

ENDORSED
FILED
ALAMEDA COUNTY

FEB 17 2006

CLERK OF THE SUPERIOR COURT
By HOLLIE M. ADAMIC
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

RAFIQZADA (DURAN), et al.,

Plaintiffs,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Defendant.

2001 035537

ORDER CONTINUING PLAINTIFFS'
MOTION FOR SUMMARY
ADJUDICATION PURSUANT TO CCP
§437c(h)

The Plaintiffs' Motion for Summary Adjudication, brought by Plaintiff Sam Duran and Matt Fitzsimmons, as representatives of the Plaintiff Class, came on regularly for hearing on December 16, 2005, in Department 20 of this Court, the Honorable Robert B. Freedman presiding. Plaintiffs and Moving Parties Sam Duran and Matt Fitzsimmons, as representatives of the Plaintiff Class, appeared by counsel Edward Wynne and J.E.B. Pickett of Righetti Wynne. Defendant and Opposing Party U.S. Bank National Association appeared by counsel Timothy

Freudenberger and Natalie A. Beccia of Carlton, DiSante & Freudenberger LLP. The hearing was continued for further briefing, and upon receipt of such further briefing, was taken under submission on December 21, 2005.

The Court having considered the pleadings, supplemental pleadings, evidence and arguments submitted in support of and in opposition to the motion, and good cause appearing, it is hereby ORDERED that the motion is CONTINUED for further hearing to May 11, 2006, at 2:00 p.m. in Department 20. The reasons follow.

I. The Motion May Properly Proceed as to the Separate Theories Asserted by Defendant for Exemption from Overtime

Defendant argued for the first time at the hearing that the instant motion could not be granted because it would not dispose of an entire affirmative defense as required by CCP §437c(f)(1). Defendant's Answer to the operative complaint asserted a single affirmative defense (the Seventh Affirmative Defense) concerning exempt status, which stated:

Plaintiffs and the proposed class members were, at all relevant times, properly classified as exempt employees for overtime purposes under California and Federal law.

Defendant argues that Plaintiffs' Motion, seeking to summarily adjudicate two of the exemptions Defendant has asserted would not eliminate the entire affirmative defense and therefore cannot be granted.

Plaintiffs argue that the single affirmative defense should be read to encompass several separate affirmative defenses based upon different theories of

exempt status. Under the rule set forth in *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, a complaint may not combine the pleading of multiple causes of action under a single, nominal cause of action to avoid summary adjudication under Section 437c(f)(1). So too, Plaintiffs argue, an answer may not combine multiple, distinct theories of affirmative defense to avoid summary adjudication.

The Court agrees that the purposes of the summary adjudication statute would not be served by permitting Defendant to avoid adjudication by pleading the separate and distinct issues of exemption from overtime pursuant to the administrative exemption and the commissioned sales exemption, under a single heading.¹ Defendant's objection to the motion on this basis, and on the grounds that the CRC 342 statement does not adequately identify the affirmative defenses to be adjudicated, are both without merit.

II. The Motion for Summary Adjudication of the Commissioned Sales Exemption from Overtime is GRANTED.

Class members are exempt from overtime, under Wage Order 4 §3(D), if their "earnings exceed one and one-half (1 ½) times the minimum wage [and] more than half of that employee's compensation represents commissions." The definition of "commission" in Labor Code §204.1 applies generally to class

¹ *North Coast Women's Care Medical Group v. Superior Court*, 2005 WL 3251789 (Dec. 2, 2005), previously cited by Defendant, has since been depublished upon the Fourth District's grant of rehearing of the matter on December 30, 2005, and is no longer citable. The Court has not relied on that decision in reaching this ruling.

members herein, and requires that for compensation to be deemed commission it must be “paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof.” (See *Ramirez, supra*, 20 Cal.4th at 804.)

Based upon the evidence in the record,² the Court finds that the compensation paid to class members under Defendant’s Sales Incentive Plans does not meet the definition of “commission.” The evidence offered, both in support of and in opposition to the motion for summary adjudication, demonstrate that Defendant’s incentive pay plans were discretionary, were only paid after certain threshold levels were met, and were based largely on team or enterprise performance, rather than on individual sales performance. (See Plaintiffs’ Statement of Undisputed Facts, Issue II, Nos. 1-6, and Defendant’s response thereto and evidence cited therein.) Because pay under these incentive plans does not constitute commissions, the Court need not reach the second requirement for the exemption, whether commissions constituted more than half of the class members’ compensation. Thus, Plaintiffs are GRANTED summary adjudication of that part of Defendant’s Seventh Affirmative Defense asserting the commissioned sales exemption.

