

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALICIA HARRIS,

No. C-08-5198 EMC

Plaintiff,

v.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR CONDITIONAL
COLLECTIVE ACTION
CERTIFICATION**

VECTOR MARKETING CORPORATION,

Defendant.

(Docket No. 132)

Currently pending before the Court is Plaintiff Alicia Harris's motion for conditional collective action certification. Ms. Harris seeks conditional collective action certification for her claim pursuant to the Fair Labor Standards Act ("FLSA"). That claim is predicated on the allegation that Sales Representatives working for Defendant Vector Marketing Corporation were employees and were not paid minimum wages for their time spent in an initial training. The class for which Ms. Harris seeks conditional certification is defined as "all individuals who worked for Defendant Vector Marketing Corporation in the State of California as 'Sales Representatives' from April 15, 2006 through the resolution of this case." Mot. at 1.

Having considered the parties' briefs and accompanying submissions, as well as all other evidence of record, the Court hereby **GRANTS** Ms. Harris's motion.

I. DISCUSSION

A. Legal Standard

Under the FLSA, employers must pay their employees a minimum wage. *See* 29 U.S.C. § 206(a). If an employer fails to do so, then an aggrieved employee may bring a collective action on

1 behalf of himself and other employees “similarly situated.” *Id.* § 216(b). Determining whether a
 2 collective action is appropriate is within the discretion of the district court. *See Adams v. Inter-Con*
 3 *Sec. Sys.*, 242 F.R.D. 530, 535 (N.D. Cal. 2007).

4 “To maintain a collective action under the FLSA a plaintiff must demonstrate that the
 5 putative collective action members are similarly situated.” *Murillo v. Pac. Gas & Elec. Co.*, No.
 6 CIV. 2:08-1974 WBS GGH, 2010 U.S. Dist. LEXIS 20240, at *4 (E.D. Cal. Mar. 5, 2010); *see also*
 7 *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1123-24 (E.D. Cal. 2009)
 8 (noting that a plaintiff has the burden of proving the similarly situated requirement). Unfortunately,

9 [n]either the FLSA nor the Ninth Circuit have defined
 10 “similarly situated.” [But a] majority of courts have adopted a
 11 two-step approach for determining whether a class is “similarly
 12 situated.” Under this approach, a district court first determines, based
 13 on the submitted pleadings and affidavits, whether the proposed class
 14 should be notified of the action. At the first stage, the determination
 15 of whether the putative class members will be similarly situated “is
 16 made using a fairly lenient standard, and typically results in
 17 ‘conditional certification’ of a representative class.” District courts
 18 have held that conditional certification requires only that “plaintiffs
 19 make substantial allegations that the putative class members were
 20 subject to a single illegal policy, plan or decision.”

21 The second-step usually occurs after discovery is complete, at
 22 which time the defendants may move to decertify the class. In this
 23 step, the court makes a factual determination about whether the
 24 plaintiffs are similarly situated by weighing such factors as “(1) the
 25 disparate factual and employment settings of the individual plaintiffs,
 26 (2) the various defenses available to the defendant which appeared to
 27 be individual to each plaintiff, and (3) fairness and procedural
 28 considerations.” If the district court determines that the plaintiffs are
 not similarly situated, the court may decertify the class and dismiss the
 opt-in plaintiffs’ action without prejudice. Even when the parties
 settle, the court “must make some final class certification finding
 before approving a collective action settlement.”

Murillo, 2010 U.S. Dist. LEXIS 20240, at *4-6.

At this juncture, the issue before the Court is whether Ms. Harris’s case should be
 conditionally certified at the first stage. In describing the lenient standard used at the first stage,
 many courts have indicated that a plaintiff must simply show that “there is some factual basis
 beyond the mere averments in their complaint for the class allegations.” *Id.* at *10-11 (internal
 quotation marks omitted); *see also Felix v. Davis Moreno Constr., Inc.*, No. CV F 07-0533 LJO
 GSA, 2008 U.S. Dist. LEXIS 98458 (E.D. Cal. Sept. 3, 2008) (stating that “[t]he evidence must

