FILED
OCT 4 2016
FRESNO COUNTY SUPERIOR COURT
By _____ DEPT. 402

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

CAROLYN CORTINA, et al, on behalf of Themselves and all others similarly situated, Plaintiffs, vs. NORTH AMERICAN TITLE COMPANY, NORTH AMERICAN SERVICES, LLC, Defendants.	Case No. 07CECG01169 STATEMENT OF DECISION

This matter came on regularly for a bench trial in Department 402 of the above-entitled Court, before the Honorable Jeff Hamilton. Oral and documentary evidence was introduced on behalf of the parties as noted in the Court minutes.

After receiving and considering objections from all parties in this matter to the Proposed Tentative Statements of Decision submitted by North American Title Company ("NATC") and North American Services ("LLC") after the Court's oral announcement of its findings on August 12, 2016, the Court issues this final Statement of Decision.

As an initial matter, the Court notes that a trial court is not required to address all of the legal and factual issues raised by the parties in its statement of decision. The court need only state the grounds on which the judgment rests without necessarily specifying the particular evidence considered by the court in reaching its decision. *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124; *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.41h 101, 112. Findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them. *Muzquiz*, id at 125.

COUNTY OF FRESNO
Fresno, CA

THE CLAIMS AND CLASSES AT ISSUE

This putative class action was filed on April 17, 2007. The original complaint had several causes of action, but the matter proceeded to trial on the cause of action for breach of Business and Professions Code section 17200 et seq. (the "UCL") only. The class seeks seek recovery of wages representing unpaid work time for hours over eight in a day, as well as working through meal periods.

Two classes were originally certified. The first, the "exempt class," was defined as:

> "All persons employed by defendants and each of them, in the positions of Escrow Associate or equivalent position, however titled, in the State of California who were classified as overtime exempt by defendant at any time within four years prior to filing of the original complaint up to the time final judgment is entered. It is to include, but is not limited to, persona holding the job titles of Escrow Officers, Senior Escrow Officer, Special Projects Escrow Officer, Escrow Supervisor, Advisory Escrow Officer, Escrow Unit Manager, Escrow Manager, Branch Manager, and Escrow Operations Manager. The Exempt Class does not include persons occupying the position of Escrow Assistant."

The second was the "Non-Exempt Class." The definition of it was:

> "All persons employed by defendants, and each of them, in the position of Escrow Associate or equivalent position, however titled, in the State of California who were classified as non-exempt from overtime by defendants at any time within four years prior to the filing of the original Complaint up to the time final judgment is entered. The Non-Exempt Class includes, but is not limited to persons holding the job titles of Junior Escrow Officer, Escrow Officer, Senior Escrow Officer, Special Projects Escrow Officer, and Escrow Supervisor. The Non-Exempt does not include persons occupying the position of Escrow Assistant."

DECERTIFICATION OF THE NON-EXEMPT CLASS

a. Decertification may Occur at Any Time

If later events or knowledge show that a class action procedure is not appropriate, "the trial court retains the option of decertification." *Sav-On. v. Superior Court* (2004) 34 Cal. 4th 319, 335. Cited was *Lazar v. Hertz Corp.* (1983) 143 Cal. App. 3d 128, 144:

> "The trial court retains jurisdiction throughout the proceedings concerning class certification. Our decisions clearly contemplate the possibility of successive motions concerning certification. In *Vasquez*, we recognized that the courts should retain flexibility in the trial of a class action, for 'even after an initial determination of the propriety of such an action the trial court may discover subsequently that it is not appropriate.' *Vasquez* authorized the courts to utilize the procedures in Rule 23 of the Federal Rules of Civil Procedure, and observed that a certification order issued under Rule 23 'may be conditional and may be altered or amended before a decision on the merits.' "

The *Lazar* court was quoting from *Vasquez* v. *Supreme Court* (1971) 4 Cal. 3d 800, 821 and *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal. 3d 355, 360. See also *United Farm Workers v. Superior Court of Monterey County* (1976) 16 Cal. 3d 499. Decertification works as a dismissal without prejudice in such circumstance.

b. Failure of class-wide proof

The violation at issue in the *Tobacco II Cases* was of the fraudulent prong of the UCL. The class representatives there had to prove that they were exposed to the wrongful conduct and that they lost money or property due to the wrongful conduct. For the absent class members, the proof required was only that they have been exposed to the wrongful conduct. *Cohen v. DIRECTV, Inc.* (2009) 178 Cal. App. 4th 966 (*rev. denied*); *Pfizer v. Superior Court* (2010) 182 Cal. App. 4th 622 (*rev. denied*); *Sevidal v. Target* (2010) 189 Cal. App. 4th 905.

