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THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KELLY BOLDING, and MICHAEL
MANFREDI, individually and on behalf of a class
of all others similarly situated,

Plaintiffs,

v.

BANNER BANK, a Washington Corporation,

Defendant.

No. 2:17-cv-0601 RSL

**PLAINTIFFS' PRE-DISCOVERY
MOTION FOR COLLECTIVE
ACTION CERTIFICATION UNDER
29 U.S.C. §216(b) AND TO SEND
NOTICE TO THE CLASS**

**NOTE ON MOTION CALENDAR
August 18, 2017**

ORAL ARGUMENT REQUESTED

1 Plaintiffs, individually and on behalf of all others similarly situated, hereby move this
2 Court for an order granting conditional certification of Plaintiffs' collective action under the
3 Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). Plaintiffs are current and former
4 Mortgage Loan Officer employees (including Loan Officers, Residential Lenders, Real Estate
5 Commissioned Loan Officers) engaged in the typical duties of mortgage loan officers
6 ("MLOs") employed by Defendant Banner Bank and other banks acquired by Banner within
7 the statutory period, including AmericanWest Bank, Islands Bank, Bank of Sacramento,
8 PremierWest Bank and Siuslaw Bank ("Defendant" or "the Bank").

9 For the reasons set forth in this motion, Plaintiffs easily meet the lenient conditional
10 certification "similarly situated" standard. This Court should order that notice be immediately
11 issued so employees have the soonest possible opportunity to opt-in to this lawsuit and toll the
12 statute of limitations as to their claims.

13 I. STATEMENT OF CASE

14 On April 7, 2017, Named Plaintiffs Kelly Bolding and Michael Manfredi filed this
15 collective action and putative class action asserting that Defendant Banner Bank requires
16 MLOs to work overtime "off-the-clock" for the benefit of Defendant without compensation.
17 Additionally Plaintiffs allege that the overtime paid does not properly include calculation of
18 earned commission wages in the base rate for the calculation of overtime, time-and-a-half as
19 required by the FLSA.

20 Plaintiffs and the MLOs are similarly situated. Plaintiffs have virtually identical job
21 responsibilities and essential job functions reflected in current job listings for the MLO
22 position in different regions in different states attached as Exhibit B, and reflected in the
23 declaration of Kelly Bolding, Michael Manfredi, and Miranda Taylor. To complete the job
24 duties outlined in these job descriptions, MLOs must work more than 40 hours per week,
25 something that Defendant knows and encourages.

1 MLOs sell mortgage loans to Defendant's customers through Defendant's offices and
2 branches located in Washington, Oregon, Utah, Idaho and California. They have similar job
3 duties with respect to selling, originating and producing loans for Defendant in accordance
4 with Defendant's policies and procedures. MLOs are all subject to Defendant's uniform
5 compensation policy paying a base salary plus commissions on loans sold, and overtime pay
6 when recorded. Plaintiffs allege that MLOs are expected to and regularly work more than 40
7 hours per workweek.

8 For years, MLOs were wrongfully designated as "Exempt" employees not entitled to
9 overtime, industry wide. When the law was clarified that MLOs are in fact "Non-exempt" and
10 must be compensated with overtime wages, some compensation schemes may have changed,
11 but the expectation to earn commissions and generate and keep business did not.

12 The nature of the work demands that MLOs work more than 40 hours per week and be
13 available to work outside of normal operating hours, as outlined in the job responsibilities and
14 essential job functions. MLOs help customers make substantial purchases requiring significant
15 funds. To even be in a position to need the services of a MLO, customers must be generally
16 financially stable, meaning they must be employed. Most, if not all, customers are employed
17 full time and are generally unavailable to work with MLOs during normal working hours.

18 Thus, the job requires substantial time outside the bank branch or office location; it is
19 not a nine-to-five job; MLOs do not keep regular banker's hours. To be a successful MLO, and
20 fulfill the job responsibilities and essential job functions required by Defendant, regular work
21 above and beyond 40 hours in a week is a necessity. MLOs are expected to be available to take
22 calls for potential leads and customers on their personal cell phones after business hours.
23 Defendant encourages and facilitates this off-the-clock work by requiring MLOs' personal cell
24 phones to be on their business cards, and placing those same personal cell phone numbers on
25 Defendant's website, making them available after business hours. They must respond to emails
26 on weekends and after business hours, and generally do. These customers rely on the

1 availability of MLOs in the mornings and evenings, and on weekends and holidays, and MLOs
2 must be available, or they will fail to fulfill Defendant's enumerated job responsibilities and
3 essential job functions.

4 As reflected in the current job descriptions and essential job duties, Defendant actually
5 requires MLOs to build relationships with realtors, real estate agents, and realtor and builder
6 association members. They are expected to develop these relationships to gain referral
7 customers, which includes attending association meetings and residential open-houses which
8 regularly occur outside of normal working hours. Defendant is aware, and in fact requires, that
9 MLOs perform these duties.

10 The off-hours and off-the-clock work performed by MLOs takes many forms, but it is
11 work. The proposed notice outlines what Plaintiffs allege to be compensable work, so that
12 potential opt-in Plaintiffs fully understand what is at stake in this case. Plaintiffs allege that
13 Defendant's knowledge that it is being done, and failure to compensate MLOs for this time is
14 intentional, and violates the law.

