiffs'
17 proposed notice do not aid in clarifying the substantive content of the notice, and should be disregarded.

18 **VII. CONCLUSION**

19 Plaintiffs request that this Court certify the collective action under 29 U.S.C. § 216(b), and
20 approve notice of this action to prospective opt-in members in the form Plaintiffs have proposed, with
21 the exclusion of the term "class".
22

23 Dated: May 20, 2010

**CALIFORNIA CORRECTIONAL
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24
25
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