

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JASON J. SPAINHOWER, an
individual,

Plaintiff,

vs.

U.S. BANK NATIONAL
ASSOCIATION, a Delaware
Corporation; and DOES 1 through 50,
inclusive,

Defendants.

) Case No. 2:08-CV-00137-JHN-PJWx
) Consolidated with Case No. 2:08-CV-
) 00645-FMC-PJWx

**ORDER DENYING PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION**

Judge: Honorable Jacqueline H. Nguyen

L. MICHAEL WILLIAMS,
individually,

Plaintiff,

vs.

U.S. BANCORP dba U.S. BANK, a
Delaware Corporation, and DOES 1
through 10, inclusive,

Defendants.

1 The matter before the Court is Plaintiffs’ Motion for Class Certification
2 (“Motion”) (Docket No. 83). The Court has considered the Motion, Opposition,
3 and Reply briefs, and oral arguments at the hearing on March 15, 2010. For the
4 reasons below, the Court hereby DENIES the Motion and declines to certify
5 Plaintiffs’ proposed class.

6 **I.**

7 **BACKGROUND**

8 Plaintiffs Jason Spainhower and L. Michael Williams sued their former
9 employer, Defendant U.S. Bank National Association, for violations of California
10 law. Defendant removed to federal court on the basis of diversity jurisdiction.
11 (Notice of Removal 3.)

12 Since 2003, Defendant opened over 200 “in-store bank branches” in large
13 grocery stores throughout California. (P. & A. 1.) These in-store bank branches
14 enable branch personnel to offer banking products to grocery store customers.
15 (*Id.*) Plaintiffs were “in-store bank managers” (“IBMs”) at these facilities. (*Id.*)
16 Plaintiffs claim Defendant misclassified all IBMs, including Plaintiffs, as exempt
17 from California’s overtime pay and meal and rest requirements. (*Id.*) Defendant
18 contends IBMs were exempt from these requirements under the executive,
19 administrative, and outside sales exemptions. (Opp’n 2–4.)

20 Plaintiffs filed this Motion and supporting Points & Authorities (“P. &
21 A.”). Plaintiffs seek to certify as a class:

22 All people employed in California by Defendant, U.S. Bank, National
23 Association, as an In-Store Branch Manager Since [sic] September 13,
2003, who were paid on a salary basis.

24 (Mot. 2.) Plaintiffs wish to certify this class for purposes of four causes of
25 action: (1) failure to pay overtime compensation in violation of California Labor
26 Code § 1194; (2) failure to provide rest breaks and meal breaks in violation of
27 California Labor Code § 226.7; (3) claim for statutory waiting time penalties for
28 failure to pay wages under California Labor Code § 203; and (4) unlawful

1 business practices in violation of California Business & Professions Code §
2 17200 *et seq.* (*Id.*) Defendant filed an Opposition, and Plaintiffs filed a Reply.

3 **II.**

4 **DISCUSSION**

5 **A. Judicial Notice**

6 In support of their Motion, Plaintiffs filed a Request for Judicial Notice,
7 asking the Court to take judicial notice of (1) the Statement of Decision for Phase
8 I, *Duran v. U.S. Bancorp National Association* (Superior Court of California,
9 Alameda County, Northern Division, Case No. 2001-035537). In support of their
10 Reply, Plaintiffs requested the Court also take judicial notice of the following:
11 (2) Order Granting Plaintiffs’ Motion for Class Certification, *Morton v. Valley*
12 *Farm Transport, Inc.*, 2007 WL 1113999 (N.D. Cal. Apr. 13, 2007); (3)
13 Memorandum and Order Regarding Plaintiffs’ Motion for Class Certification,
14 *Alba v. Papa John’s USA*, 2007 WL 953849 (C.D. Cal. Feb. 7, 2007); (4) Order
15 Granting In Part and Denying In Part Plaintiffs’ Motion for Class Certification,
16 *Bibo v. Federal Express, Inc.*, 2009 WL 1068880 (N.D. Cal Apr. 21, 2009); (5)
17 Order Granting Motion for Class Certification, *Cervantes v. Celestica Corp.*, 253
18 F.R.D. 562 (C.D. Cal. July 28, 2008); (6) Order Granting Motion for Class
19 Certification, *Espinoza v. Domino’s Pizza, LLC*, 2009 WL 882845 (C.D. Cal.
20 Feb. 18, 2009); and (7) “Statement As To The Basis” issued by the Industrial
21 Welfare Commission of the State of California (“IWC”) to Wage Orders 1–13,
22 15, and 17, effective January 1, 2001, available at
23 <http://www.dir.ca.gov/iwc/wageorderindustriesprior.htm>.