1 show there is ‘some factual nexus which binds the named plaintiffs and the potential class members
2 together as victims of a particular alleged [policy or practice]’”); *Realite v. Ark Rest. Corp.*, 7 F.
3 Supp. 2d 303, 306 (S.D.N.Y. 1998) (stating that plaintiffs can show that potential class members are
4 similarly situated “by making a modest factual showing sufficient to demonstrate that they and
5 potential plaintiffs are victims of a common policy or plan that violated the law”). Courts have
6 emphasized that a fairly lenient standard is used at the first step because a court does not have much
7 evidence at that point in the proceedings – just the pleadings and any declarations submitted. In
8 contrast, at the second step, a stricter standard is applied because there is much more information
9 available, “which makes a factual determination possible.” *Vasquez*, 670 F. Supp. 2d at 1123; *see*
10 *also Labrie v. UPS Supply Chain Solutions, Inc.*, No. C 08-3182 PJH, 2009 U.S. Dist. LEXIS 25210,
11 at *10-12 (N.D. Cal. Mar. 18, 2009) (noting that the first step “is characterized by a fairly lenient
12 standard, necessitated by the fact that not all discovery will have been completed at the time of the
13 motion,” while, at the second step, “the court engages in a more stringent inquiry into the propriety
14 and scope of the collective action” because “discovery is complete and the case is ready to be
15 tried”).

16 In considering whether this lenient standard has been met in the instant case, the Court bears
17 in mind the following.

18 (1) A plaintiff need not submit a large number of declarations or affidavits to make the requisite
19 factual showing. A handful of declarations may suffice. *See, e.g., Gilbert v. Citigroup, Inc.*,
20 No. 08-0385 SC, 2009 U.S. Dist. LEXIS 18981, at *5 (N.D. Cal. Feb. 18, 2009) (finding
21 lenient standard met based on declarations from plaintiff and four other individuals);
22 *Escobar v. Whiteside Constr. Corp.*, No. C 08-01120 WHA, 2008 U.S. Dist. LEXIS 68439,
23 at *10-11 (N.D. Cal. Aug. 21, 2008) (finding lenient standard met based on declarations from
24 three plaintiffs); *Sniffen v. Spectrum Indus. Servs.*, No.: 2:06-cv-622, 2007 U.S. Dist. LEXIS
25 35206, at *5 (S.D. Ohio Feb. 13, 2007) (finding lenient standard met based on affidavits
26 from two plaintiffs); *Leuthold v. Destination Am.*, 224 F.R.D. 462, 468-69 (N.D. Cal. 2004)
27 (Walker, J.) (finding lenient standard met based on affidavits from three proposed lead
28 plaintiffs).

- (2) The fact that a defendant submits competing declarations will not as a general rule preclude conditional certification. *See Hipp v. National Liberty Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001) (explaining that plaintiffs may meet lenient standard “‘by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which *successfully engage* defendants’ affidavits to the contrary’”) (emphasis added). As Judge Alsup of this District has noted, competing declarations simply create a “he-said-she-said situation”; while “[i]t may be true that the [defendant’s] evidence will *later* negate [the plaintiff’s] claims, that should not bar conditional certification at the first stage.” *Escobar*, 2008 U.S. Dist. LEXIS 68439, at *12 (emphasis added).
- (3) The fact that other potential class members have not affirmatively stated a desire to opt in does not preclude conditional certification. As pointed out by one district court, while “a number of courts have held that named plaintiffs must proffer some evidence that other similarly situated individuals desire to opt in to the litigation before putting the parties to the expense and effort of notice,” others “have recognized that requiring named plaintiffs to proffer evidence that others desire to opt in . . . puts the named plaintiff[s] [in] the ‘ultimate chicken and egg dilemma.’” *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, No. 2:08-cv-00722-RCJ-PAL, 2009 U.S. Dist. LEXIS 5941, at *37-38 (D. Nev. Jan. 12, 2009). The district court therefore concluded that “plaintiffs’ failure to demonstrate that there are other similarly situated employees who wish to opt in to this FLSA action for overtime wages does not, of itself, constitute sufficient grounds to defeat the motion [for conditional certification].” *Id.* at *39.

B. Parties’ Arguments

In the instant case, Ms. Harris argues that she is entitled to conditional certification based on evidence previously submitted by Vector that shows it has a uniform practice of having its Sales Representatives participate in an initial training and then not paying the Sales Representatives for their time spent in the training.

