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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DUANE WATERS, DEBRA TURNER and RUDY FAJARDO, on behalf of themselves, all others similarly situated and the general public,

Plaintiffs,

vs.

AT&T SERVICES, INC. (formerly SBC Services, Inc.) and DOES 1 through 10;

Defendants.

Case No: CV 09-3983 BZ

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ADEQUACY OF FORMER EMPLOYEES AS CLASS REPRESENTATIVES IN RESPONSE TO AUGUST 5, 2010 ORDER

Under submission
Courtroom G

TO THE COURT AND ALL INTERESTED PARTIES, PLEASE TAKE NOTICE THAT:

In response to the Court's Order of August 5, 2010, and the Court's concerns expressed at the August 4, 2010 hearing on the motion for preliminary approval of the class settlement, Plaintiffs Duane Waters, Debra Turner and Rudy Fajardo hereby submit the following memorandum of points and authorities

demonstrating that a former employee can adequately represent employed class members beyond the period of the representative's employment.

I. INTRODUCTION

It is well established that former employees, such as Plaintiffs Duane Waters, Debra Turner and Rudy Fajardo, can be adequate class representatives in a lawsuit on behalf of both current and former employees and may seek damages on behalf of the class beyond the period of their own employment. Indeed, it has been widely recognized that former employees often make *better* class representatives than current ones since they have no fear of reprisal for their participation in the action and therefore are more likely to push for a better result on behalf of the class. The courts have also noted that if former employees were deemed to be inadequate class representatives for classes that include current employees, employers would be encouraged to discharge those employees suspected as most likely to initiate actions against the company. In light of the clear line of authority holding that former employees are adequate class representatives for current employees seeking damages, Plaintiffs' motion for preliminary approval of the class action settlement should be granted.

II. FORMER EMPLOYEES ARE ROUTINELY APPROVED AS REPRESENTATIVES FOR CLASSES THAT INCLUDE PRESENT AND FORMER EMPLOYEES IN ACTIONS FOR DAMAGES.

In numerous cases, courts have uniformly determined that former employees were adequate class representatives in actions seeking damages on behalf of both former and current employees. For example, in *Glass v. UBS Financial Services, Inc,* 2007 WL 221862 (N.D. Cal. 2007), *affirmed* 331 Fed. Appx. 452 (9th Cir. 2009), the District Court approved, and the Ninth Circuit affirmed, a class action settlement in a wage and hour case where, as here, the class representatives were former employees

seeking damages on behalf of both former and current employees beyond the date of their employment. The Court in *Glass* specifically rejected the proposition that former employees could not be adequate representatives for current employees:

> [T]here is no conflict between the named plaintiffs and class members who are current employees of defendants. Both former and current employees are equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint. The fact that, in any given case, some of the class members may have potential claims in addition to those raised by the named plaintiffs does not necessarily create a conflict of interest between the named plaintiffs and such class members.
>
> Here, the purpose of the instant settlement is to provide compensation for assertedly unlawful practices occurring during the class period. Notably, the settlement provides for a release only of claims "arising during the Class Members' Released Period," which ends on the date of final approval of the settlement, (*see* Amended Joint Stipulation of Settlement ¶¶ 8, 48-49), and, thus, does not preclude any class member from filing suit against UBS for any future violation of the law. Consequently, if any class member is of the view that defendants' ongoing policies are unlawful, they remain free to challenge such policies in a future lawsuit.

2007 WL 221862 at 10; *see also Glass v. UBS Financial*, 331 Fed. Appx. at 455

(affirming adequacy of former employees as class representatives, and citing *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir.2003) *cert. denied*, 539 U.S. 927 for the proposition that "this circuit does not favor denial of class certification on the basis of speculative conflicts.").

The same logic applies with equal force in this action. The class representatives in this case have every incentive to fairly and adequately protect the interests of the class by seeking compensation for the Defendant's alleged failure to pay wages for overtime during the relevant class period. In fact, the court-approved class action settlement in *Glass* involved the identical factual scenario as the instant *Waters* matter, *i.e,* the covered class period extended through the date of the preliminary approval of the motion for class certification. Further, in the event that there are issues that arise after the conclusion of this lawsuit, current and future employees are free to challenge them in a future lawsuit.

