

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

DAVID DICKENS,

Plaintiff,

v.

J.G. WENTWORTH HOME LENDING, LLC,

Defendant.

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Civil Action No.: 4:17-cv-00642

ORDER

Pending before the Court is Plaintiff David Dickens’ (“Plaintiff”) Motion for Notice to Potential Plaintiffs and Conditional Certification (the “Motion”) (Dkt. 28). In the Motion, Plaintiff requests that the Court: (1) conditionally certify this case as a collective action; (2) order Defendant J.G. Wentworth Home Lending, LLC (“Defendant”) to provide Plaintiff with contact information for all those similarly situated employees in an electronic format within seven (7) days of the Court’s order granting conditional certification; and (3) direct the issuance of Plaintiff’s proposed notice to all such persons. *See* Dkt. 28 at 15. Defendant submitted a Response in Opposition (Dkt. 53) to the Motion; Plaintiff filed a reply (Dkt. 54); and Defendant filed a sur-reply (Dkt. 55).

On January 31, 2018, the Court held a hearing regarding the Motion (Dkt. 28). *See* Dkt. 56. Upon review of the relevant pleadings, and for the reasons stated below and on the record at the hearing, the Court finds that Plaintiff’s Motion (Dkt. 28) is **GRANTED IN PART and DENIED IN PART.**¹

¹ The parties submitted notices of consent to proceed before the undersigned for all matters related to the Motion. *See* Dkts. 60, 61. Accordingly, the undersigned issues this Order on the Motion, as opposed to a Report and Recommendation, as would ordinarily be issued regarding this type of motion.

I. BACKGROUND

Plaintiff worked for Defendant as a “Loan Officer” from approximately December 2015 to January 2017. *See* Dkt. 12 at 6. Defendant is a Virginia limited liability company that, *inter alia*, sells home loan products to individuals over the telephone and through the internet. *See* Dkts. 12 at 3; 28 at 4. As a Loan Officer, Plaintiff’s primary job duties consisted of selling Defendant’s loan products to customers over the telephone and through the internet. *See* Dkt. 12 at 6. Plaintiff alleges that he, and other Loan Officers similarly situated, routinely worked over forty (40) hours per week and were not compensated for those hours. *See* Dkt. 28 at 4-5. Plaintiff also alleges that Defendant knew Plaintiff, and others similarly situated, worked in excess of forty (40) hours per week, did not accurately track hours worked, and improperly paid for work on a commission basis without overtime pay. *See* Dkt. 12 at 6; *see also* Dkts. 28-3, 28-4, 28-5, 28-6.

Plaintiff also stated, and Defendant does not dispute, that each Loan Officer was required to sign a “Loan Officer Compensation and Employment Agreement” (the “Loan Officer Contract”) (Dkt. 28-4 at 8-12), which set the compensation schedule for Loan Officers. *See* Dkt. 28-4 at 5. Pursuant to the Loan Officer Contract, Loan Officers were paid the greater of (1) an hourly wage; or (2) a commission. *See* Dkt. 28-4 at 8-12. Accordingly, Plaintiff alleges that if the commission for a pay period was greater than the hourly rate pay, he (and other Loan Officers) was not paid the hourly rate, resulting in failure to properly pay overtime wages. *See* Dkt. 28-4 at 5.

II. LEGAL STANDARD

The FLSA requires covered employers to compensate nonexempt employees at overtime rates for time worked in excess of statutorily defined maximum hours. 29 U.S.C. § 207(a). Section 216(b) of the FLSA gives employees the right to bring an action on behalf of themselves, as well as “other employees similarly situated” for violations of the FLSA. 29 U.S.C. § 216(b). “Under §

216(b), district courts have the discretionary power to conditionally certify collective actions and authorize notice to potential class members.” *Tice v. AOC Senior Home Health Corp.*, 826 F. Supp. 2d 990, 994 (E.D. Tex. 2011).