15 When overtime is paid by Defendant, it is allegedly not being calculated correctly.
16 Many MLOs are even unaware of how Defendant calculates their overtime compensation and
17 to Plaintiffs' knowledge, commissions are not included in the calculation of overtime as
18 required by the FLSA. Given that commissions must be included in calculating the base rate
19 for overtime pay by law, Defendant has a substantial motive to discourage the recording of
20 overtime hours by MLOs and to keep them in the dark about how overtime must be calculated
21 to include commissions. Commission payments being included in the base pay for overtime
22 calculations paid at time and a half, significantly increases MLOs' hourly rates.

23 Therefore these Plaintiffs, on behalf of themselves and all others similarly situated,
24 move the Court for entry of an order:

25 (1) Conditionally certifying a collective FLSA class and to send statutory notice;
26

- 1 (2) Implementing a procedure whereby Court-approved Notice of Plaintiffs' FLSA
2 claim is sent (via U.S. Mail and email) to the proposed class members;
- 3 (3) Requiring Defendant Banner Bank to identify all potential opt-in plaintiffs by
4 providing a list in electronic and importable format, of all current and former
5 Mortgage Loan Officers who worked for Defendant at any time since April 7, 2014;
- 6 (4) Approving the proposed Notice to class members and approving an opt-in period of
7 90 days;
- 8 (5) Identification of all banks or entities acquired by Defendant that employed or
9 employ Mortgage Loan Officers since April 7, 2014.

10 Plaintiffs base their motion on the pleadings, declarations, relevant evidence, and
11 argument of Counsel. For conditional certification Plaintiffs need only show they are "similarly
12 situated" to the other MLOs working for Defendant. "The 'similarly situated' standard at this
13 phase is fairly lenient and typically results in certification." *Wilson v. Maxim Healthcare Servs.,*
14 *Inc.*, 2014 WL 7340480, *2 (W.D. Wash. Dec. 22, 2014)(Lasnik, J.); *see also Zachary v.*
15 *Cobalt Mortgage, Inc.*, 2017 WL 1079374, *2 (E.D. Texas Mar. 22, 2017); *Ingersoll v. Royal*
16 *& Sunalliance USA*, 2006 WL 859265 (W.D. Wash. Feb. 10, 2006)(Lasnik, J.); *Douglas v.*
17 *Xerox Bus. Servs.*, 2014 WL 3396112 *2 (W.D. Wash. July 10, 2014)(citing *In Re Wells*
18 *Fargo*, 527 F.Supp.2d 1053, 1071 (2007) ("the usual result is conditional class certification").
19 All MLOs here are "similarly situated."

20 Plaintiffs request that the Court certify a collective action for unpaid wages and
21 overtime compensation under §216(b) of the FLSA and approve the proposed Notice (attached
22 as Exhibit A) to the proposed FLSA class, defined as:

23 ***All current and former Mortgage Loan Officers and/or Residential Lenders who***
24 ***were employed by Banner Bank, its parent, subsidiary, or affiliate of Banner***
25 ***Bank at any time during the past three years including AmericanWest Bank,***
26 ***Islands Bank, Bank of Sacramento, PremierWest Bank and Siuslaw Bank***

1 For each such person, Defendant should produce the person’s name, job title, last
2 known address, telephone number, e-mail address, dates of employment, location of
3 employment, and date of birth, within 14 days of the entry of the order. In addition, Plaintiffs
4 ask this Court to approve an opt-in period of 90 days.

5 Conditional certification for a FLSA class under §216(b) is different than traditional
6 FRCP 23 classes, because the statute of limitations for class members is not tolled
7 automatically by the filing of the complaint. This makes conditional certification and sending
8 of notice vitally important to the rights of putative class members. The statute of limitations is
9 only tolled when class members file a consent to join document. Thus, an expedient
10 determination on this motion is highly important to protect FLSA opt-in plaintiffs’ rights so
11 they can have the opportunity to opt-in and preserve their right to wages owed.

12 II. STATEMENT OF FACTS

13 This case seeks to recover unpaid wages and overtime compensation for MLOs who, at
14 any time during the past three years, were not properly compensated for all hours worked and
15 not compensated at the lawfully calculated regular rate for overtime compensation by including
16 wages earned as commissions in overtime compensation calculations. MLOs working in every
17 state where Defendant does business – Washington, Oregon, Idaho, Utah, and California –
18 have the same job requirements, the same essential job functions, and are subject to the same
19 compensation policy which pays them a base salary and commission wages. They are
20 undeniably “similarly situated” as required by the FLSA such that the Court should grant this
21 motion and order that Notice be immediately sent to all MLOs informing them of their rights to
22 exercise and preserve their rights by opting-in to this lawsuit and stopping their individual
23 statute of limitations from running.

24 Defendant Banner Bank is a Washington State chartered commercial bank that operates
25 190 full-service branches and 12 loan offices in 58 counties in Washington, Oregon, Idaho,
26 California, and Utah. *See* Exhibit C (Defendant’s Answer to the Class Complaint (“Answer”))

¶ 1. Plaintiffs and class members are, or were, employees of Defendant employed for the purpose of selling loan products, and who performed the typical duties of a mortgage loan officer. *See* Exhibit D (Complaint – Collective Action and Class Action (“Complaint”)) ¶ 12. Plaintiffs allege that there are hundreds, and possibly up to a thousand, class members who are eligible to opt-in to the present action. Exhibit D ¶ 34.

