

United States District Court  
For the Northern District of California

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

GLENN HILL,  
Plaintiff,  
v.  
R+L CARRIERS, INC.; R+L CARRIERS  
SHARED SERVICES, LLC,  
Defendants.

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No. C 09-1907 CW  
ORDER DENYING  
DEFENDANT SHARED  
SERVICES' MOTION FOR  
SUMMARY JUDGMENT AND  
GRANTING PLAINTIFF'S  
MOTION FOR  
CONDITIONAL CLASS  
CERTIFICATION AND  
APPROVAL OF HOFFMAN-  
LA ROCHE NOTICE  
(Docket Nos. 50, 61)

Defendant R+L Carriers Shared Services, LLC moves for summary judgment or, in the alternative, for partial summary judgment (Docket No. 50). Plaintiff Glenn Hill opposes the motion and moves for conditional class action certification and approval of his Hoffman-La Roche notice (Docket No. 61). Defendant opposes Plaintiff's motion. The motions were heard on December 17, 2009. Having considered oral argument and all of the papers filed by the parties, the Court DENIES Defendant's motion and GRANTS Plaintiff's motion.

BACKGROUND

Plaintiff Glenn Hill is a former employee of Defendant R+L Carriers Shared Services, LLC. Defendant provides operations and administrative employees to transportation services companies that operate under the R+L Carriers brand. Plaintiff was employed by Defendant between September, 2007 and December, 2008. At all times during his employment, Plaintiff was classified by Defendant as

1 exempt from overtime pay requirements and, accordingly, was not  
2 paid overtime compensation.

3 Plaintiff worked at Defendant's San Lorenzo terminal. He  
4 claims that his job title was "City Dispatcher," although Defendant  
5 asserts that he held the position of "First Shift Supervisor/City  
6 Dispatcher." See Hill Decl. ¶ 4; see also Nelson Decl. Ex. 2,  
7 58:1-5; Fishpaw Decl. ¶ 4. Plaintiff's job entailed dispatching  
8 drivers to pick up and deliver various types of freight. Defendant  
9 claims that Plaintiff's duties included: (1) conducting daily  
10 meetings with "the management team;" (2) conducting daily meetings  
11 with drivers; (3) scheduling delivery appointments; (4) addressing  
12 and resolving driver staffing issues; (5) ensuring that daily  
13 equipment inspections were completed; (6) monitoring drivers'  
14 progress in completing scheduled deliveries and employing  
15 discretion to make adjustments when necessary; (7) receiving  
16 customer inquiries for pickups; (8) instructing drivers on the most  
17 efficient way to complete their scheduled pickups; (9) monitoring  
18 each driver's performance and disciplining or recommending  
19 disciplinary action to the Service Center Manager as necessary; and  
20 (10) addressing and resolving customer complaints. Defendant  
21 maintains that, among other things, Plaintiff exercised discretion  
22 and independent judgment in performing these duties sufficient to  
23 warrant his exemption from overtime pay requirements.

24 Plaintiff acknowledges that he scheduled delivery  
25 appointments; took customers' orders; dispatched drivers for pick-  
26 up requests based upon computer-generated assignments; and, on rare  
27 occasions, handled customer complaints. He disputes, however,  
28 Defendant's characterization of the extent of his discretion and

1 maintains that the Service Center Manager,<sup>1</sup> not the City  
 2 Dispatcher, handled many of the duties described above. He asserts  
 3 that his discretion and authority were in fact limited. In  
 4 particular, he claims that he could not deviate from the  
 5 instructions contained in the Terminal Services Operation Manual,  
 6 which delineated his duties. And, to the extent he had discretion,  
 7 he was required to seek approval from the Service Center Manager  
 8 before taking action.

9 Plaintiff asserts that Defendant unlawfully mischaracterized  
 10 him as exempt from overtime pay requirements. In addition, he  
 11 alleges that Defendant failed to provide meal and rest breaks, and  
 12 did not keep and provide adequate work and payroll records as  
 13 required by law. He brings claims under the federal Fair Labor  
 14 Standards Act (FLSA), California's wage-and-hour laws and  
 15 California Business and Professions Code § 17200.