While the Fifth Circuit has not specifically addressed the meaning of “similarly situated” in this context, “[t]wo approaches are used by courts to determine whether collective treatment under § 216(b) is appropriate: (1) the two-stage class certification set forth in *Lusardi v. Xerox, Corp.*, 118 F.R.D. 351 (D. N.J. 1987); and (2) the ‘Spurious Class Action’ method outlined in *Shushan v. Univ. of Colorado*, 132 F.R.D. 263 (D. Colo. 1990).” *Cripe v. Denison Glass Mirror, Inc.*, No. 4:11-CV-224, 2012 WL 947455, at *3 (E.D. Tex. Jan 27, 2012), *report and recommendation adopted*, 2012 WL 947362 (E.D. Tex. Mar. 20, 2012). “The *Lusardi* two-stage approach is the prevailing standard among federal courts.” *Tice*, 826 F. Supp. 2d at 994 (citations omitted). This Court has applied the *Lusardi* approach in a number of other cases. *See Halleen v. Belk, Inc.*, No. 4:16-CV-00055, 2016 WL 5118646, at *2 (E.D. Tex. Sept. 21, 2016); *Miranda v. Mahard Egg Farm, Inc.*, No. 4:15-CV-406, 2016 WL 1704861, at *1 (E.D. Tex. Apr. 28, 2016); *Stier v. Great Plains Nat'l Bank*, No. 4:15-CV-519, 2016 WL 1572194, at *1 (E.D. Tex. Apr. 19, 2016). As such, the Court will apply the *Lusardi* approach in this case.

Under *Lusardi*, “certification for a collective action under § 216(b) is divided into two stages: (1) the notice stage; and (2) the merits stage.” *Id.* “At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members.” *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Because the Court has minimal evidence before it at this stage, “the determination is made using a fairly lenient standard requiring nothing more than

substantial allegations that the putative class members were victims of a single decision, policy or plan.” *Tice*, 826 F. Supp. 2d at 995. “Notice is appropriate if the court concludes that there is ‘some factual nexus which binds the named plaintiffs and potential class members together as victims of a particular alleged [policy or practice].’” *Allen v. McWane, Inc.*, No. 2:06-CV-158 (TJW), 2006 WL 3246531, at *2 (E.D. Tex. Nov. 7, 2006). “If the first step [of the *Lusardi* approach] is satisfied, the court conditionally certifies a class; and the action proceeds as a collective action during discovery.” *Sedtal v. Genuine Parts Co.*, No. 1:08-CV-413-TH, 2009 WL 2216593, at *3 (E.D. Tex. July 23, 2009).

III. ANALYSIS

Defendants contend that collective treatment is not appropriate because Loan Officers have “divergent [] pay, job duties, geography, and other work-related issues. . . .” Dkt. 53 at 8. As the Court stated at the January 31, 2018, hearing, however, this case is in the first stage under *Lusardi*. At this stage, “Plaintiff bears the burden of presenting preliminary facts to show that there is a similarly situated group of potential plaintiffs.” *Cripe*, 2012 WL 947455, at *2. This does not mean that their positions must be identical. “The court need not find uniformity in each and every aspect of employment to determine a class of employees are similarly situated [under § 216(b)].” *Tice*, 826 F. Supp. 2d at 995-96. Rather, “the relevant inquiry is whether the potential class members performed the same basic tasks and were subject to the same pay practices.” *Id.* at 996. “[Plaintiffs] need only show that their positions are similar to the potential plaintiffs.” *Id.* at 995.

Here, Plaintiff has alleged that each Loan Officer’s primary duties involved selling home loan products to individuals over the telephone and through the internet, and therefore, all Loan Officers should be included in the putative class. In response, Defendant pointed to distinctions between “call center” and “non-call center” Loan Officers. *See* Dkt. 53 at 13. In reply, Plaintiff

conceded that Loan Officers outside of call centers may operate differently than those operating inside of call centers. *See* Dkt. 54 at 4. Plaintiff, thereafter, adjusted the requested class to include only those Loan Officers “within call centers.” *See id.* The Court finds that Plaintiff has submitted sufficient evidence to show that Loan Officers *within call centers* are similarly situated and should be certified as a conditional class.

Defendant also argues that Plaintiff is not similarly situated to the putative class because Loan Officers within call centers received varying compensation. *See* Dkt. 53 at 15. Plaintiff, however, has provided evidence, and Defendant conceded at the hearing, that the putative class of Loan Officers within call centers were all subject to the same Loan Officer Contract, which structured each Loan Officers’ compensation under the same general terms. *See* Dkt. 28-4 at 5, 9-11. Moreover, Plaintiff alleges that he, and others similarly situated, often worked over forty hours a week and were not paid overtime compensation during their employment. *See* Dkt. 28-4. Accordingly, Plaintiff has satisfied the fairly lenient *Lusardi* standard requiring nothing more than substantial allegations that the putative class members were victims of a single decision, policy, or plan. Plaintiff here sufficiently alleged that he was a victim of a similar plan—the Loan Officer Contract—under which he did not receive overtime compensation. *See* Dkt. 28-4 at 5, 9-11; *see also Collier v. Careplus Health Servs., Inc.*, No. 4:16-CV-00178, 2017 WL 434350, at *3 (E.D. Tex. Feb. 1, 2017) (granting conditional certification where all Plaintiffs “performed the same basic tasks”); *Tice*, 826 F. Supp. 2d at 996 (granting conditional certification where all Plaintiffs claimed that they were required to work overtime without appropriate compensation).