Plaintiffs are similarly situated to other MLOs for purposes of FLSA §216(b) conditional certification. Defendant has a uniform standard of job responsibilities applicable for all MLOs regardless of which state the MLO operates in. *See* Exhibit E (Declaration of Michael Manfredi); *see also* Exhibit F (Declaration of Kelly Bolding) and Exhibit G (Declaration of Miranda Taylor). The essential functions of MLOs working for Defendant are also uniform in all states. *See* Exhibit B (Advertisements posted and disseminated by Defendant for positions available in other states). The job requirements and skills that Defendant requires of MLOs are:

1. Perform the actions needed to attract desirable loan applications and to select those meeting the Bank’s requirements;
2. Call on realtors and builders together with bank branch personnel to encourage them to refer potential borrowers to the Bank;
3. Meet with potential borrowers and preparing loan applications. This includes gaining the confidence of applicants, obtaining desired information from them and explaining loan terms. A favorable public relations result is highly important;
4. Originate real estate loans in accordance with Bank and investor lending guidelines;
5. Know federal and state laws and regulations relating to real estate lending.

See Exhibits B, E, F & G. Plaintiffs allege that the job skills and responsibilities are uniform throughout Defendant’s operations. Exhibit D ¶¶ 12-20. The essential functions of MLOs are uniform as well, including:

- 1 1. Originate real estate loans from all of the following sources: Realtor business
2 developed through a structured outside calling program, contractors (both those
3 doing business with Banner Bank and others), referrals from branch personnel,
4 general public through normal business relationships (i.e. Service originations,
5 friends, acquaintances, etc.), walk in and call in customers;
- 6 2. Once originated, the loans are to be set up in the bank's computer system and
7 processed through to submission for underwriting (this includes maximum
8 usage of Freddie Mac Prospector);
- 9 3. Seek out opportunities for and provide financing sheets for listings and
10 Realtor/builder open houses. Periodically, be in attendance at weekend open
11 houses and/or subdivisions for loan solicitation purposes;
- 12 4. Attend regular Realtor Association and Builder Association meetings;
- 13 5. Seek out attendance at Realtor staff meetings for product presentation;
- 14 6. When requested, be available for closing signing appointments;
- 15 7. Attend, as required, internal training sessions, internal sales meetings, and
16 external training opportunities;
- 17 8. When required, be available to take applications and/or meet with clients at
18 other Banner Bank branch locations;
- 19 9. As required perform field construction draw inspections;
- 20 10. Other loan production related duties as assigned by supervisor;
- 21 11. Comply with policies, procedures, security requirements, and government
22 regulations.

23 *See* Exhibits B, E, F & G. Plaintiffs allege that the job essential functions are uniform
24 throughout Defendant's operations. Exhibit D ¶¶ 12-20.

25 As alleged, MLO job responsibilities and essential functions require them to work in
26 the interests of Defendant and of Defendant's customers. The nature of the MLO position
requires them to be available at times when Defendant's clients need them, including mornings
before Defendant's regular operating hours, evenings after operating hours, and on weekends.
Exhibit D ¶ 19. MLOs are regularly working with clients who work full-time and therefore
require contacts and meetings to be made mornings, evenings, and on weekends, including for

1 example, for attending open-houses. *See* Exhibits E, F & G. MLOs regularly perform this work
2 in addition to their normally scheduled 40 hour work week. However, MLOs are advised that
3 they should not be recording any hours over 40 per week on their timesheets without prior
4 approval. *Id.*

5 The MLO job responsibilities to customers are highly time-sensitive. *Id.* For loans to
6 close properly and on-time, issues must be dealt with when they arise. If an MLO needs to get
7 information from customers or attend certain events, they cannot avoid their responsibilities
8 because they have already used up any allotted or approved overtime hours. *Id.* Loans have
9 hard closing dates and customers have expectations that loans will close on time. *Id.* MLOs
10 must put in the time necessary to get the job done.

11 Defendant knows that MLOs are regularly working in excess of 40 hours and not
12 recording hours when they are performing work such as answering and returning phone calls
13 and emails, attending realtor and builder association meetings and events, and attending open
14 houses. *Id.* Overtime was only paid when approved prior to it being worked. *Id.* When MLOs
15 submit timesheets that record hours over 40 which Defendant knew they would be working but
16 would not approve, MLOs are not compensated for their time. *See* Exhibit H, p. 89:17-24
17 (Deposition of Lisa Knight from *Erickson, et al v. AmericanWest Bank, Case No. 15-2-01976-*
18 *7 SEA*); *see also* Exhibits E, F & G.

19 One result of Defendant's policy and practice related to overtime was that when MLOs
20 worked overtime that was not approved ahead of time, they would not record those hours.
21 Exhibit H, p. 89:17-24. If MLOs told managers that they worked these overtime hours, they
22 were discouraged from recording them or explicitly told not to record them. Exhibits E, F & G.
23 In some cases, Defendant has even instructed MLOs to alter their timesheets by omitting or
24 even removing overtime hours worked, before managers will approve payment for any time
25 worked. *Id.*

1 Plaintiffs allege they and putative class members were all subject to the same uniform
 2 compensation scheme. Exhibit D ¶ 48. They received a base salary per month and also received
 3 commissions on loans sold. *Id.* ¶ 23. While the base salary and basis points given to each MLO
 4 varied slightly depending on their physical location, the compensation policy was uniformly
 5 applied to all MLOs. According to Defendant's Answer, "Banner Bank admits that Residential
 6 Loan Officers' compensation can include a base salary and commissions." Exhibit C ¶ 23.
 7 Based on Plaintiffs' experiences and observations while working for Defendant, other MLOs
 8 company-wide similarly worked off-the-clock without payment. Exhibits E, F & G.