In response, Vector argues that the motion for conditional certification should be denied because Ms. Harris has failed to make a sufficient factual showing that she is similarly situated to

other class members with respect to: (1) whether they were employees instead of independent contractors; (2) whether they were employees instead of nonemployee trainees; and (3) whether the time they spent in training, assuming they were employees, constituted working time. Each of these arguments is addressed below.

C. Independent Contractor v. Employee

The Ninth Circuit has stated, that to determine whether a person is an employee (as opposed to an independent contractor) for purposes of the FLSA, the following nonexhaustive factors should be considered:

1) The degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.

Neither the presence nor the absence of any individual factor is determinative. Whether an employer-employee relationship exists depends "upon the circumstances of the whole activity," and ultimately, whether, as a matter of economic reality, the individuals "are dependent upon the business to which they render service."

Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981). In the instant case, Vector argues that Ms. Harris's motion for conditional certification should be denied because she has failed to make any showing that she is similarly situated to other Sales Representatives with respect to any of the above factors. See *Bamgbose v. Delta-T Group, Inc.*, No. 09-667, 2010 U.S. Dist. LEXIS 10681, at *18 (E.D. Penn. Feb. 8, 2010) (stating that a court "must determine whether the proof to demonstrate that the workers are 'employees' or 'independent contractors' can be applied to the class as a whole").

The Court does not agree. As a preliminary matter, the Court has doubts as to whether the specific factors itemized above are applicable in a case such as this in which the only wages being sought are those related to time spent in training. Notably, some of the factors make little sense in a training situation – e.g., the worker's opportunity for profit or loss. Furthermore, the Ninth Circuit has implicitly taken into account that the factors may not be applicable in all cases because it has

1 expressly stated that (1) the factors are nonexhaustive and (2) at the end of the day, the question is
2 what is the economic reality of the relationship between the worker and the employer. *See*
3 *Donovan*, 656 F.2d at 1370. Finally, it is notable that most courts that have evaluated whether a
4 trainee should be paid for time spent in training do not look to the factors identified above but rather
5 consider the Supreme Court case *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), and its
6 progeny. Significantly, the *Portland Terminal* case has been construed by some courts as essentially
7 setting up an economic realities test in the specific context of training, including one of the cases
8 cited by Vector in its supplemental brief. *See Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465,
9 467-68 (M.D. Tenn. 1979), *rev'd*, 668 F.2d 234 (6th Cir. 1981); *see also* 50 A.L.R. Fed. 632, at *2,
10 5 (2008) (discussing cases in which the court has evaluated whether “the economic realities of the
11 situation are such that the trainees are primarily working for the benefit of the employer sponsoring
12 the training rather than for their own benefit”).

13 The Court acknowledges Vector’s point that *Portland Terminal* “did not present the
14 independent contractor versus employee issue as one of the key issues to be determined.” Docket
15 No. 173 (Def.’s Letter at 2). Nevertheless, the Supreme Court did analyze in *Portland Terminal* the
16 ultimate issue of when a trainee is “employed” within the meaning of and entitled to protection
17 under the FLSA. 330 U.S. at 152-53. This Court thus agrees with *Marshall* that *Portland Terminal*
18 effectively prescribes an economic realities test in the specific context of job training.

19 As a logical matter, the determination of the economic realities inevitably depends on the
20 context. That context matters is underscored by the example provided by the Court at the hearing –
21 *i.e.*, how could the above-identified *Donovan* factors have any applicability in a situation where a
22 trainee completed the training but thereafter “quits” and never goes on to conduct any activity in the
23 attempt to sell the product? The test of employment must be tailored to the context at hand.

24 Tellingly, Vector cites no authority to support its contention that the court must first evaluate
25 the *Donovan* factors identified above *i.e.*, to first determine whether the worker is an employee
26 under the conventional economic realities test *before* applying the *Portland Terminal* or some
27 version of the DOL test (derived from *Portland Terminal* as discussed, *infra*) for FLSA coverage.
28 Vector has cited only one case in which the above-listed factors were considered at all in

determining whether trainees should be considered employees under the FLSA, *see Reich v. Shiloh True Light Church of Christ*, 895 F. Supp. 799, 815 (W.D.N.C. 1995), but that case is materially distinguishable. There, the trainees worked in the training program for years, and therefore the above factors, such as the workers' opportunity for profit or loss, had application, unlike the situation where pre-job training is involved.