Last, courts within the Fifth Circuit have repeatedly recognized that “based on the statute of limitations . . . class certification is appropriately limited to workers employed by the defendant up to three years before notice is approved by the court.” *Minyard v. Double D Tong, Inc.*, 237 F.

Supp. 3d 480, 486 (W.D. Tex. 2017); *Zachary v. Cobalt Mortg., Inc.*, No. 4:16-CV-00754, 2017 WL 1079374, at *3 (E.D. Tex. Mar. 22, 2017); *Biller v. RMCN Credit Servs., Inc.*, No. 4:16-CV-43, 2017 WL 1661687, at *4 (E.D. Tex. May 3, 2017); *Halleen v. Belk, Inc.*, No. 4:16-CV-00055, 2016 WL 5118646, at *3 (E.D. Tex. Sept. 21, 2016); *Miranda v. Mahard Egg Farm, Inc.*, No. 4:15-CV-406, 2016 WL 1704861, at *3 (E.D. Tex. Apr. 28, 2016). Accordingly, the date of approval of notice is determinative for purposes of establishing a class period. The Court recommends that a class period covering the three years before the date the Court approves conditional certification and notice is appropriate in this case.

IV. CONCLUSION

For the foregoing reasons, the Court finds the Motion (Dkt. 28) is **GRANTED IN PART and DENIED IN PART.**

IT IS THEREFORE ORDERED that this matter shall proceed as a collective action with the potential class plaintiffs (the “Potential Class Plaintiffs”) described as follows:

All persons who are or have been employed by J.G. Wentworth Home Lending, LLC or WestStar Mortgage, Inc. within call centers (including but not limited to the call centers located in the states of Arizona, Florida, Michigan, Pennsylvania, Texas, and Virginia) as “Loan Officers,” “Mortgage Loan Officers,” “Mortgage Bankers,” “Loan Originators,” “Mortgage Loan Originators,” or any other like mortgage sales employee at any time during the three-year period preceding the date of the Court’s Order granting this motion.

Additionally, at the January 31, 2018, hearing regarding the Motion (Dkt. 28), the Court ordered the Parties to confer regarding final versions of the Notice and Consent Forms, any other notices that may be sent to Potential Class Plaintiffs, and the manner in which the “Opt-In Period”² of this matter shall proceed. The Parties have agreed that three (3) forms may be sent to the Potential Class Plaintiffs and have also agreed regarding information Defendant must provide to

² The “Opt-In Period” refers to the time during which Plaintiff may send out notice and consent forms to Potential Class Plaintiffs to include them as plaintiffs to this lawsuit.

Plaintiff prior to and protocol for the Opt-in Period.

IT IS THEREFORE ORDERED that Plaintiff shall use the forms attached to this Order to contact Potential Class Plaintiffs during the Opt-In Period: (1) Consent to Join (Exhibit A); (2) Notice of Collection Action (Exhibit B); and (3) Reminder Regarding Lawsuit (Exhibit C).

IT IS FURTHER ORDERED that Defendant shall produce the names, last known addresses, and personal email addresses, if known, (“Potential Class Plaintiffs’ Information”) of current and former Potential Class Plaintiffs. Defendant shall provide the Potential Class Plaintiffs’ Information in an Excel or similar electronic format within seven (7) days of the entry of this Order. Plaintiff’s Counsel shall send the Notice and Consent Form to the Potential Class Plaintiffs within fourteen (14) days after Defendant provides the Potential Class Plaintiffs Information to Plaintiff’s counsel. The Court authorizes Plaintiff to immediately issue the Notice and Consent Form to those individuals whose names are being provided as required by this Order. Plaintiff shall issue the Notice and Consent forms by email, unless Plaintiff does not have an email for the Potential Class Plaintiffs. If Plaintiff does not have an email for the Potential Class Plaintiffs, or the email sent enclosing the Notice and Consent is unopened or returned as undeliverable, Plaintiff can then issue the Notice and Consent forms by U.S. Mail. If the Notice and Consent forms are issued by U.S. Mail, Plaintiff shall provide a self-addressed, postage paid return envelope. Plaintiff’s Counsel is also authorized to provide to the Potential Class Plaintiffs the Notice and Consent Form electronically through DocuSign. Plaintiff shall bear the cost of issuing the Notice and Consent forms and any reminder notice. Plaintiff shall inform Defendant which Potential Class Plaintiffs received the Notice and Consent forms by U.S. Mail.