9 In its Answer to Plaintiffs' Complaint, Defendant admits that MLOs can perform the
 10 same typical job duties, and Defendant's nationwide job postings contain identical job
 11 responsibilities, and essential job functions for MLO positions. Exhibit C ¶¶ 13-16; Exhibit B.
 12 If Defendant denies that MLOs complete identical job tasks on a daily basis, however, that is
 13 irrelevant to determine if putative class members are "similarly situated." "The court need not
 14 find uniformity in each and every aspect of employment to determine a class of employees are
 15 similarly situated [under § 216(b)]." *Tice, v. AOC Senior Home Health Corp.*, 826 F.Supp.2d
 16 990, 996 (E.D. Texas, Sept. 30, 2011) (quoting *Holbrook v. Smith & Hawken, Ltd.*, 246 F.R.D.
 17 103, 106 (D.Conn.2007)). Rather, "the relevant inquiry is whether the potential class members
 18 performed the same basic tasks and were subject to the same pay practices." *Id.* at 996.
 19 "[Plaintiffs] need only show that their positions are similar to the potential plaintiffs[.]" *Id.* at
 20 995. Defendant admits in Answer to the Complaint that typical duties of MLOs can include:

- 21 1. Receiving internal leads and contacting potential customers, or receiving
 22 contacts from customers generated by direct mail or other marketing activities,
 about loans and mortgages. Exhibits C & D ¶ 13;
- 23 2. Collecting required financial information from customers they contact, or who
 24 contact them, including information about income, employment history,
 25 judgments, and liens, and also running credit reports. Exhibits C & D ¶ 14;

- 1 3. Using the collected financial information to identify which loan products may
2 be offered to customers based on the financial information provided. Exhibits C
3 & D ¶ 15;
- 4 4. Assessing the loan products they identify, and discussing with the customers the
5 terms and conditions of particular loans, while trying to match the customers’
6 needs with one of Defendant’s loan products. Exhibits C & D ¶ 15.
- 7 5. Compiling customer documents for forwarding to an underwriter or loan
8 processor, and finalizing documents for closings. Exhibits C & D ¶ 16.

9 Plaintiffs and MLOs are required to be available at all times for customer contacts, as is
10 evident from the requirement to list personal phone numbers on business cards and websites.
11 Exhibit H, p. 91:7. MLOs do not generally share customers, and failing to be available at the
12 convenience of customers is viewed as poor customer service. Exhibits E, F & G. For each
13 MLO, Banner creates an individual website that lists the direct business line of the MLO, and
14 the personal cell phone number. These webpages are available 24/7. Indeed the bottom of each
15 MLO individual website Banner encourages that a potential borrow to call loan officer at any
16 time, stating “they are just a phone call away.”

17 Our goal is to provide the highest level of service at competitive rates. Our Loan
18 Officers are only a phone call away if you need help. Contact us at (business
19 inside line phone number).

20 See Exhibit I. (Website) Notably, the inside business line on these individual Banner websites
21 nationwide appear to have been forwarded to each of the MLOs personal cell phones.

22 Thus, Defendant not only knows about, but it intentionally set up a system where
23 MLOs can receive calls from potential borrowers at all times of day and night. MLOs are
24 expected by Defendant to be “only a phone call away if [a potential lead or existing customer]
25 needs help.” *Id.* Those who are not a phone call away risk losing a lead, or seriously damaging
26 customer relationships, Defendant’s business interests. Since the loans are typically assigned to
27 individual loan officers, there is a substantial incentive for these commission based MLOs to
28 answer the call from potential leads to secure the business. If an MLO simply ignores the call,

1 or does not timely respond, the potential to lose the business to another MLO or a competitor is
2 very real. Exhibits E & F.

3 Defendant further requires MLOs to use their personal cell phones for mobile email
4 accounts, so MLOs available to serve Defendant's business interests when not physically in the
5 office, including before and after business hours. Exhibits E, F & G. Banner work email
6 accounts are loaded on the MLOs' phones, and emails are checked and responded to regularly
7 outside of Defendant's normal operating hours of 9AM to 5PM, including mornings before
8 arriving at the office, as well as evenings and weekends. *Id.*

9 Failing to be available for customers can lead to, among other things, strained and
10 broken relationships and a significant loss of current and possibly future business for
11 Defendant. *Id.* For an MLO to be successful, he/she must establish and build a client and
12 referral base. *Id.* Customers are generally exclusive to an MLO. *Id.* If an MLO is not
13 responsive to the needs of customers, they risk alienating their customers and potentially losing
14 clients to competitors. MLOs do not normally cover for each other by responding to clients
15 when coworkers are unavailable, whether the unavailability is from illness, vacation, or
16 otherwise. *Id.*

17 Borrowers are typically employed individuals and families who work during the days
18 and are only available to speak with MLOs in the evenings or on weekends, requiring MLOs to
19 answer emails and respond to phone calls off-the-clock. Exhibit H, pp. 91:13; 93:13-94:24;
20 Exhibits E & G. Additionally, all MLOs are expected to develop relationships with realtors,
21 builders, and local associations. They are also expected to solicit business in essentially the
22 same ways, such as attending association meetings and open houses. These tasks regularly
23 require MLOs to work on weekends and outside of normal 9AM to 5PM working hours.
24 Exhibits E, F & G.