In addition to *Glass*, there are numerous other cases in which the courts determined that former employees were adequate class representatives. *See, e.g, U.S. Fidelity & Guar. Co. v. Lord*, 585 F.2d 860, 874 (8th Cir. 1978) ("It is well settled that, even if the class representatives are no longer employees, they may nonetheless be adequate representatives of a class of past and present employees.") *cert. denied*, 440 U.S. 913 (1979); *Cross v. National Trust Life Insurance Company*, 553 F.2d. 1026, 1030-33 (6th Cir. 1977) ("The fact that plaintiffs are no longer employees of the defendant does not deprive them of standing to represent a class of current and prospective employees."); *Kouba v. Allstate Ins. Co.*, 1981 WL 16495, * 3, fn. 3 (E.D. Cal. 1981) ("former employees may be adequate representatives of past and present employees"); *Guzman v. VLM, Inc.*, 2008 WL 597186, * 7 (E.D.N.Y. 2008) (holding that former employees were adequate representatives in wage and hour class action for money damages on behalf of current and former employees for a period that extended beyond the date of the named plaintiffs' employment).

Indeed, it has long been recognized that former employees may actually be *better* class representatives than current ones as they are free from any possible coercion by their employer. This rationale was addressed by the Court in *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975), a class action for employment discrimination in which the court rejected the proposition that former employees were not adequate class representatives:

> Plaintiffs who were former employees of the company, being familiar with (the company's) employment practices and being free from any possible coercive influence of management...are better situated than either job applicants or present employees to present an intelligent and strongly adverse case against (the company's) alleged discriminatory practices." [quoting *Mack v. General Electric*, 329 F. Supp 72, 76 (E.D. Pa. 1971)]. Moreover, were the position advanced by [defendant] adopted, employers would be encouraged to discharge those employees suspected as most likely to initiate a [lawsuit] in the expectation that such employees would thereby be rendered incapable of bringing the suit as a class action.

508 F.2d at 247.

The notion that former employees make better class representatives because they are less likely to fear retaliation from their employer has been adopted in numerous other cases. *See, e.g,. In re FedEx Ground Package System, Inc.*, --- F.R.D. ----, 2008 WL 7764456, *6 (N.D. Ind. 2008) (recognizing the benefits of having former employees represent classes that include both former and current employees since they are familiar with the company's employment practices and free from any coercive influence of company's management.); *Fujita v. Sumitomo Bank of*

California, 70 F.R.D. 406, 411 (N.D. Cal. 1975) (holding that former employees, none of whom worked for defendant-company at the time of the filing of their complaint, adequately represented a class of current and former employees and "may well be better situated than job applicants or present employees to present an intelligent and strongly adverse case against the employer's alleged [unlawful] practices.") .[1/]

Similarly, in *Walker v. Bankers Life & Cas. Co.*, No, 2007 WL 2903180, *11 (N.D. Ill. 2007), the court deemed that the named plaintiff, who stopped working for the defendant in July 2004 and filed the lawsuit in 2006, was an adequate representative for a class of persons employed from September 2002 through the conclusion of the action. The court emphasized that "[f]ormer employees may provide superior representation in claims against the employer on behalf of current employees." *Walker*, 2007 WL 2903180, at *7.[2/] *See also Kouba v. Allstate Ins. Co.*, 1981 WL 16495, *3 (E.D. Cal. 1981) (holding that "the subtle fear of covert retribution that current employees may sometimes have (whether warranted or

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1. In *In re FedEx Ground Package System, Inc., supra*,, the Court emphasized that "[i]n the employment context, courts have held that former employees have standing to represent a class consisting of both current and past employees." *Id* at 5. The Court reasoned that there was no antagonism between the interests of the plaintiffs and other members of the class they sought to represent since the "plaintiffs signed the same standard Operating Agreement and were classified as independent contractors . . . [and] were subject to the same regulations regarding their appearance, trucks, delivery methods, and working hours. Whether they were improperly classified as independent contractors affects all of them equally, as it entitles both former and current drivers to additional benefits and compensation...." *Id* at 6. The same reasoning applies in this case in that both current employees and the named Plaintiffs were allegedly improperly classified by Defendant.