For the reasons discussed above, the Court finds that the *Portland Terminal*/DOL analysis of trainees rather than the *Donovan* test applies. This counsels against a denial of Ms. Harris's motion for conditional certification as discussed *infra*. But, even assuming that Vector is correct – *i.e.*, that Ms. Harris must make a showing of “similarly situated” with respect to the *Donovan* factors identified above – the Court still would grant conditional certification. For purposes of the first stage, Ms. Harris has made a sufficient factual showing that she and other Sales Representatives are similarly situated because (1) there is no real dispute that Vector's Sales Representatives have the same duties¹; and (2) Vector categorically classifies the Sales Representatives as independent contractors.²

Furthermore, submitted in conjunction with Vector's prior motion for summary judgment is sufficient to establish “similarly situated” at the first stage. In its summary judgment order, the Court pointed to facts from which a reasonable jury could find that Vector exercised sufficient

¹ *See Bunyan v. Spectrum Brands, Inc.*, No. 07-CV-0089-MJR, 2008 U.S. Dist. LEXIS 59278, at *27 (S.D. Ill. July 31, 2008) (stating that “[a] number of district courts have recognized that where a fact-specific analysis of each individual plaintiff's employment responsibilities would be required to determine their status, class certification is not appropriate”); *Reich v. Homier Distr. Co., Inc.*, 362 F. Supp. 2d 1009, 1013-14 (N.D. Ind. 2005) (noting that “[m]any other courts . . . have declined to find potential class members similarly situated where liability depended on an individual determination of each employee's duties”).

² *See Misra v. Decision One Mortg. Co., LLC*, 673 F. Supp. 2d 987, 996 (C.D. Cal. 2008) (noting that “[i]t is somewhat disingenuous . . . for Defendants to argue that they should be permitted to treat all sales representatives as one group for purposes of classifying them as exempt, but that this Court can only determine the validity of that classification by looking to the specific job duties of each individual sales representative”; adding that “Defendants' arguments are ‘better suited for the more stringent second step of the § 216(b) collective action certification analysis’”); *Houston v. URS Corp.*, 591 F. Supp. 2d 827, 834 (E.D. Va. 2008) (stating that plaintiffs had sufficiently alleged a common policy or plan in that, *e.g.*, “all inspectors were classified as independent contractors rather than employees”). *But see Bamgbose*, 2010 U.S. Dist. LEXIS 10681, at *27 (stating that, although employer “may have represented to the DOL and IRS that its workers were similar, in order to argue that they were properly classified as independent contractors, the Court cannot rely on these representations to find the workers similarly situated for FLSA collective action purposes”).

1 control over Ms. Harris – *e.g.*, that Sales Reps are not allowed to advertise or use the Vector or
2 Cutco name without approval; that Sales Reps are not able to set their own prices for the Cutco
3 knives; that Vector distributes during its initial training program a Manual that encourages persons
4 to follow the suggested presentation; that Sales Representatives are required to obtain and use a
5 sample kit for in-home demonstrations; and that Vector’s materials (including its training manual)
6 promote “PDI,” *i.e.*, Personal Daily Interest, which suggests that Sales Representatives may
7 effectively have been required to keep in touch with their managers. Clearly, these facts would
8 suggest a degree of control applicable to all Sales Representatives, not just Ms. Harris.