25 When Plaintiffs and Class Members did record overtime, it is alleged that Defendant
26 did not properly calculate overtime wages by failing to include earned commissions in the

1 calculation as required by law. Exhibit D, E, F & G. Plaintiffs have no knowledge of any
2 payments of overtime wages that included commission wages in the overtime calculations.
3 Exhibits E, F & G. They have also spoken with other potential opt-in MLOs, including current
4 employees, who similarly have no knowledge of being paid overtime that included commission
5 wages in the calculations. *Id.* Plaintiffs are unaware of ever receiving information from
6 Defendant regarding overtime wage calculations including commissions. *Id.* Plaintiffs have
7 requested, in lay-down discovery, that Defendant produce any evidence it has showing that
8 MLOs had commission wages included in overtime calculations; however, to-date Defendant
9 has refused to provide any information or evidence. See Dkt. 14, 4:17-19.

10 Defendant has pay and timekeeping policies that apply uniformly to MLOs regardless
11 of geographic location. Defendant’s MLO job postings are virtually identical regardless of the
12 state the MLO will be hired in, and the job responsibilities and essential job functions of MLOs
13 are uniform throughout Defendant’s enterprise. *See supra.* Plaintiffs easily meet the very
14 lenient similarly situated standard for conditional FLSA collective action certification, and
15 respectfully request that the Court grant this motion and order notice sent to all potential opt-in
16 parties.

17 **III. LAW AND ARGUMENT**

18 **A. FLSA Authorizes Collective Actions and Notice to Similarly Situated Employees.**

19 The FLSA provides that “no employer shall employ any of his employees . . . for a
20 work week longer than forty hours unless such employee receives compensation for his
21 employment in excess of the hours above specified at a rate not less than one and one-half
22 times the regular rate at which he is employed.” See 29 U.S.C. § 207(a). Compliance with this
23 provision is obtained through the maintenance of *accurate* records of all hours worked by
24 employees. 29 U.S.C. § 211(c). An employer who violates this requirement can be sued by the
25 affected employee. 29 U.S.C. § 216(b). This is happening with MLOs employed by Defendant
26

1 who are not receiving properly calculated overtime including commissions when they report it,
2 and are also working off-the-clock without compensation, and they are suing for owing wages.

3 Often an employer's decision to pay or not pay overtime is a company-wide decision; it
4 is applied to all workers of a particular title or job duty, and not limited to one person. Where
5 the employer's violations are alleged to be widespread like in this case, Section 216(b) of the
6 FLSA authorizes employees to bring a collective action against an employer accused of
7 violating the FLSA as follows:

8 An action ... may be maintained against any employer . . . by anyone or more
9 employees **for and in behalf of himself or themselves and other employees**
10 **similarly situated**. No employees shall be a party Plaintiffs to any such action
11 unless he gives his consent in writing to become such a party and such consent
12 filed with the court in which such action is brought.

11 *Id.* (emphasis added). However, an “opt-in” action under § 216(b) of the FLSA prohibits any
12 person from being a plaintiff in an FLSA action unless they file a written consent with the
13 Court. Actions pursued in such a representative capacity are referred to as “collective actions.”
14 *Id.* The main effect of certification of a wage dispute such as this under §216(b), is the sending
15 of notice and the creation of an opt-in period. In contrast to class actions brought pursuant to
16 FRCP 23, §216(b) collective actions are “opt-in,” meaning that employees who seek to join the
17 action must file a written consent with the district court. *Bollinger v. Residential Capital, LLC*,
18 761 F.Supp.2d 1114, 1119 (W.D. Wash. 2011). “A purported class member's statute of
19 limitations continues to run until [they] join the collective action.” *Wilson v. Maxim*, 2014 WL
20 7340480, *1.

21 It is critical that notice be sent now. The lack of class-wide tolling of the statute of
22 limitations in FLSA cases should cause the Court to favor providing notice to other similarly
23 situated persons of their “opt-in” rights at the earliest stage of the litigation. *Hoffmann v.*
24 *Sbarro, Inc.*, 982 F. Supp. 249, 262 (S.D.N.Y. 1997). Failing to provide such prompt notice
25 frustrates the FLSA's broad remedial purposes and its specific grant of collective action rights
26

1 to employees. See *Fisher v. Michigan Bell Telephone Co.*, 665 F.Supp.2d 819, 828-29 (E.D.
2 Mich. 2009); *Jackson v. New York Tel. Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995). Because the
3 statute of limitations is not tolled for putative class members until they file a consent to join the
4 action, 29 U.S.C. §216(c), the decision to send notice is typically made early in the case.¹

5 Commenting favorably upon collective actions, the Supreme Court has stated:

6
7 A collective action allows . . . Plaintiffs the advantage of lower individual costs to
8 vindicate rights by the pooling of resources. The judicial system benefits by
9 efficient resolution in one proceeding of common issues of law and fact arising
10 from the same alleged . . . activity. These benefits, however, depend on employees
receiving accurate and timely notice concerning the pendency of the collective
action, so that they can make informed decisions about whether to participate.