The conduct at issue in this case is described as unlawful, consisting of a company-wide policy of pressuring class members to work unreported overtime as well as through meal periods and rest breaks. At trial, there was substantial evidence that some employees worked unreported overtime for the purpose of earning commissions for closing escrows; with some earning six figures a year. But there was also a wealth of evidence that many employees did not work any overtime, worked overtime and were paid for it, or were disciplined for failing to report overtime they did work (as well as paid

for it). Several witnesses who claimed a large volume of unreported and unpaid overtime were impeached with deposition testimony or through evidence from a defense expert showing email messages from the witness' computer were sent during reported work hours some 98% of the time.

Plaintiffs' original trial plan included a promise of expert opinion to establish class-wide proof via a valid sampling or through statistical evidence. However, at trial, the Court found that plaintiff's expert had not laid the necessary foundation for presentation of his opinion. This left defendants' expert, Dr. Saad, unchallenged on the issue of lack of a class-wide policy of encouraging unpaid, unreported overtime, except by individual representative testimony, which was (as noted above) often impeached.

The absence of admissible expert testimony from plaintiffs' side, coupled with the impeachment of several of those who did testify, showing that they did not work overtime, did report overtime, and were paid overtime, persuades the Court that no uniform policy consistently applied was demonstrated for the non-exempt class. The existence of such a policy or practice is a prerequisite to relief under the UCL for a class of employees, and for maintenance of a class action.

The Court's finding on the absence of a class-wide policy requires decertification of the class of the general overtime class. *Gorgan-Beall v. Ferdinand Roten Galleries, Inc.* (1982) 133 Cal. App. 3d 969. However, the Court would like to make clear that it did see evidence of unreported and unpaid overtime, just not on a class-wide basis. Thus the Court's decision should have no impact on any individual worker's attempt to secure recovery on an individual basis.

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c. Notice is Required

Notice to the class is mandatory in this instance, as the non-exempt class was previously certified. California Rules of Court, Rule 3.770(c). That should include a short discussion of how the statute of limitations is tolled when the putative class action is filed until the dismissal order. *Becker v. McMillin Construction Co.* (1991) 226 Cal. App. 3d 1493; *Falk v. Children's Hospital Los Angeles* (2015) 237 Cal. App. 4th 1454. "Notice of dismissal protects the class from prejudice it would otherwise suffer if class members have refrained from filing suit because of knowledge of the pending class action." *Doe v. Lexington-Fayette Urban County Gov't.* (6th Cir. 2005) 407 F.3d 755, 761 (internal citations omitted).

The parties are to submit proposed notices within two weeks of service of this Statement of Decision, which shall include a short synopsis of the Court's rulings herein. Defendant NATC shall pay for service of the notice by the class administration, as such notice will also advise of the findings in favor of the exempt class discussed below. Class counsel is charged with creating and maintaining an internet web site which includes the notice and the full Statement of Decision. Such website and its address shall be included in the proposed notice sent. The class administrator will be required to file a declaration as to service of the notice.

Code of Civil Procedure section 581(k) provides the date such dismissal is effective (emphasis added): "(k) No action may be dismissed which has been determined to be a class action under the provisions of this code unless ***and until*** notice that the court deems adequate has been given and the court orders the dismissal." The effective date of the dismissal of the non-exempt class claims will be the date the court issues a minute order of dismissal, which will occur after the administrator files the declaration attesting to such notice.

d. Judgment on Individual Class Member Claims

In *Gorgan-Beall v. Ferdinand Roten Galleries, Inc., supra,* 133 Cal. App. 3d 969, the trial court judge entered judgment for the named plaintiff only, after decertification of the class, post-trial.

There are several named plaintiffs, two of whom (Carolyn Cortina and Kimberly Baker) did not testify. Judgment against Ms. Cortina and Ms. Baker is to be entered on their individual claims. The parties have advised the Court that another woman, Janet Dornan, was originally a named class representative, but withdrew herself from that position, and also opted out of the class. Her claims are therefore dismissed without prejudice.

The other named plaintiffs are: Lori Baker, Judith Bates, Catherine Bell, Melodie Bates, Martha Dominguez, Cheryl Fuller, Laurel Johnstone, Teresa Spencer, Tina Texeira, and Mary Weidmark. Their claims for restitution of overtime pay for time employed as a non-exempt worker are to be considered by the referee, discussed below.

EXEMPT CLASS

a. Liability of defendant NAS

The evidence showed that NAS is a company created by NATC for the purpose of performing NATC's HR and payroll functions. Although the master agreement between NATC and NAS contemplated that NAS might supervise employees, categorize them, determine pay scale hire, and fire them, there was no evidence that NAS actually performed any of the functions that resulted in misclassification of employees as exempt or encouraged employees not to report overtime. Further, prior to January 1, 2006, NAS performed no services for NATC.