16 He intends to move to certify two subclasses for this action.  
 17 His complaint defines the nation-wide sub-class as:

18 All persons who worked for any period of time in the  
 19 United States, but outside of California, who were  
 20 classified as Dispatchers (including "City Dispatchers"  
 21 and any other position(s) who are either called, or  
 22 work(ed) as, dispatchers) in the three years prior to the  
 23 filing of this Complaint.

24 First Am. Compl. (FAC) ¶ 27. His California sub-class is defined  
 25 as:

26 All persons who worked for any period of time in  
 27 California who were classified as Dispatchers (including

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28 <sup>1</sup> Plaintiff and Defendant disagree about the title held by the  
 individual who has overall management duties over a terminal.  
 Plaintiff maintains that the individual's title was "Terminal  
 Manager" during his employment with Defendant. Without deciding  
 which title is factually accurate, the Court refers to this  
 position as "Service Center Manager" for the purposes of clarity.

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"City Dispatchers" and any other position(s) who are either called, or work(ed) as, dispatchers) in the four years prior to the filing of this Complaint, up through the final disposition of this action.

FAC ¶ 27.

DISCUSSION

I. Defendant's Summary Judgment Motion

A. Legal Standard

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

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1 Where the moving party bears the burden of proof on an issue  
2 at trial, it must, in order to discharge its burden of showing that  
3 no genuine issue of material fact remains, make a prima facie  
4 showing in support of its position on that issue. UA Local 343 v.  
5 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That  
6 is, the moving party must present evidence that, if uncontroverted  
7 at trial, would entitle it to prevail on that issue. Id.; see also  
8 Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th  
9 Cir. 1991). Once it has done so, the non-moving party must set  
10 forth specific facts controverting the moving party's prima facie  
11 case. UA Local 343, 48 F.3d at 1471. The non-moving party's  
12 "burden of contradicting [the moving party's] evidence is not  
13 negligible." Id. This standard does not change merely because  
14 resolution of the relevant issue is "highly fact specific." See  
15 id.

16 B. Analysis

17 1. Summary Judgment Based on Exemption from Overtime  
18 Pay Requirements

19 Under the FLSA and California law, employees must ordinarily  
20 be paid overtime compensation if they work more than forty hours in  
21 one week. 29 U.S.C. § 207(a)(1); Cal. Lab. Code § 510. Both  
22 federal and state law exempt from this rule employees who work in  
23 executive and administrative capacities. 29 U.S.C. § 213(a)(1);  
24 Cal. Lab. Code § 515; Cal. Code Regs. tit. 8, § 11090(1)(A)(2)  
25 (codifying California Industrial Welfare Commission Wage Order No.  
26 9-2001, which pertains to employees in the transportation  
27 industry). Also exempt from overtime coverage are certain  
28 employees of motor carriers covered by the federal Motor Carrier

1 Act. 29 U.S.C. § 213(b)(1); 29 C.F.R. § 782.2; Cal. Code Regs.  
2 tit. 8, § 11090(3)(L).

3 Employers have the burden of proving that an employee is  
4 exempt from federal and state overtime pay requirements. See Gieg  
5 v. DDR, Inc., 407 F.3d 1038, 1045 (9th Cir. 2005); Gomez v.  
6 Lincare, Inc., 173 Cal. App. 4th 508, 515 (2009) (citing Sav-On  
7 Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 338 (2004)).  
8 Courts construe exemptions narrowly against employers. Klem v.  
9 County of Santa Clara, California, 208 F.3d 1085, 1089 (9th. Cir.  
10 2000); Gomez, 173 Cal. App. 4th at 515. The determination of  
11 whether an exemption applies requires a fact-intensive inquiry.  
12 See Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 945 (9th  
13 Cir. 2009) (citing Tumminello v. United States, 14 Cl. Ct. 693, 697  
14 (1988) ("The determination of whether an exemption applies to a  
15 given individual . . . is a very fact-specific exercise.").