9 To the extent there may be some individualized inquiries about the level of control actually
10 exercised (*e.g.*, some managers may have been more stringent about PDI), several courts have
11 indicated that individualized inquiries such as this are better to address at the second stage of
12 certification rather than the first. *See Labrie*, 2009 U.S. Dist. LEXIS 25210, at *17 (finding that
13 employer’s “arguments [regarding individualized inquiries on control] raise issues primarily going
14 to the merits and are more appropriately addressed on a motion to decertify or motion for summary
15 judgment once notice has been given, the deadline to opt-in has passed, and discovery is closed”);
16 *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, No. 2:08-cv-00722-RCJ-PAL, 2009 U.S. Dist.
17 LEXIS 5941, at *33-34 (D. Nev. Jan. 12, 2009) (noting that “[a] number of reasoned decisions have
18 held that the need for individualized adjudication is more appropriately addressed at the second step
19 of this § 216(b) collective action certification analysis in a motion to decertify the collective action
20 after notice has been given and the opportunity to opt in has passed”); *Lemus v. Burnham Painting*
21 *& Drywall Corp.*, No. 2:06-cv-01158-RCJ-PAL, 2007 U.S. Dist. LEXIS 46785, at *15-16 (D. Nev.
22 June 25, 2007) (stating that “[t]he fact intensive inquiries concerning whether the plaintiffs are
23 independent contractors or employees for purposes of the FLSA, and detailed analysis of whether
24 the plaintiffs are sufficiently similarly situated to maintain the class are more appropriately decided
25 after notice has been given, the deadline to opt in has passed, and discovery has closed”); *Westfall v.*
26 *Kendle Int’l, CPU, LLC*, No. 1:05-cv-00118, 2007 U.S. Dist. LEXIS 11304, at *27 (N.D. W. Va.
27 Feb. 15, 2007) (stating that “[t]he defendants’ arguments are more appropriate in the second stage of
28 the similarly situated inquiry”).

1 D. Nonemployee Trainee v. Employee

2 As noted above, in *Portland Terminal*, the Supreme Court addressed the issue of whether
 3 persons participating in a training course offered by a railroad should be considered employees of
 4 the railroad and therefore compensated for their training time under the FLSA. The Supreme Court
 5 concluded that they should be not be deemed employees, taking into account, *inter alia*, the fact that
 6 the trainees' activities did not displace any of the railroad's regular employees, that the trainees
 7 work did not expedite the railroad's business and in fact sometimes impeded and retarded it, and that
 8 the trainees benefitted more from the training than did the railroad. *See Portland Terminal*, 330 U.S.
 9 at 149-53.

10 Based on *Portland Terminal*,

11 the Department of Labor's Wage and Hour Division has developed a
 12 test listing six criteria for determining whether trainees are employees
 within the meaning of FLSA. . . . It provides:

13 Whether trainees are employees under the Act, according to the
 14 WH Administrator, will depend upon all the circumstances
 15 surrounding their activities on the premises of the employer. If all six
 of the following criteria apply, the trainees are not employees within
 the meaning of the Act:

16 * The training, even though it includes actual operation of the facilities
 17 of the employer, is similar to that which would be given in a
 vocational school[.]

18 * The training is for the benefit of the trainee[.]

19 * The trainees do not displace regular employees, but work under
 20 close observation[.]

21 * The employer that provides the training derives no immediate
 22 advantage from the activities of the trainees and on occasion his
 operations may actually be impeded[.]

23 * The trainees are not necessarily entitled to a job at the completion of
 the training period[.]

24 * The employer and the trainees understand that the trainees are not
 25 entitled to wages for the time spent in training.

26 *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1025-26 (10th Cir. 1993).

27 In the instant case, Ms. Harris asserts that the DOL test's interpretation of *Portland Terminal*
 28 is controlling as to whether a trainee should be considered an employee for purposes of the FLSA.

1 A number of courts have adopted the Department of Labor (“DOL”) test. *See, e.g., Atkins v.*
2 *General Motors Corp.*, 701 F.2d 1124, 1127-28 (5th Cir. 1983) (giving substantial deference to
3 Wage and Hour Administrator’s approach). Others have not. *See, e.g., McLaughlin v. Ensley*, 877
4 F.2d 1207, 1209-10 & n.2 (4th Cir. 1989) (declining to rely on DOL test and instead applying “the
5 general test [of] whether the employee or the employer is the primary beneficiary of the trainees’
6 labor”). Still others have taken somewhat of a middle position, stating that the DOL test need not be
7 strictly or rigidly applied and that the totality of the circumstances instead controls whether a trainee
8 should be deemed an employee for purposes of the FLSA. *See Reich*, 992 F.2d at 1026-27 (noting
9 that “there is nothing in *Portland Terminal* to support an ‘all or nothing approach’” and concluding
10 that the six criteria of the DOL test “are relevant but not conclusive”).