11 *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169-70 (1989).²

12 A Court should conditionally certify a FLSA class where the plaintiffs have shown that
13 putative class members are “similarly situated.” *Id.* at *2. “The FLSA does not define the term
14 “similarly situated,” and the Ninth Circuit has not yet interpreted the term; nevertheless, courts
15 in this Circuit apply a two-step inquiry to determine whether a collective action should be
16 certified, involving preliminary and then final determinations of whether class members are
17 ‘similarly situated.’” *Id.* The first step is known as the “notice stage” where the Court
18 determines, with “little more than substantial allegations supported by evidence, that the entire
19 proposed class was subject to a single decision, policy or plan that violated the law.” *Id.*
20 (internal citations omitted). “The ‘similarly situated’ standard at this phase is fairly lenient and
21 typically results in certification.” *Wilson v. Maxim Healthcare Servs., Inc.*, 2014 WL 7340480,

22
23 ¹ A three-year FLSA statute of limitations is applicable in this case (in addition to any applicable tolling) because
24 Plaintiffs allege Defendant willfully violated federal wage and overtime laws. The statute of limitations for willful
violations of the FLSA is three years. 29 U.S.C. § 255(a).

25 ² Although *Hoffman-LaRoche* is an Age Discrimination in Employment Act (ADEA) case, its analysis is
26 applicable to FLSA cases because the ADEA explicitly incorporates the FLSA collective action provisions.
Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1212 (5th Cir. 1995); *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 261
n.15 (S.D.N.Y. 1997)(“[I]n *Hoffman-LaRoche*, the Supreme Court construed § 216(b) on its own terms, and its
analysis applies with equal force to FLSA cases.”).

1 *2 (W.D. Wash. Dec. 22, 2014); *see also Zachary v. Cobalt Mortgage, Inc.*, 2017 WL
2 1079374, *2 (E.D. Texas Mar. 22, 2017); *Douglas v. Xerox Bus. Servs.*, 2014 WL 3396112 *2
3 (W.D. Wash. July 10, 2014)(citing *In Re Wells Fargo*, 527 F.Supp.2d 1053, 1071 (2007) (“the
4 usual result is conditional class certification)). “In deciding whether potential plaintiffs should
5 receive notice, courts **do not consider** individual differences between putative class members.”
6 *Randolph v. Centene Mgmt. Co.*, C14-5730 BHS, 2015 WL 2062609, at *3 (W.D. Wash. May
7 4, 2015)(citing *Wilson*, 2014 WL 7340480, *8) (emphasis added). “Fact-specific differences
8 between putative class members go to the merits and are properly addressed at the
9 decertification stage.” *Id.*

10 Here, the allegations alone (all that is necessary), easily meet the “similarly situated”
11 standard for conditional certification and sending of notice to putative class members, as does
12 the evidence and declarations. As the job descriptions also prove, Mortgage Loan Officers have
13 the same job responsibilities and essential job functions regardless of where they are located.
14 For example, a MLO working for Defendant in California is expected to build client
15 relationships and provide clients with loans that meet their needs, much of it after work hours
16 and on weekends, and which aligns with the interests of the Bank, but requires MLOs to work
17 7 days a week and odd hours to accommodate customers and realtors; this is the same as in
18 other states. The fact that all MLOs do not go about their days in an identical manner is not
19 relevant to the odd hours required for the MLO job, or the “similarly situated” determination.
20 The goals, responsibilities, and essential functions are the same. MLOs are also all subject to
21 the same compensation schedule. Their compensation, across the board, is in large part
22 determined through a base salary and commissions earned on loans that are closed and funded.
23 This is a common policy uniformly affecting all MLOs, and Plaintiffs allegations relating to
24 how Defendant calculates, tracks, and pays overtime, are therefore directly related to this
25 uniform compensation policy.

1 Defendant is required to include commission payments in the calculation of Plaintiffs'
2 regular rate for calculation of overtime under 29 C.F.R. §778.117 and 29 C.F.R. §778.118 and
3 state wage statutes, including Washington and California. This means that the base regular rate
4 for overtime calculations must include commission payments in the calculations and cannot be
5 based solely on MLO base monthly salary. Here, Plaintiffs have alleged that Defendant has
6 failed to properly include commissions in the calculation of their overtime rates, to the extent
7 they received overtime. Plaintiffs have alleged that Defendant's practice for the calculation of
8 overtime rates was the same for all MLOs. Even if Defendant alleges it is paying overtime
9 lawfully, Defendant must provide the class with evidence regarding its calculations to show
10 how overtime is being calculated.

11 Defendant also has uniform policies related to recording of hours worked and policies
12 related to overtime hours. Plaintiffs and class members are required to track and log their time.
13 Once time is tracked and logged, managers must give approval for wages to be paid. Plaintiffs
14 allege that Defendant and its managers had a policy and practice of not paying MLOs for all
15 hours worked, including but not limited to discouraging the recording of overtime hours,
16 refusing to pay overtime hours recorded unless certain goals were met, telling MLOs they need
17 to be working more than 40 hours in a week while also telling them not to record any hours
18 over 40, and forcing MLOs to remove logged overtime hours before approval of timesheets.
19 Most significantly, Defendant knew that the job descriptions, and demands of the job, required
20 working after hours, on weekends, and working overtime, yet it did not accurately track that
21 time. *See supra*.

22 The Court should also certify this collective action class because it promotes the
23 interests of judicial efficiency. Plaintiffs and class members are similarly situated in the job
24 responsibilities and essential functions they perform, in the uniform compensation and time
25 keeping policies applied to them, and class members will rely on common evidence to prove
26 their claims. The common evidence Plaintiffs and class members will use to prove their

1 common claims includes evidence related to Defendant's overtime, compensation, and
 2 timekeeping policies. This is in addition to the common questions of law or fact that apply to
 3 all questions regarding the legality of Defendant's actions under the Fair Labor Standards Act.