24 In support of their Opposition, Defendant filed a Request for Judicial
25 Notice, asking the Court to take judicial notice of the following: (1) *Mendoza v.*
26 *Home Depot, U.S.A., Inc.*, No. CV 09-05843 SJO (JCx), Order Denying
27 Plaintiffs’ Motion for Class Certification and Denying Request for Oral
28 Argument on January 6, 2010 (C.D. Cal. Jan. 21, 2010); and (2) *Hostetter v.*

1 *Barnes & Noble*, No. CV 09-1572-VBF (SSx), Court Order Denying Plaintiffs’
2 Motion for Class Certification (C.D. Cal. Jan. 25, 2010).

3 The Court takes judicial notice of the six judicial decisions cited by
4 Plaintiffs, Nos. (1)–(6), and the two judicial decisions cited by Defendant, Nos.
5 (1)–(2). They constitute matters appropriate for judicial notice, as they are
6 capable of accurate and ready determination by resort to sources whose accuracy
7 cannot reasonably be questioned. Fed. R. Evid. 201(b). Moreover, because the
8 parties have requested judicial notice and supplied the Court with the necessary
9 information, i.e. the judicial opinions themselves, the Court must take judicial
10 notice under Federal Rule of Evidence 201(d).

11 However, the Court declines to take judicial notice of Plaintiffs’ Request
12 No. (7)—“Statement As To The Basis” issued by the Industrial Welfare
13 Commission of the State of California (“IWC”) to Wage Orders 1–13, 15, and 17,
14 effective January 1, 2001, available at
15 <http://www.dir.ca.gov/iwc/wageorderindustriesprior.htm>. It is not clear that the
16 documents are capable of accurate and ready determination by resort to sources
17 whose accuracy cannot be reasonably questioned. Fed. R. Evid. 201(b).
18 Accordingly, Plaintiffs’ seventh request for judicial notice is denied.

19 **B. Evidentiary Objections**

20 In support of their Reply, Plaintiffs filed objections to the Declaration of
21 William Watson and Declaration of Deanna Baisch. In denying Plaintiffs’
22 Motion, the Court did not consider these declarations and thus need not rule on
23 these objections. In support of their Opposition, Defendant also filed objections
24 to Plaintiffs’ evidence. Because the Court denies class certification, it need not
25 address these objections.

26 ///

27 ///

28 ///

1 **C. Class Certification**

2 **1. Legal Standard - Motions for Class Certification**

3 Pursuant to Federal Rule of Civil Procedure 23, one or more members of a
4 class may sue as representative parties on behalf of the entire class. The party
5 seeking class certification bears the burden of demonstrating that each of the four
6 requirements of Rule 23(a) and at least one requirement of Rule 23(b) is met.

7 *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

8 Although a court has “broad discretion” to certify a class, it must rigorously
9 assess whether the moving party has met its burden. *Id.* It may not inquire into
10 the merits of the class representatives’ underlying claims and must accept as true
11 the substantive allegations of the complaint. *Eisen v. Carlisle & Jacquelin*, 417
12 U.S. 156, 178 (1974); *In re Syncor ERISA Litig.*, 227 F.R.D. 338, 341 (C.D. Cal.
13 2005).