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"[A] a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties . . ." *People v. Jayhill* (1973) 9 Cal. 3d 283, 286. "The linchpin for equitable estoppel is equity—fairness." *Goldman v. KPMG LLP* (2009) 173 Cal. App. 4th 209.

The Court finds that under these circumstances, it would be inequitable to hold NAS liable. The Court makes no finding on the issue of whether NAS was or was not an employer or joint employer, as such a finding is not necessary to the finding of inequity. Accordingly, the Court will enter judgment in favor of NAS in this action.

b. Liability of NATC

i. No Proof of Classwide Injury Required

In 2004, Proposition 64 amended the standing requirement to bring an action for relief, by amending Business and Professions Code section 17204. Same now states a claim must be brought by: "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."

In 2009, the Supreme Court determined that "the effect of Proposition 64 is to prevent uninjured private persons from suing for restitution on behalf of others." *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 314. It also found that the new standing requirement applied solely to the class representative, not to the absent class members. "Restitution under the UCL and FAL may be ordered without individualized proof of harm." *People v. Sarpas* (2014) 225 Cal. App. 4th 1539, 1548.

ii. Burden of Proof on Defense Not Met

Defendants mounted an affirmative defense on the basis that it property deemed certain job titles to encompass exempt status. The burden of proof to show that employees are exempt rested on defendants. *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal. 4th 785, 794-795:

> "The assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption."

An exempt employee must be paid a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Labor Code section 515(a). Deducting from vacation or leave balances for partial or full day absences does not affect a finding of salary. *Conley v. PG&E* (2005) 131 Cal. App. 4th 260. Accord *Rhea v. General Atomics* (2014) 227 Cal. App. 4th 1560 (*rev. denied*). Section 515(a) which states, in part (emphasis added):

> "The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, if the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, ***and*** earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment."

But, if pay is docked for an absence for sickness or disability where there is no leave time left, the pay cannot be characterized as a "salary." *Negri v. Koning & Associates* (2013) 216 Cal. App. 4th 392 (*rev. denied*). "Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, ***other than*** sickness or disability." Cited is 29 C.F.R. 541.602(b)(1) (emp. Added). The evidence here established that class members were subject to a loss in pay amount if they did not have adequate leave balances for missed days, and for furlough days. The claimed exception for exempt employees fails on this basis alone.

Further, Title 8, California Code of Regulations, section 11070 deems those who earn more than two times the minimum wage in "salary" to be exempt only if they meet the definition of administrative, professional, or executive employees.

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Defendants failed to meet their burden of proof on this defense as to any class member. While there was evidence that defendants attempted to divide employees into exempt and non-exempt categories after 2003, there was abundant evidence to support the inference that such was done on a speculative basis, without proper assessment of what true managerial or administrative tasks the various job classifications were charged with doing, and that a smattering of managerial duties or a title might be bestowed, but without meeting the requirements of the law for an exempt position. There was also convincing evidence that prior to 2004, NATC mischaracterized of employees as exempt based on title alone, such as "escrow officer."

NATC also presented affirmative defenses on the basis of unclean hands and promissory estoppel. Substantial evidence showed that employees were instructed on how they must complete their time cards, and that time cards were returned if this was not done. The Court finds against NATC on these affirmative defenses as well.

iii. Relief

Relief under the UCL is limited, no damage may be awarded, and no penalties may be imposed where a private party prosecutes the action rather than the attorney general or other government entity. See, e.g., *People v. Fremont Life Ins. Co.* (2002) 104 Cal. App. 4th 508, where an offer of restitution was ordered without reference to any specific amount.

> "The court's discretion is very broad. Section 17203 does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court '*may* make such orders or judgments ... as may be necessary to prevent the use or employment ... of any practice which constitutes unfair competition ... or as may be necessary to restore ... money or property.' (*Ibid.*) That is, as our cases confirm, a grant of broad equitable power."
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> *Cortez v. Purolater Air Filtration Products Co, supra,* 23 Cal. 4th at 180.

The Court orders restitution of unpaid overtime wages to the exempt class members earned during the class period. It will refrain from entering final judgment until an amount is determined.

"As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." *Duran v. U.S. Bank National Association* (2014) 59 Cal. 4th 1, 28, quoting from *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021-1022. Federal Rules of Civil Procedure, Rule 53, permits special masters to be appointed without the consent of the parties to resolve questions involving "difficult computation of damages." Use of same in class action was approved in *Levya v. Medline Industries, Inc.* (9th Cir. 2013) 716 F. 3d 510, 515. See also *Carnegie v. Household Intern., Inc.* (7th Cir. 2004) 376 F. 3d 656, 661. And see Newberg & Conte, Newberg on Class Actions (4th Ed., 2002) sections 24.119 – 24.121.