2. *Walker* was subsequently de-certified on other grounds, having nothing to do with the adequacy of the class representative. *See Walker v. Bankers Life & Cas. Co.*, 2008 WL 2883614 (N.D. Ill. 2008).

otherwise), may suggest that in some cases former employees may be in a better position to represent the class of current employees than are current employees themselves.").

In this case, the controlling authority supports a finding that the named Plaintiffs, who are former employees of Defendant, are adequate, if not superior, representatives in a case seeking damages for the class that includes current employees and others who may have worked beyond the period of the named Plaintiffs' employment.

III. THE NAMED PLAINTIFFS IN THIS ACTION CAN AND WILL FAIRLY AND ADEQUATELY REPRESENT THE PROPOSED CLASS INCLUDING CURRENT AND FORMER EMPLOYEES.

Fed.R.Civ.P. 23(a)(4) requires that class representatives be able to "fairly and adequately protect the interests of the class."[3] "Adequate representation depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Crawford v. Honig,* 37 F.3d 485, 487 (9th Cir. 1994) [citations omitted]. In this case, the named Plaintiffs share the same interests as the other class members in seeking redress from Defendant. Rather than being antagonistic, the interests of the proposed class representatives are identical to those of the proposed class members.

The named Plaintiffs were subjected to the same employment practices that current employees face, namely their mis-classification as "exempt employees" who were not paid overtime. The fact that the Plaintiffs are no longer employees does not

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3. The standards for certification of an FLSA collective action under 29 U.S.C. § 216(b) are more lenient than the class action certification standards under FRCP 23. *See Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 468 (N.D. Cal. 2004); *Jackson v. New York Tel. Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995).

mean that they are unable to adequately represent the class given the fact that they faced the exact same classification issues faced by current employees. Plaintiffs' counsel has obtained discovery from Defendant, as well as surveys from numerous present and former employees, confirming that the classification of Sr. Analysts in effect during Plaintiffs' employment is consistent with the classification in effect throughout the class period.[4/] Under these circumstances, the fact that the named Plaintiffs are no longer employed by Defendant does not in any manner diminish their ability to represent the class in seeking damages and restitution for periods beyond their employment.[5/]

This case centers on Defendant's allegedly unlawful practice of mis-classifying employees, both former and current, as being exempt from federal and state overtime law. Thus, there exist overriding questions of fact and law common to both former and current employees as to whether the Defendant's policy and practice of classifying each putative class member as exempt from the requirement to pay overtime was unlawful. Former and current employees alike are entitled to compensation that they were deprived of as a result of this alleged mis-classification. As the Ninth Circuit held in *Glass*, the named plaintiffs in this action are "equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint." *Glass*, 2009 WL 1360920, at *1. Indeed, as discussed above, there are numerous reasons why the named plaintiffs in this action are even better representatives than a current employee would be.

Counsel for Plaintiffs have diligently obtained all necessary information to evaluate the potential damages incurred by both current and former employees of

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4. In May 2009, prior to the filing of this lawsuit, the position of Sr. Database Administrator was re-classified as non-exempt.

5. Plaintiffs' counsel has obtained surveys from approximately 67 current employees of Defendant, who were employed in the covered positions during the class period. *See* Declaration of V. James DeSimone at ¶ 2.

AT&T Services, Inc. Moreover, not permitting former employees to represent current employees would be both judicially and economically inefficient and encourage an unnecessary multiplicity of action. Accordingly, this Court should grant Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Provisional Certification of the Class.

VI. CONCLUSION

The named Plaintiffs, who are former employees of Defendant AT&T Services, and who are being represented by diligent and experienced counsel, are adequate class representatives for the proposed class of current and former employees of Defendant. There is no conflict between current employees and former employees in this action for damages based on alleged mis-classification and failure to pay overtime. Indeed, as former employees, Plaintiffs have been able to vigorously advocate on behalf of the class without fear of retaliation by Defendant. Moreover, Plaintiffs are familiar with the employment practices at issue in this case, and Plaintiffs' counsel has received information from numerous current employees and from Defendant, which enable them to adequately represent the interests of both current and former employees. Accordingly, Plaintiffs respectfully request that the Motion for Preliminary Approval of the Class Action Settlement be granted.

DATED: August 23, 2010

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