11 For purposes of this opinion, the Court assumes that the DOL test in some form applies,
12 particularly since neither party has made any real argument to the contrary. In her papers, Ms.
13 Harris asserts that this test “is conducive to class-wide analysis,” Mot. at 11, and Vector has not
14 really disputed such. Instead, Vector’s sole contention is that Ms. Harris has failed to provide
15 evidence to support the above criteria or provided insufficient evidence.

16 While Ms. Harris arguably could have done a better job of accumulating evidence to support
17 her factual showing, the Court does not agree with Vector that Ms. Harris has failed to provide
18 adequate evidence, particularly at the first stage of FLSA collective action certification.

19 First, contrary to what Vector suggests, Ms. Harris’s failure to provide evidence on all
20 criteria is not dispositive. As noted above, at least one court has concluded that the DOL test need
21 not be strictly applied. And even under a strict application of the DOL test, *all* of the six factors
22 must be present before a trainee is deemed not an employee covered by the FLSA. If the plaintiff
23 demonstrates the inapplicability of any one factor, the FLSA applies. Ms. Harris has demonstrated
24 that she is similarly situated as to more than one of the factors.

25 For example, Ms. Harris has provided evidence related to the first criteria – *i.e.*, the training
26 is more specific to the Vector position than that which would be given in a vocational school. The
27 Manual which is distributed during the training is relevant evidence. *See Harris Decl.*, Ex. A. That
28 is, the Manual indicates that there is a sufficient showing of consistency and uniformity as to the

1 nature and content of the training to establish Ms. Harris is similarly situated to the other trainees.³
 2 As for the second criteria – *i.e.*, whether the training is for the benefit of the trainee – it is basically
 3 the inverse of the fourth – *i.e.*, whether the employer derives an immediate advantage from the
 4 activities of the trainees – and Vector has admitted that Ms. Harris has provided some evidence as to
 5 the fourth criteria. Again as to the analysis of these criteria, there is nothing that materially
 6 distinguishes Ms. Harris from the other trainees.

7 Second, some of the criteria are not in need of any specific evidence from Ms. Harris in order
 8 to establish she is similarly situated. For example, there does not seem to be any dispute regarding
 9 the third criteria – *i.e.*, that the trainees did not displace any regular employees. Also, for the fifth
 10 and sixth criteria – *i.e.*, that trainees are not necessarily entitled to a job and that the employer and
 11 trainee understand that trainees are not entitled to wages for time spent in training – Vector has
 12 actually provided evidence in opposition to the motion for conditional certification, and nothing
 13 about this evidence indicates that these factors do not apply to all trainees, including Ms. Harris.
 14 Indeed, Vector’s evidence suggests that trainees are *uniformly* told prior to training (*i.e.*, during the
 15 interview process) that they will not be paid for the time spent in training. *See, e.g.*, Conedera Decl.
 16 ¶ 5; Hanks Decl. ¶ ; Lombardi Decl. ¶ 5; Montesdeoca Decl. ¶ 5; Rodrigo Decl. ¶ 5.

17 Third, Vector’s criticism of Ms. Harris’s evidence on the fourth criteria – *i.e.*, that the
 18 employer derives no immediate advantage from the activities of the trainees – is somewhat
 19 unwarranted. For example, Ms. Harris claims that one of the benefits obtained by Vector from the
 20 training was the trainees’ purchase of a sample knife kit during the training. Vector argues that,
 21 although Ms. Harris clearly states in her declaration that she bought the sample kit during her
 22 training, *see* Harris Decl. ¶ 9, the declarations Ms. Harris has submitted from other former Sales
 23 Representatives are not so clear. Vector is correct that no other declarant explicitly testifies that the
 24 sample kit was purchased during the training. But at least for two of the declarants it can be inferred
 25 from the context that that was in fact the case. *See* Bryan Decl. ¶ 8; Seville Decl. ¶ 8.

26
 27 ³ Nothing bars the Court from considering the evidence submitted by the parties previously in
 28 conjunction with Vector’s motion for summary judgment – *e.g.*, the training outlines. *See* Docket No.
 71 (Order at 20-21) (noting that Vector training materials reflected that a significant part of the training
 was specific to Vector and Cutco knives).