4 Plaintiffs and the putative class are similarly situated, and the Court should grant
 5 certification so that these class members can receive notice of their right to participate in this
 6 action, and protect their rights by opting-in to stop the individual statute of limitations from
 7 running, and order production of the requested records.

8 **B. The Court Must Authorize Notice To Protect Employees' Statute of Limitations**

9 "To further the Congressional policy that Plaintiffs be allowed to proceed collectively
 10 under Section 216(b), a district court has the authority and discretion to issue an order
 11 permitting a plaintiff to send notice of opt-in rights to potential members of the class." *Kreher*
 12 *v. City of Atlanta, Georgia*, 2006 WL 739572, 5 (N.D. Ga. 2006) (*citing Grayson*, 79 F.3d at
 13 1096); *see also Owen v. West Travel, Inc.*, 2003 U.S. Dist. LEXIS 26212, 25 (W.D. Wash.
 14 2003) ("The parties do not dispute that the Court may exercise its discretion in the
 15 authorization and facilitation of notice in this action."). As affirmed by the U.S. Supreme
 16 Court:

17 [N]otice to absent class members need not await a conclusive finding of similar
 18 situations. To impose such a requirement would condemn any large class claim. . .
 19 to a chicken-and-egg limbo in which the class could only notify all its members to
 20 gather together after it had gathered together all its members, and from which the
 class could escape only by refusing entry after some unpublicized cutoff date to
 additional class members who thereafter stumble upon the case by themselves.

21 *Sperling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392, 406 (D.N.J. 1988), *aff'd*, 862 F.2d 439 (2d
 22 Cir. 1988), *aff'd*, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989).

23 The court concluded that allowing notice to be sent early in the two-step process
 24 followed across the company and prior to a final decision on the similarly situated element,
 25 assures that the decision made after absent members had opted-in would be "informed,
 26 efficiently reached, and conclusive." *Id.*

1 Further, the FLSA statute of limitations is, at most, three years for a willful violation.
2 29 U.S.C. §255(a). If notice is not issued early in a case, a great number of employees will lose
3 their claims due to nothing more than the passage of time. District courts recognize the great
4 prejudice that befalls employees when notice of a collective action is not issued in a timely
5 fashion. *See LaFleur v. Dollar Tree Stores, Inc.*, 2012 WL 4739534, at *3 (E.D. Va.
6 2012)(“Because the statute of limitations continues to run on unnamed class members’ claims
7 until they opt into the collective action . . . courts have concluded that the objectives to be
8 served through a collective action justify the conditional certification of a class of putative
9 Plaintiffs early in a proceeding”); *see also Taylor v. Pittsburgh Mercy Health Sys., Inc.*, 2009
10 WL 1324045, at *2 (W.D. Pa. 2009) (“time is of the essence for purposes of FLSA notice
11 because the statute of limitations is not tolled until a potential Plaintiffs opts into the proposed
12 collective action”); *Lynch v. United Services Auto. Ass’n*, 491 F. Supp. 2d 357, 367 (S.D.N.Y.
13 2007) (issuance of notice “protects Plaintiffs’ claims from expiring under the statute of
14 limitations”); *Smith v. Lowe’s Cos., Inc.*, 2005 WL 6742234, at *4 (S.D. Ohio 2005) (because
15 the statute of limitations continues to run until consent forms are filed, the Plaintiffs’ burden at
16 the notice stage is light). These decisions recognize that because most employees will not know
17 about a collective action before receiving court-authorized notice, those employees cannot join
18 the case until after that notice is sent and will have lost a large portion of their claim(s) by the
19 time they do join. Plaintiffs only delayed filing this motion until now, in the hope of receiving
20 a stipulation for conditional certification from Defendant given that MLOs are undeniably
21 similarly situated throughout Defendant’s operations, and have promptly moved after learning
22 a stipulation was not forthcoming.

23 When courts delay in determining whether to conditionally certify a class, numerous
24 FLSA violations may persist without redress due to nothing more than the running statute of
25 limitations. Indeed, defendant employers could easily eliminate all FLSA exposure by simply
26 running out the clock. Conversely, employees who lack meritorious claims or who are not

1 ultimately found to be “similarly situated” to the named Plaintiffs in a given case receive no
2 structural advantage from early court-approved notice. These employees still must prove their
3 case on the merits, and they still must withstand a stage-two decertification analysis in order to
4 proceed in the group action. In sum, the only plausible purpose for delaying early notice is to
5 foreclose the vindication of valid claims under the FLSA.

6 *1. The Court Should Order Notice to the Class Members.*

7 Once a plaintiff satisfies its burden of showing that potential class members are
8 similarly situated, the court facilitates the ultimate goal of the “notice stage” to give notice to
9 all potential class members of the pending litigation so they may exercise their “opt-in” right.

10 Plaintiffs meet the burden for class certification under §216(b) of the FLSA. Thus, it is
11 appropriate for the Court to grant class certification and approve distribution of the proposed
12 Notice attached as Exhibit A. Without notice, the Plaintiffs, and one other former MLO for
13 Defendant have joined this lawsuit. Further, the Plaintiffs have provided declarations stating
14 that based on their experience and familiarity with other MLOs, that there are many who were
15 subjected to the same practices, worked more than 40 hours per week, and would likely
16 participate in a lawsuit to recover unpaid wages.