² Plaintiffs’ objections to the declaration of Jeffrey S. Rosen are OVERRULED. Plaintiffs’ other objections to the Declarations of Biggs, Naftel, and Collins are SUSTAINED.

III. As to the Motion to Summarily Adjudicate the Administrative Exemption Affirmative Defense Under the, the Motion is Continued Per CCP §437c(h)

Plaintiffs also moved for summary adjudication of Defendant's affirmative defense under the administrative exemption.

The test for the administrative exemption for overtime applicable to this matter is set forth in Wage Order 4, §1(A)(2). Pursuant to the definition in 29 CFR §541.205(a), explicitly incorporated into Wage Order 4, sales work is not administratively exempt work. (*See* Wage Order 4 §1(A)(2)(f).)

Plaintiff contends that the evidence in the record, in the form of Defendant's own testimony, establishes that Defendant considers and expects the work of all class members to be sales work.

Defendant argues that time spent performing work that is exempt under the definitions in administrative exemption should be 'tacked' on to time spent performing work that fits under another overtime exemption, such that if the time combined is greater than 50% of the employee's work, the employee is exempt from overtime. Defendant cites a passing reference in a single opinion letter of the Division of Labor Standards Enforcement as its sole authority for the notion that California has adopted the "tacking" concept from federal law.

The federal regulation cited in the DLSE opinion letter is 29 C.F.R. §541.600 (a section that has been superseded and re-numbered in the current regulations by 29 C.F.R. §541.708.) Defendant has not offered, and the Court has not found, any indication in the Wage Orders that the federal tacking regulation

has been adopted into California law. Indeed, the current version of the DLSE Enforcement Manual contains an appendix showing which federal regulations have been explicitly incorporated into the Wage Orders and which have not. The Appendix indicates that former 29 C.F.R. §541.600 was not incorporated into the Wage Orders and is not guidance for their enforcement. (*See* DLSE Manual (2002 Update), Federal Regulations Appendix at 1, 28 [sections in ~~strikeout~~ are not applicable; section 29 CFR §542.600 in ~~strikeout~~].)

In the absence of any controlling authority indicating that the federal tacking regulation should be imported, the Court declines to find that the tacking concept can be applied to exempt status under California law. As the California Supreme Court has held, statutory provisions regulating wages that are enacted to protect employees are liberally construed with “an eye to promoting such protection,” such that exemptions to those protections are to be narrowly construed. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794; *see also Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592 [federal authorities are not applicable absence evidence that they were intended to be incorporated into Wage Orders].) Particularly here, where Defendants apparently contend that hours spent on non-sales, administrative duties can be added to sales duties (which are per se non-exempt under the administrative exemption) to pass the 50% threshold, the tacking concept does not apply to Defendant’s affirmative defenses.

Defendant submits evidence that class members had duties that were exempt, non-sales duties. Defendant also contends that additional evidence

regarding class members' duties, and the time spent on performing them, is necessary, but cannot now be offered.

The Court acknowledges that its prior protective order, and the sequence of events in class certification, may have prevented Defendants from timely obtaining information from class members to oppose this motion. Further, though the Court is inclined to find that Defendant's own characterizations of class members' duties preclude any assertion that they were truly exempt as administrative employees, Defendant should be afforded a fair opportunity to present evidence to oppose the motion.

The Court therefore grants Defendant's request for a continuance under CCP §437c(h) to conduct a limited amount of discovery that it contends will lead to "facts essential to justify opposition." Defendant has leave to conduct brief depositions, not to exceed 3 hours in length, of ten (10) class members of Defendant's choosing. The depositions shall be limited to the nature of the class member's duties and time spent performing those duties. Defendants shall notice the depositions forthwith, and they shall be completed no later than April 7, 2006. In conjunction with the deposition notices, Defendants may request production of documents in the possession and control of the individual class member that pertain to the nature of his or her duties and the time spent performing those duties. The parties are ordered to meet and confer forthwith on the scheduling of these depositions. The Court expects the parties to act cooperatively to expedite the completion of the depositions.

Defendant shall file and serve its further opposition no later than April 24, 2006, by overnight delivery. Plaintiffs shall file their further reply no later than May 4, 2006, by overnight delivery. Should the continued hearing date prove to be unworkable for either party, counsel are to meet and confer and present jointly-acceptable alternative dates via stipulation and proposed order.

The continued case management conference, currently set for February 28, 2006 at 10:00 a.m. is CONTINUED to May 11, 2006 at 2:00P.M. in Department 20.

IT IS SO ORDERED.

DATED: February 17, 2006

ROBERT FREEDMAN

Robert B. Freedman
Judge of the Superior Court