As another example, Ms. Harris maintains that one of the benefits obtained by Vector from the training was the generation of potential customer lists by the trainees. Vector contends that there is no evidence that the lists were ever given to Vector or used by Vector (even if given) and therefore there could have been no benefit. But this ignores the declaration testimony of Ms. Harris and at least one other former Sales Representative that the generated potential customer list was eventually used. *See* Harris Decl. ¶ 10 (“I did call some of the people on the list that I created to try to set up appointments, some of which I did make presentations to.”); Seville Decl. ¶ 11 (“After signing the Sales Rep Agreement, I called the people on the list that I had created in order to set up sales demonstration appointments.”).

The Court therefore rejects Vector’s argument that, at the first stage, Ms. Harris has failed to make a sufficient factual showing that she and other Sales Representatives are similarly situated with respect to the factors enumerated in the DOL test.

E. Training as Working Time or Nonworking Time

As the Court discussed in its prior summary judgment order, even assuming that Sales Representatives are employees of Vector within the meaning of the FLSA, that does not automatically make the time they spent in training compensable under the FLSA. Federal regulations provide:

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

- (a) Attendance is outside of the employee's regular working hours;
- (b) Attendance is in fact voluntary;
- (c) The course, lecture, or meeting is not directly related to the employee’s job; and
- (d) The employee does not perform any productive work during such attendance.

29 C.F.R.. § 785.27. While it is unclear whether this test applies once a trainee is found to be employed within the meaning of the FLSA under the *Portland Terminal* or the DOL test, this Court has previously noted in its summary judgment order that it is “doubtful whether criteria (c) applies

1 [in the instant case because] [t]he training appears to be related to the job. Indeed, the training is
2 keyed to the specifics of the Vector sales program and Cutco knives.” Docket No. 71 (Order at 19).

3 In any event, Vector does not argue in opposition to the pending motion that the above test is
4 not conducive to class-wide analysis or that Ms. Harris is not similarly situated to the other trainees.
5 If it had, such an argument would lack merit. For example, it appears that the training manual was
6 used throughout California as were certain training outlines. Rather, Vector simply argues that Ms.
7 Harris’s evidence cannot stand against its evidence – *i.e.*, Ms. Harris has submitted only four
8 declarations while Vector has submitted twelve. *See* Opp’n at 10. But, as noted above, the fact that
9 there are competing declarations does not bar a court from conditionally certifying a class. Such
10 evidence will have more weight at the second stage, but this is only the first stage.

11 Moreover, Vector’s characterization of its evidence with respect to this issue is problematic.
12 Vector argues that, even if Sales Representatives are in fact employees, its evidence shows that
13 individuals were not hired as Sales Representatives until the end of training (as opposed to being
14 hired after the interview and before the training, which is Ms. Harris’s position). This is not an
15 argument under 29 C.F.R. § 785.27. It would also appear to be irrelevant under *Portland Terminal*
16 where the analysis did not turn on the fact that the railroad trainees were contingent hires. In any
17 event, even if the timing of the offer were relevant, many of the Vector managers admit that, after
18 the interview and before the training, they told the individuals that they were accepted for the
19 position or they were welcomed to the team. *See, e.g.*, Gedris Decl. ¶ 9; Keller Decl. ¶ 12; Casey
20 Decl. ¶¶ 11-12; Comstock Decl. ¶ 10. Vector seems to be taking the position that the individuals
21 were only being accepted into the training program or being welcomed into the training program
22 because it would not allow any individual to actually sell the Cutco knives until after completing the
23 training and signing the Sales Representative Agreement. *See, e.g.*, Keller Decl. ¶ 12; Casey Decl. ¶
24 12; Comstock Decl. ¶ 10. But just because Vector would not permit a sale until after the Agreement
25 was formally signed does not necessarily mean that an employment agreement did not exist earlier –
26 *i.e.*, after the interview and before the training. In short, even if this issue of timing were relevant, it
27 is a second stage issue.
28

1 Thus, as above, the Court rejects Vector's contention that Ms. Harris has failed to make a
2 sufficient factual showing at the first stage that she and other Sales Representatives are similarly
3 situated with respect to the factors identified in § 785.27.