16 Defendant claims that it is entitled to summary judgment  
17 because Plaintiff was properly classified as an exempt employee.  
18 It asserts that he was subject to the administrative, executive,  
19 motor carrier and "combination" exemptions under federal and state  
20 law. Because Defendant would bear the burden at trial to prove  
21 that Plaintiff was an exempt employee, it must show that there is  
22 no genuine issue of material fact concerning each element of an  
23 exemption in order to prevail on summary judgment.

24 a. Administrative Employee Exemption

25 Plaintiff asserts that Defendant does not show, as a matter of  
26 law, that he exercised sufficient discretion and independent  
27 judgment to qualify as an administrative employee.

28 Both federal and state law exempt administrative employees

1 from overtime pay requirements. A component common between the  
2 federal and state exemptions is the purportedly exempt employee's  
3 exercise of discretion and independent judgment. Under federal  
4 law, the employee must have a "primary duty" that "includes the  
5 exercise of discretion and independent judgment with respect to  
6 matters of significance."<sup>2</sup> 29 C.F.R. § 541.200. The California  
7 analog exempts an employee who "customarily and regularly exercises  
8 discretion and independent judgment." Cal. Code Regs. tit. 8,  
9 § 11090(1)(A)(2)(b).

10 Plaintiff provides testimonial and documentary evidence that  
11 contradicts Defendant's assertion that he exercised sufficient  
12 discretion and independent judgment to be exempt. He states that  
13 drivers' assignments were generated by computer and that his role  
14 was limited to distributing these assignments to drivers. Nelson  
15 Decl., Ex. A 96:11-97:19; see also Fishpaw Decl., Ex. C at  
16 RLC000520 (explaining that there is a "default driver" assigned to  
17 each "destination area"). Further, Plaintiff states that when he  
18 was confronted with imbalances in drivers' workloads, he would  
19 first ask the Service Center Manager whether he could make  
20 adjustments. Nelson Decl., Ex. A 99:25-100:11.

21 The Terminal Manual corroborates Plaintiff's position. For  
22 many duties, including modifying drivers' work schedules or calling  
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24 <sup>2</sup> Federal law provides additional guidance in determining  
25 whether an employee exercises sufficient discretion and independent  
26 judgment. Employees exercise discretion and independent judgment  
27 "even if their decisions or recommendations are reviewed at a  
28 higher level." 29 C.F.R. § 541.202(c). "The fact that an  
employee's decision may be subject to review and that upon occasion  
the decisions are revised or reversed after review does not mean  
that the employee is not exercising discretion and independent  
judgment." Id.

1 in an additional driver, the Manual instructs a City Dispatcher  
2 first to seek the Service Center Manager's approval. See Fishpaw  
3 Decl., Ex. C at RLC000503, RLC000506. With regard to driver  
4 discipline, the Manual provides that the City Dispatcher may not  
5 take action without first consulting the Service Center Manager  
6 because the "Service Center Manager is responsible for dealing with  
7 discipline issues." Fishpaw Decl., Ex. C at RLC000570. Further,  
8 contrary to Defendant's assertion, City Dispatchers do not contact  
9 customers when a driver misses a scheduled pickup; instead, this  
10 duty is given to the Service Center Manager. Fishpaw Decl., Ex. C  
11 at RLC000548.

12 The mandatory consultation of the Service Center Manager  
13 suggests that Plaintiff did not exercise discretion or independent  
14 judgment on "matters of significance" or "customarily or  
15 regularly." Instead, the Manual implies that Plaintiff's role was  
16 limited to identifying problems and reporting them to the Service  
17 Center Manager. In turn, the Service Center Manager ultimately  
18 decided how to resolve these issues. Indeed, much of the Terminal  
19 Manual prescribes, in substantial detail, how to perform the duties  
20 of the City Dispatcher, most of which appear ministerial in nature.  
21 This suggests that discretion was not a central component of  
22 Plaintiff's job.