14 **2. Rule 23(a)**

15 To certify a class, Plaintiffs must demonstrate the four prerequisites under
16 Rule 23(a)—numerosity, commonality, typicality, and adequacy of
17 representation. *Zinser*, 253 F.3d at 1186. However, the Court need not address
18 Rule 23(a), since Plaintiffs fail to satisfy Rule 23(b).

19 **3. Rule 23(b)**

20 Plaintiffs must show that at least one requirement of Rule 23(b) is met.
21 *Zinser*, 253 F.3d at 1186. In their Motion, Plaintiffs seek class certification under
22 Rule 23(b)(2) or (b)(3). (Mot. 2.) However, in their Points & Authorities, they
23 only argue for certification under Rule 23(b)(3). (P. & A. 13, 19–21.) As
24 Plaintiffs cannot meet their burden without argument or evidence, the Court need
25 only consider whether certification is appropriate under Rule 23(b)(3).

26 Rule 23(b)(3) requires that questions of law or fact common to the class
27 “predominate” over questions affecting only individual members and that a class
28 action is superior to other available methods for fairly and efficiently

1 adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

2 Recent Ninth Circuit precedent is instructive. In *Vinole v. Countrywide*
3 *Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009), and *In re Wells Fargo Home*
4 *Mortgage*, 571 F.3d 953 (9th Cir. 2009), the Ninth Circuit issued opinions in two
5 companion cases. In *Vinole*, appellant sought review of an order denying class
6 certification in a wage and hour dispute where appellant had sought to represent a
7 class of external home loan consultants (“HLCs”). *Vinole*, 571 F.3d at 937. The
8 district court did not abuse its discretion, since the record supported its finding
9 that individual issues, *not* common ones, were likely to predominate. (*Id.*) Under
10 the outside salesperson exemption—also at issue in this case—employees are
11 exempt from overtime and other wage requirements if they customarily and
12 regularly work more than half the working time away from the employer’s place
13 of business selling tangible or intangible items or obtaining orders or contracts
14 for products, services, or use facilities. *Id.* at 945. Because this inquiry requires
15 “an individualized analysis of the way each employee *actually* spends his or her
16 time, and not simply [a] review [of] the employer’s job description,” class
17 certification was inappropriate. *Id.* (emphasis added). The fact that an employer
18 may classify a group of employees as exempt does not warrant a rule in favor of
19 class certification given the necessity for individualized analyses. *Id.* at 945–46.

20 In *In re Wells Fargo Home Mortgage*, the district court abused its
21 discretion in granting class certification under Rule 23(b) in a wage and hour
22 dispute similar to *Vinole*. *In re Wells Fargo Home Mortgage*, 571 F.3d at 955.
23 Plaintiffs were home mortgage consultants (“HMCs”), claiming violations of
24 labor and overtime laws. *Id.* Defendant relied on exemptions, including the
25 administrative and outside salesperson exemptions at issue here. *Id.* at 956.
26 Despite its conclusion that numerous individualized inquiries would be
27 necessary—for instance, regarding each HMC’s particular job experiences, the
28 amount of time each worked, how each spent his or her time, where each

1 primarily worked, and each's level of compensation—the district court found that
2 the defendant's uniform exemption policy satisfied predominance. *Id.* The
3 court's substantial reliance on defendant's internal policy of treating its
4 employees as exempt from overtime laws constituted reversible error. *Id.* at 955.
5 As in *Vinole*, “courts must still ask where the individual employees *actually* spent
6 their time.” *Id.* at 959 (emphasis added). Accordingly, because the court failed
7 to afford these individualized inquiries the appropriate weight and relied almost
8 exclusively on defendant's internal policy as the basis for class certification, the
9 Ninth Circuit remanded for a new certification analysis. *Id.* at 959.