Pursuant to Code of Civil Procedure section 639(a)(3), due to the consumption of time that would be required to assess the amounts of individual restitution, such issue of fact is to be considered by a referee, on the basis of his review of individual testimony and any other evidence as the referee finds appropriate. The referee is to report his findings to the Court. The Court has been given no basis to reopen discovery, and declines to do so. The referee is to be guided by the principal that California courts have shifted the burden of proof to employers when inadequate records prevent employees from proving their claims for unpaid overtime hours. (*Hernandez v. Mendoza* (1988) 199 Cal. App. 3d 721, 726-728) and unpaid meal periods. (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal. App. 45h 949, 961-963).[1]

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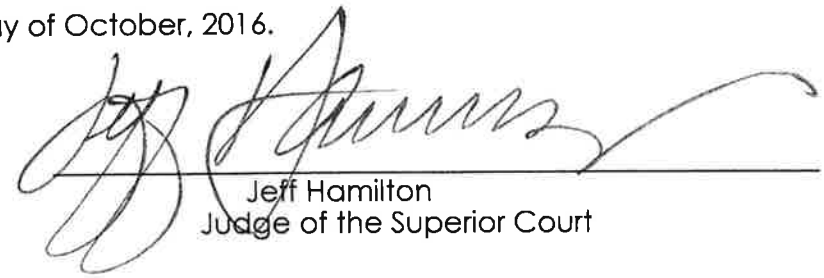
[1] Plaintiffs dropped their claim for missed rest periods prior to trial.

No party has established an economic inability to pay for the reference. Payment of wages is a fundamental public policy in the state of California. *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal. App. 4th 141, 156; *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2008) 222 Cal. App. 4th 819, 830. For these reasons, the Court orders that NATC shall bear the cost of the reference.

Pursuant to Code of Civil Procedure section 640, the parties submitted the names of proposed referees to the Court. No objection was made by any party to any referee proposed in the time permitted by Code of Civil Procedure section 641. The Court selects the Hon. Patrick J. O'Hara (Ret.) as the referee. Judge O'Hara's office is located at 300 North Willis Street, Visalia, California 93291. His office number is (559) 429-4570 and his State Bar Number is 72138. He may charge a maximum hourly rate of $500.00. Court facilities and personnel may not be used for the reference.

DATED this 20th Day of October, 2016.



Jeff Hamilton
Judge of the Superior Court

COUNTY OF FRESNO
Fresno, CA

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000	*FOR COURT USE ONLY*
TITLE OF CASE: Carolyn Cortina vs North American Title Co	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 07CECG01169

I certify that I am not a party to this cause and that a true copy of the:

10/20/2016 Minute Order and copy of Statement of Decision

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in
the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: **Fresno, California 93724-0002**

On Date: **10/20/2016** Clerk, by _____, Deputy

M.Santana

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☐ Clerk's Certificate of Mailing Additional Address Page Attached

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: **Carolyn Cortina vs North American Title Co**	
LAW AND MOTION MINUTE ORDER	Case Number: **07CECG01169**

Hearing Date: **October 20, 2016** Hearing Type: **From Chambers**
Department: **402** Judge/Temp. Judge: **Hamilton, Jeffrey Y.**
Court Clerk: **Santana, Maria** Reporter/Tape: **Not Reported**

Appearing Parties:
Plaintiff: Not Present Defendant: Not Present
Counsel: Counsel:

[X] See attached copy of Statement of Decision.

[ ] Continued to [ ] Set for __ at __ Dept. __ for __

[ ] Submitted on points and authorities with/without argument. [ ] Matter is argued and submitted.

[ ] Upon filing of points and authorities.

[ ] Motion is granted [ ] in part and denied in part. [ ] Motion is denied [ ] with/without prejudice.

[ ] Taken under advisement

[ ] Demurrer [ ] overruled [ ] sustained with __ days to [ ] answer [ ] amend

[ ] Tentative ruling becomes the order of the court. No further order is necessary.

[ ] Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

[X] Service by the clerk will constitute notice of the order.

[ ] See attached copy of the Tentative Ruling.

[ ] Judgment debtor __ sworn and examined.

[ ] Judgment debtor __ failed to appear.
Bench warrant issued in the amount of $ __

JUDGMENT:
[ ] Money damages [ ] Default [ ] Other __ entered in the amount of:
Principal $__ Interest $__ Costs $__ Attorney fees $__ Total $__
[ ] Claim of exemption [ ] granted [ ] denied. Court orders withholdings modified to $__ per __

FURTHER, COURT ORDERS:
[ ] Monies held by levying officer to be [ ] released to judgment creditor. [ ] returned to judgment debtor.
[ ] $__ to be released to judgment creditor and balance returned to judgment debtor.
[ ] Levying Officer, County of __, notified. [ ] Writ to issue
[ ] Notice to be filed within 15 days. [ ] Restitution of Premises
[ ] Other: __