23 Citing Vinole, Defendant asserts that the Court should  
24 consider an employer's realistic expectations to determine whether  
25 Plaintiff was an exempt employee. See 571 F.3d at 945. However,  
26 an employer's expectations do not determine whether an employee  
27 performs exempt duties. As Vinole states, in the context of  
28 analyzing whether a California exemption applies, a court first

1 "examines in an individualized fashion the work actually performed  
2 by the employee to determine how much of that work is exempt." Id.  
3 Then, the court turns to whether "the employee's work was  
4 consistent with the employer's expectation and whether those  
5 expectations were realistic." Id. Here, Defendant's expectations,  
6 as embodied by the Terminal Manual, are consistent with Plaintiff's  
7 description of his work. Defendant's testimonial evidence, to the  
8 extent that it suggests Defendant had even higher expectations of  
9 Plaintiff, creates a genuine issue of material fact that must be  
10 resolved at trial.

11 Plaintiff's testimonial and documentary evidence contradicts  
12 Defendant's evidence that Plaintiff exercised discretion and  
13 independent judgment with respect to matters of significance in his  
14 job as a City Dispatcher. Because this creates a triable issue on  
15 whether Plaintiff was an exempt administrative employee, summary  
16 judgment on this ground is not warranted.

17 b. Executive Employee Exemption

18 Plaintiff maintains that Defendant does not show that he  
19 satisfied all the requirements necessary to qualify as an exempt  
20 executive employee. For employees to qualify as exempt executive  
21 employees under federal and state law, they must, among other  
22 things: (1) manage the enterprise in which they work or a  
23 "customarily recognized department or subdivision thereof," and  
24 (2) have authority to hire or fire other employees or, in the  
25 alternative, have particular weight given to their suggestions and  
26 recommendations as to the hiring, firing, advancement, promotion or  
27 any other status change of other employees. 29 C.F.R. § 541.100;  
28 Cal. Code Regs. tit. 8, § 11090(1)(A)(1).

1 Defendant acknowledges that Plaintiff's primary duty was  
2 dispatching. As noted above, Plaintiff testified at his deposition  
3 and the Terminal Manual states that Plaintiff first had to seek  
4 leave of the Service Center Manager before taking many substantive  
5 actions. These facts allow a reasonable inference that, in  
6 contrast to Defendant's assertion, Plaintiff did not have  
7 management responsibilities.

8 Even if Plaintiff had managerial duties, he did not have the  
9 requisite influence over personnel decisions. Defendant concedes  
10 that Plaintiff lacked authority to hire or fire drivers. Nelson  
11 Decl., Ex. 1 at 170:6-10; Nelson Decl., Ex. 2 at 244:8-9, 268:12-  
12 14. And with regard to the influence of his recommendations,  
13 Plaintiff has proffered sufficient evidence to contradict  
14 Defendant's assertion that his suggestions were given particular  
15 weight. Federal law provides factors to consider in determining  
16 whether "particular weight" was afforded, including "the frequency  
17 with which such suggestions and recommendations are made or  
18 requested" and "the frequency with which the employee's suggestions  
19 and recommendations are relied upon." 29 C.F.R. § 541.105.

20 Plaintiff testified that he was not asked for recommendations, and,  
21 to the extent that he gave any, they were ignored. Nelson Decl.,  
22 Ex. A, 131:21-23, 170:8-10. Defendant did not provide contrary  
23 evidence to show that any of Plaintiff's recommendations resulted  
24 in substantive personnel action. Thus, a jury could reasonably  
25 infer that Plaintiff did not sufficiently influence Defendant's  
26 personnel decisions.

27 Thus, summary judgment on the ground that Plaintiff was an  
28 exempt executive employee is unwarranted because there is a triable

1 issue on whether Plaintiff performed executive duties and had the  
2 requisite influence over personnel decisions.