10 Following the Ninth Circuit's remand, the district court denied class
11 certification. *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, No. C 06-
12 01770 MHP, 2010 U.S. Dist. LEXIS 3132, at *31 (N.D. Cal. January 13, 2010).
13 One of the factors that supported denial of class certification was defendant's
14 claim that it exercised no control over plaintiffs and did not monitor their work
15 activities. *Id.* at *18. Another factor was that defendant did not keep records
16 regarding whether a particular employee qualified for the exemption and did not
17 monitor possible changes in an employee's exemption eligibility. *Id.* The court
18 also considered that common proof would not show how each employee *actually*
19 spent his time or what percentage of each employee's work was spent in exempt
20 versus non-exempt activities. *See id.* at *20, *23. In light of these factors, the
21 court found that individualized inquiries “would inevitably consume the majority
22 of a trial” and “overwhelm the adjudication of common issues.” *Id.* at *21.

23 In this case, Plaintiffs have failed to establish predominance. Plaintiffs
24 assert that Defendant had the same expectation for all IBMS—to make their
25 branch goals. (P. & A. 14.) Plaintiffs further contend that Defendant had no
26 expectation as to how those goals were to be met. (*Id.*) In other words, as
27 Plaintiffs acknowledge and even cite to testimony in support thereof, Defendant
28 treated IBMs as owners of their individual branches and gave them nearly

1 limitless discretion as to how to achieve the company's goals.¹ (*Id.* at 14–15.) It
2 is Plaintiffs' own argument that weighs against class certification. With
3 substantial discretion as to how to operate one's branch comes the likelihood of
4 substantial differences in how each member of the proposed class spent his or her
5 workday. These likely variances weigh against the notion that common proof
6 would establish how each employee actually spent his or her time or what
7 percentage of each employee's work was spent in exempt versus non-exempt
8 activities. *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 2010 U.S.
9 Dist. LEXIS 3132, at *20, *23.

10 Plaintiffs rely heavily on Defendant's staffing models and requirements for
11 the IBM positions. While Defendant's staffing models and requirements may
12 prove susceptible to common proof, they do not establish predominance. Even if
13 Defendant had some expectation, based on its staffing models, as to how an IBM
14 would perform his or her daily tasks, this does not nullify the need for many
15 individualized inquiries into how the IBMs *actually* spent their time. *Id.*; *Vinole*,
16 571 F.3d at 945; *In re Wells Fargo Home Mortgage*, 571 F.3d at 959. In wage
17 and hour disputes where a defendant claims exemptions, like the administrative
18 and outside salesperson exemptions at issue, individualized inquiries about the
19 *actual* hours worked, percentage of exempt versus non-exempt work performed,
20 particular job experiences, and other inquiries are critical. *In re Wells Fargo*
21 *Home Mortgage*, 571 F.3d at 956. This is particularly true where employees are
22 given much discretion as to their daily work routine. *In re Wells Fargo Home*
23 *Mortgage Overtime Pay Litig.*, 2010 U.S. Dist. LEXIS 3132, at *18. Here, as
24 discussed, Plaintiffs acknowledge in their briefs and reiterated at oral argument
25

26 ¹ Although Plaintiffs argued at the hearing that *Alba v. Papa John's USA*,
27 supports their position, that case is factually dissimilar as the Papa John's defendants'
28 centralized control left those plaintiffs with virtually no discretion. *Alba*, 2007 WL
953849, at *10–11.

1 that Defendant gave IBMs much discretion regarding how to meet branch goals.
2 (P. & A. 14–15.) Although Plaintiffs argue that the Court can simply look to
3 staffing models to determine how an IBM was likely to have spent his or her day,
4 that is not true where the staffing models were recommendations as to how an
5 employee should accomplish his tasks and where those employees were given
6 nearly limitless discretion. (*Id.*) For these reasons, individual issues are likely to
7 predominate. As such, Plaintiffs have failed to meet their burden under Rule
8 23(b).

9 **III.**

10 **CONCLUSION**

11 For these reasons, the Court DENIES Plaintiffs' Motion (Docket No. 83)
12 and declines to certify the proposed class.

13 IT IS SO ORDERED.

14
15 Dated: March 25, 2010

16 
17 _____
18 Honorable Jacqueline H. Nguyen
19 UNITED STATES DISTRICT COURT
20
21
22
23
24
25
26
27
28