17 In order to facilitate timely and orderly notice to all potential class members, Plaintiffs
18 request this Court compel Defendants to produce a list of all potential class members
19 identifying each person by full name and last known address, telephone number, and dates and
20 location(s) of employment. Discovery of this information is permitted to facilitate effective
21 notice to potential class members so they may exercise their right to opt in, or not. *Ingersoll*,
22 2006 WL 859265, at * 2; *see also Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170 (1989)
23 (“The District Court was correct to permit discovery of the names and address of the
24 discharged employees.”). This Court, upon deciding to grant 29 U.S.C. § 216(b) conditional
25 certification, has ordered a defendant to produce the name, address, social security number, and
26 dates of employment for all similarly situated individuals to facilitate notice. *Ingersoll*, 2006

1 WL 859265, at * 2. Given that Plaintiffs have established conditional certification is
2 appropriate, this Court should approve the proposed Notice to all potential class members.

3 Plaintiffs' proposed Notice to class members is appropriate and necessary to adequately
4 inform class members regarding the claims in this lawsuit and their legal rights under the law.
5 One issue in this case is a lack of understanding of what constitutes compensable work by
6 MLOs, and what activities and actions they should be compensated for by Defendant.
7 Therefore, the proposed notice includes what Plaintiffs allege is compensable time because
8 class members must know what constitutes "work" for which they deserve compensation.
9 Exhibits E, F, G, and Proposed Notice. Compensable work is defined as, activity or inactivity
10 that is requested or allowed by the employer and that is pursued predominantly for the
11 employer's benefit, even though it confers a benefit on the employee. *See, e.g.: Tennessee*
12 *Coal, Iron & Railroad Co. v. Muscoda Local 123*, 321 U.S. 590, 598, 64 S. Ct. 698 (1944)
13 (defining work as "physical or mental exertion (whether burdensome or not) controlled or
14 required by the employer and pursued necessarily and primarily for the benefit of the employer
15 and his business").

16 Plaintiffs' counsel anticipates significant difficulties in locating all potential class
17 members due to Defendant's large geographic area of operation, and the fact that many
18 potential class members are no longer employed by Defendants. Given the large size of the
19 anticipated class, a 90-day notice period will allow all potential plaintiffs sufficient time to opt
20 in to this collective action and does not unreasonably prolong the litigation, nor will it
21 adversely affect discovery proceedings. *See Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D.
22 530, 542-44 (N.D. Cal. 2007) (noting that a "thirty day [] [notice period] is too short in light of
23 the number of potential plaintiffs" and setting a 90-day deadline for potential plaintiffs to file
24 consent to join). This Court has also found the 90-day period to be a reasonable amount of time
25 to allow the opt-ins to join the action. *Ingersoll*, 2006 WL 859265, at * 2. Accordingly, the
26 potential class should be allowed 90 days to return their consents to opt-in to this case.

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IV. CONCLUSION

In conclusion, Plaintiffs respectfully pray that the Court grant this motion, conditionally certify this collective action class, and order Plaintiffs’ proposed Notice to be sent to potential opt-in plaintiffs. The very lenient “similarly situated” standard has been met here, where all MLOs, regardless of geographic area of operation, have the same job responsibilities, the same essential job functions, uniformly perform the typical duties of mortgage loan officers, are subject to Defendant’s uniform wage, compensation, overtime, and time-keeping policies, and where common evidence will be used to establish liability on the part of Defendant. With the statute of limitations running for each potential opt-in plaintiff, their interests and rights must be protected and they must be immediately informed of their rights to participate in this lawsuit. Granting this motion also promotes judicial economy, and protects Defendant by allowing the efficient adjudication of the substantial number of claims for which it is allegedly liable.

DATED this 27th day of July, 2017.

THE BLANKENSHIP LAW FIRM, P.S.

By: s/ Scott C. G. Blankenship
Scott C. G. Blankenship, WSBA No. 21431
Robin J. Shishido, WSBA No. 45926
Jordan A. Taren, WSBA No. 50066
The Blankenship Law Firm, P.S.
1000 Second Avenue, Suite 3250
Seattle, WA 98104
Telephone: (206) 343-2700
Facsimile: (206) 343-2704
Email: sblankenship@blankenshiplawfirm.com
rshishido@blankenshiplawfirm.com
jtaren@blankenshiplawfirm.com

Attorneys for Plaintiffs

DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date and in the manner listed below I caused delivery of a true copy of the attached document to the following attorneys for Defendant(s):

Kenneth E. Payson, WSBA No. 26369
Sheehan Sullivan Weiss, WSBA No. 33189
Ryan Hess, WSBA No. 50738
Laura-Lee Williams, WSBA No. 51358
Davis Wright Tremaine LLP
1201 Third Ave, Suite 2200
Seattle, WA 98101
Telephone: (206) 622-3150
Facsimile: (206) 757-7700
Email: kennethpayson@dwt.com
sheehansullivanweiss@dwt.com
ryanhess@dwt.com
lauraleewilliams@dwt.com

- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery
- by Notification via E-filing System

Attorneys for Defendant

DATED this 27th day of July, 2017, at Seattle, Washington.

s/ Scott C.G. Blankenship
Scott C. G. Blankenship, WSBA No. 21431
The Blankenship Law Firm, P.S.
1000 Second Avenue, Suite 3250
Seattle, WA 98104
Telephone: (206) 343-2700
Facsimile: (206) 343-2704
Email: sblankenship@blankenshiplawfirm.com