3 c. Motor Carrier Exemption

4 To qualify as an exempt employee under the federal motor  
5 carrier exemption, the employee must, among other things, "engage  
6 in activities of a character directly affecting the safety of  
7 operation of motor vehicles in the transportation on the public  
8 highways of passengers or property in interstate or foreign  
9 commerce within the meaning of the Motor Carrier Act." 29 C.F.R.  
10 § 782.2(a).<sup>3</sup> Generally, dispatching is not considered work that  
11 affects the safety of motor vehicle operation. See 29 C.F.R.  
12 § 782.2(f); cf. id. § 782.6(c)(1) (discussing the applicability of  
13 the exemption to mechanics, and stating that activities "which do  
14 not directly affect such safety of operation include those  
15 performed by employees whose jobs are confined to such work as that  
16 of dispatchers . . . .").<sup>4</sup>

17 \_\_\_\_\_  
18 <sup>3</sup> Defendant maintains that Plaintiff was also exempt from  
19 state overtime pay requirements under California's motor carrier  
20 exemption. However, it does not make a prima facie showing that  
21 this state exemption applies to Plaintiff. The California  
22 exemption applies to employees whose hours of service are subject  
23 to 49 C.F.R. §§ 395.1-395.13. Cal. Code Regs. tit. 8,  
24 § 11090(3)(L). However, these federal regulations relate to "hours  
25 of service for drivers." 49 C.F.R. pt. 395; see also 49 C.F.R.  
26 § 395.1(a)(1) (stating that part 395 applies to "all motor carriers  
27 and drivers"). Because Defendant has not provided evidence that  
28 Plaintiff was a driver subject to these regulations, it is not  
entitled to summary judgment that Plaintiff was exempt under the  
California motor carrier exemption.

<sup>4</sup> Defendant cites McIntyre v. FLX of Miami, Inc., 2008 WL  
4541017 (S.D. Fla.), for the proposition that dispatchers can be  
exempt under the motor carrier exemption. There, the plaintiff's  
responsibilities included "checking the vehicles for tire safety,  
adequate oil, and verifying the vehicle was in safe operation  
before the driver left FLX's facility for deliveries." Id. at \*7.  
(continued...)

1 Plaintiff provides evidence contradicting Defendant's showing  
2 that his duties directly impacted vehicle safety. He stated at his  
3 deposition that he did not conduct truck inspections or otherwise  
4 handle truck safety. Nelson Decl., Ex. 1 at 141:25-142:2.  
5 Instead, he stated that he was instructed that he "was to be no  
6 part of it," and that safety was under the purview of the Service  
7 Center Manager and the Safety Manager. Nelson Decl., Ex. 1 at  
8 142:2-4. Also, Plaintiff stated that, if a driver experienced a  
9 mechanical malfunction on the road, the driver would call the  
10 "Breakdown Department," which, in turn, would provide Plaintiff  
11 with information concerning towing the truck back to the terminal.  
12 Nelson Decl., Ex. 1 at 133:24-134:2. These statements support a  
13 reasonable inference that Plaintiff's duties did not directly  
14 affect the safety of Defendant's vehicles.

15 Thus, there is a triable issue on whether Plaintiff was exempt  
16 from overtime pay under the motor carrier exemption, and summary  
17 judgment based on this exemption is not warranted.

18 d. Exempt through Combination of Exemptions

19 Under federal law, "an employee whose primary duty involves a  
20 combination of exempt administrative and exempt executive work may  
21 qualify for exemption." 29 C.F.R. § 541.708. California appears  
22 to recognize a similar "combination" exemption. See Cal. Div. of  
23 Labor Standards Enforcement Opinion Letter of May 23, 2003, at 5.

24 As noted above, Defendant has not proffered uncontroverted  
25

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26 <sup>4</sup>(...continued)

27 Thus, in that case, the dispatcher had duties related to safety  
28 that extended beyond mere dispatching. Here, Defendant has not  
proffered uncontested evidence that Plaintiff played a similar  
role.

1 evidence that Plaintiff's work primarily consisted of  
2 administrative or executive tasks or both. Thus, summary judgment  
3 on this basis is not warranted.

4 2. Partial Summary Judgment as to Plaintiff's Other  
5 Claims

6 Defendant asserts that if the Court grants summary judgment  
7 that Plaintiff was exempt, summary judgment would be warranted on  
8 his claims for recordkeeping violations, failure to pay wages and  
9 unfair business practices. Because the Court does not find that  
10 Defendant has shown that Plaintiff is exempt from overtime pay, the  
11 Court denies summary judgment on these other claims.