The Potential Class Plaintiffs shall be provided forty-five (45) days after the date the Notice and Consent forms are first emailed (the “Opt-In Period”) to file a Consent to Join form opting-in

to this litigation. Any re-mailing of the original notice and any reminder notices shall not extend this deadline. Plaintiff shall inform opposing counsel as to the date on which the Notice forms were sent to the Potential Class Plaintiffs. Plaintiff's counsel may email a reminder notice fifteen (15) days before the expiration of the Opt-In Period.

Plaintiff's counsel shall file signed consent forms with the Court.

Within fourteen (14) days after the close of the Opt-In period, the Parties are directed to confer pursuant to Rule 16(b) to present the Court with a proposed Joint Scheduling Order setting forth proposed dates and covering the items set forth in the Court's previous Order Governing Proceedings. The proposed Joint Scheduling Order should set forth the Parties' agreements concerning how discovery will proceed and how the case will proceed at trial. If the Parties cannot agree on elements of the Proposed Scheduling Order, they may present their views in the submission for Court determination. The Parties must file the Joint Scheduling Report and Case Management Plan within fourteen (14) days of the deadline for the Parties to confer.

IT IS SO ORDERED.

SIGNED this 9th day of February, 2018.

A handwritten signature in black ink, appearing to read 'K. Priest Johnson', written over a horizontal line.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

PLEASE PRINT OR TYPE THE FOLLOWING INFORMATION:

This information will NOT be made part of any public record and is necessary for your attorney's files for litigation and possible settlement purposes.

Name: _____

Mailing Address: _____

City, State & Zip Code: _____

Social Security No. (or last 4 digits): _____

Cellular Telephone: _____

E-Mail Address: _____

Work Location: _____

Beginning Date of Employment: _____

Ending Date of Employment: _____

EXHIBIT B
NOTICE of COLLECTIVE ACTION OVERTIME LAWSUIT and
OPPORTUNITY TO JOIN

Why Did I Get This Notice?

You have been identified as an individual that worked for J. G. Wentworth Home Lending, LLC (“Wentworth”) or WestStar Mortgage, Inc. as a Loan Officer, or other mortgage sales person (“Loan Officer”) in a call center between [TBD] and the present. If you have received this Notice, you may be eligible to join this lawsuit.

What’s This About?

A former Wentworth Loan Officer filed a lawsuit that seeks to recover overtime pay for working more than 40 hours in a workweek. The lawsuit claims that Loan Officers worked more than 40 hours in most, if not all, weeks; but, because they were paid on a Commission basis, they did not receive overtime pay.

You are eligible to join this lawsuit if you worked more than 40 hours in any week without receiving overtime pay or your Commission was not used to calculate your overtime pay.

Wentworth contends that it properly paid Loan Officers and contends that it does not owe any overtime wages.

This Court has not decided whether Wentworth failed to pay overtime wages. Plaintiff in this lawsuit must prove his claim at trial unless the case is settled.

What Can I Get?

If you join this lawsuit and the Loan Officers settle the case or win, you and the other plaintiffs may get an amount up to two times the unpaid overtime wages you and they should have received as well as attorneys’ fees and costs.

Can I be Retaliated Against?

No. It is unlawful for Wentworth or your current employer to terminate your employment or take any adverse action, as defined by the law, against you as a result of your participation in this suit.

How Do I Make a Claim?

If you want to join the lawsuit as a plaintiff, you can sign and join by DocuSign or fill out the attached *Consent to Join* form and mail, email or fax it to Mr. Miltenberger at the address below. It must be received in Mr. Miltenberger’s office by [TBD].

What Are My Choices?

If you choose to join in this case, you will be bound by the result in this case, whether it is favorable or unfavorable. If you join the case, you will not have to pay the lawyers anything out of pocket, win or lose. Mr. Miltenberger is representing the Loan Officers on a contingency fee basis.

You may have to respond to written discovery requests, provide documents and/or provide testimony.

If you do not wish to join the lawsuit as a plaintiff, you are free to take action on your own or do nothing.

Can I Get More Information?

You can call the Loan Officers’ attorneys at 1-817-416-5060. The call is confidential. Or write or email Mr. Miltenberger at:

Law Office of Chris R. Miltenberger, PLLC
Chris R. Miltenberger, Esq.
1340 N. White Chapel, Suite 100
Southlake, Texas 76092
Phone: 817-416-5060; Fax: 817-416-5062
chris@crmlawpractice.com

The United States District Court for the Eastern District of Texas approved this Notice but takes no position on the merits of the case.