12 II. Plaintiff's Motion for Conditional Certification and Approval  
13 of Hoffman-La Roche Notice

14 A. Legal Background

15 The FLSA authorizes workers to sue for unpaid overtime wages  
16 on their own behalf and on behalf of "other employees similarly  
17 situated." 29 U.S.C. § 216(b). Unlike class actions brought under  
18 Federal Rule of Procedure 23, however, collective actions brought  
19 under the FLSA require that individual members "opt in" by filing a  
20 written consent. See 29 U.S.C.A. § 216(b) ("No employee shall be a  
21 party plaintiff to any such action unless he gives his consent in  
22 writing to become such a party and such consent is filed in the  
23 court in which such action is brought.").

24 In Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169  
25 (1989), the Supreme Court held that, "in appropriate cases,"  
26 district courts should exercise their discretion to authorize and  
27 facilitate notice of a collective action to similarly situated  
28

1 potential plaintiffs.<sup>5</sup>

2 As noted above, the FLSA provides for a collective action  
3 where the complaining employees are "similarly situated." 29  
4 U.S.C. § 216(b). But the FLSA does not define "similarly  
5 situated," nor has the Ninth Circuit defined it. As noted by the  
6 Tenth Circuit, there is little circuit law defining "similarly  
7 situated." Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095,  
8 1102 (10th Cir. 2001).

9 Although various approaches have been taken to determine  
10 whether plaintiffs are "similarly situated," district courts in  
11 this circuit have used the ad hoc, two-tiered approach. See Wynn  
12 v. Nat'l Broad. Co., Inc., 234 F. Supp. 2d 1067, 1082 (C.D. Cal.  
13 2002) (noting that the majority of courts prefer this approach);  
14 see also Thiessen, 267 F.3d at 1102-03 (discussing three different  
15 approaches district courts have used to determine whether potential  
16 plaintiffs are "similarly situated" and finding that the ad hoc  
17 approach is arguably the best of the three approaches); Hipp v.  
18 Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001)  
19 (finding the two-tiered approach to certification of § 216(b)  
20 opt-in classes to be an effective tool for district courts to use).  
21 Under this approach, the district court makes two determinations,  
22 on an ad hoc, case-by-case basis. The court first makes an initial  
23 "notice stage" determination of whether plaintiffs are similarly  
24 situated, deciding whether a collective action should be certified

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25  
26 <sup>5</sup> Although Hoffmann-La Roche involved claims brought under the  
27 Age Discrimination in Employment Act (ADEA), because ADEA  
28 incorporates § 16(b) of the Fair Labor Standards Act into its  
enforcement scheme, the same rules govern judicial management of  
collective actions under both statutes. See, e.g., Shaffer v. Farm  
Fresh, Inc., 966 F.2d 142, 147 (4th Cir. 1992).

1 for the purpose of sending notice of the action to potential class  
2 members. See, e.g., Thiessen, 267 F.3d at 1102. For conditional  
3 certification at this notice stage, the court requires little more  
4 than substantial allegations, supported by declarations or  
5 discovery, that "the putative class members were together the  
6 victims of a single decision, policy, or plan." Id. The standard  
7 for certification at this stage is a lenient one that typically  
8 results in certification. Wynn, 234 F. Supp. 2d at 1082.

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

19 Notably, collective actions under the FLSA are not subject to  
20 the requirements of Rule 23 of the Federal Rules of Civil Procedure  
21 for certification of a class action. Id. at 1105. "The requisite  
22 showing of similarity of claims under the FLSA is considerably less  
23 stringent than the requisite showing under Rule 23 of the Federal  
24 Rules of Civil Procedure. All that need be shown by the plaintiff  
25 is that some identifiable factual or legal nexus binds together the  
26 various claims of the class members in a way that hearing the  
27 claims together promotes judicial efficiency and comports with the  
28 broad remedial policies underlying the FLSA." Wertheim v. Arizona,

1 1993 WL 603552, at \*1 (D. Ariz.) (citations omitted).

2 B. Analysis

3 1. Conditional Certification

4 As noted above, the standard for certification at the notice  
5 stage is a lenient one. Plaintiff has met his burden of showing  
6 that all City Dispatchers are similarly situated for the purposes  
7 of conditional class certification: all City Dispatchers do not  
8 receive overtime pay, work similar schedules and perform similar  
9 duties. Plaintiff has submitted his own deposition testimony and  
10 that of James Fishpaw, one of Defendant's vice-presidents of human  
11 resources, as well as documentary evidence, including Defendant's  
12 Terminal Manual and advertisements soliciting applicants for  
13 dispatcher positions, all of which support the allegations  
14 contained in his complaint and in the current motion. This showing  
15 satisfies his initial burden at the notice stage.

16 Defendant proffers fifteen declarations by individuals who  
17 currently hold the "First Shift Supervisor/City Dispatcher" or  
18 "City Dispatcher" positions. At this stage, these declarations do  
19 not negate the showing Plaintiff has made for conditional  
20 certification. Defendant may resubmit these declarations as part  
21 of a decertification motion, after discovery is complete. At that  
22 time, the Court will apply the more stringent standard discussed  
23 above.

24 2. Proposed Notice and Opt-in Form

25 The Court finds that Plaintiff's proposed notice, as modified  
26 and attached, provides putative class members with sufficient  
27 information about their rights and obligations. The notice shall  
28 be provided to putative class members who were employed by

1 Defendant within three years of the date of this Order. The Court  
2 sets a seventy-five day deadline for potential class members to  
3 return their consent forms. The parties appear to agree on a  
4 third-party administrator to distribute the notices; the parties'  
5 agreed-upon administrator shall distribute the notices through  
6 first-class mail. Any website providing information on this action  
7 shall include the Court's approved notice.

8 Plaintiff asks the Court to order Defendant to provide his  
9 counsel with contact information for all putative class members so  
10 that counsel can monitor the distribution of notices. He claims  
11 that Defendant is "attempting to hide putative class members."  
12 Reply at 12. Plaintiff points to the discrepancy between Mr.  
13 Fishpaw's deposition and his declaration filed in opposition to  
14 Plaintiff's conditional certification motion. In the former, Mr.  
15 Fishpaw estimated that Defendant has over 400 City Dispatcher  
16 positions, Nelson Decl., Ex. 6 at 52:19-25, and, in the latter, he  
17 states that Defendant "currently employs 128 City Dispatchers,"  
18 Fishpaw Decl. ¶ 7. This discrepancy warrants disclosing  
19 information about the putative class members to Plaintiff's  
20 counsel. Defendant shall disclose to Plaintiff, subject to a  
21 protective order if necessary, the number, location and actual job  
22 titles of persons who are classified as dispatchers.

#### 23 CONCLUSION

24 For the foregoing reasons, the Court DENIES Defendant's motion  
25 for summary judgment, or in the alternative, partial summary  
26 judgment. (Docket No. 50.) The Court GRANTS Plaintiff's motion  
27 for conditional collective action certification and authorization  
28 of a Hoffman-LaRoche opt-in notice (Docket No. 61). The Court

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For the Northern District of California

1 conditionally certifies Plaintiff's nation-wide sub-class and  
2 approves his proposed opt-in notice, as modified and attached.  
3 Notice shall be provided to putative nation-wide sub-class members  
4 who worked for Defendant within three years from the date of this  
5 Order. These class members have seventy-five days from the date  
6 the notice is mailed to return their consent forms. Defendant  
7 shall, within two weeks of the date of this order, produce to the  
8 mutually agreed-upon third-party administrator the names,  
9 addresses, alternate addresses, email addresses, social security  
10 numbers and telephone numbers of all prospective members of the  
11 class. Notice shall be mailed two weeks from the date that the  
12 third-party administrator receives the data. In addition,  
13 Defendant shall, within two weeks of the date of this order,  
14 disclose to Plaintiff the number, location and actual job titles of  
15 persons who are classified as dispatchers.

16 A further case management conference is scheduled for April  
17 29, 2010 at 2:00 p.m.

18 IT IS SO ORDERED.

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21 Dated: January 22, 2010



CLAUDIA WILKEN  
United States District Judge

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