4 F. First Stage to Second Stage

5 Finally, the Court addresses the last argument presented by Vector in its opposition – *i.e.*,
6 that Ms. Harris has failed to show adequate interest in the lawsuit even after “substantial discovery
7 and communications with class members” through a precertification notice (which was sent to
8 approximately 54,000 people). Opp'n at 14.

9 In her reply brief, Ms. Harris claims that there has been overwhelming interest in the lawsuit
10 and has submitted a declaration from her counsel in support. *See, e.g.*, Saltzman Decl. ¶ 3 (noting
11 that, in just four days, the firm received almost 1,400 calls). Not surprisingly, Vector has made
12 various objections to the declaration from counsel. *See* Docket No. 170 (objections). The Court,
13 however, need not rule on the objections because, even without the Saltzman declaration, Vector's
14 position is not persuasive. In one case, a court did express concern about a plaintiff's inability to
15 provide supporting evidence, even at the first stage, because the action had been pending for sixteen
16 months. *See Felix v. Davis Moreno Constr., Inc.*, 2008 U.S. Dist. LEXIS 98458, at *19-20 (E.D.
17 Cal. Sept. 3, 2008). But *Felix* seems to be an extreme case – *e.g.*, the plaintiff offered no
18 declarations from allegedly similarly situated employees and further mischaracterized the deposition
19 testimony of the employer. *See id.* Here, Ms. Harris has provided declarations from other persons
20 allegedly similarly situated, even if the number of declarations is small. As noted above, courts have
21 generally stated that a small number of declarations is acceptable at the first stage.

22 Moreover, contrary to what Vector argues, substantial discovery has not really taken place in
23 this case. Previously, discovery took place in conjunction with Vector's motion for summary
24 judgment – but that dealt only with the issue of whether Ms. Harris as an *individual* had evidence to
25 support her being an employee instead of an independent contractor. While it does appear that Ms.
26 Harris sent out a precertification notice, and thus arguably Ms. Harris could or should have gathered
27 information from the persons who received the notice, that does not necessarily mean that the Court
28 should, as a result, effectively convert this first stage of certification into the second. In *Leuthold*,

1 Judge Walker declined to convert the first stage into the second, noting that, although “courts
2 sometimes bypass the first stage when discovery has been completed,” that approach was not
3 appropriate in the case under consideration because “it is unclear whether the factual record of this
4 case is complete,” “[t]he relevant facts have not been presented with clarity, and the court cannot be
5 certain whether any of the ongoing discovery disputes would inform the court's second tier
6 analysis.” *Leuthold v. Destination Am.*, 224 F.R.D. at 468-69. The Court finds that Judge Walker’s
7 analysis is largely applicable to the instant case as well.

8 G. Class Notice

9 For the foregoing reasons, the Court finds that Ms. Harris has made a sufficient factual
10 showing at the first stage that she and other Sales Representatives are similarly situated. As Ms.
11 Harris contends, there is sufficient evidence indicating that Vector has a uniform practice of having
12 its Sales Representatives participate in an initial training and then not paying the Sales
13 Representatives for their time spent in the training. Because Ms. Harris has made a sufficient factual
14 showing, conditional certification is appropriate and a notice to the proposed class shall be issued.

15 Per the Court’s case management order of March 26, 2010, the class notice must be mailed
16 by May 24, 2010. Accordingly, the parties must file a joint proposed class notice no later than May
17 20, 2010, at 12:00 p.m., for the Court’s approval. The proposed notice shall be e-filed and a
18 courtesy copy shall be faxed to the Court at (415) 522-4200.

19 As to the consent-to-join form and postcard that Ms. Harris proposes accompany the class
20 notice, Vector has made objections. *See* Docket No. 173 (letter). The Court hereby rules as follows.

21 (1) Vector argues that the notice sent to the class should include a statement that the
22 Court has made no findings on the merits of the FLSA claim. The Court agrees that such
23 information should be provided in the notice. However, the information need not be repeated on
24 either the consent-to-join form or the postcard.

25 (2) Vector argues that contact information for its counsel should be provided (*i.e.*, not
26 just the contact information for Ms. Harris’s counsel) on the class notice, consent-to-join form,
27 and/or postcard. The Court does not agree. Although not all courts are in agreement, most courts
28 have held that, “[o]nce a class has been certified, the rules governing communications [with class

members] apply as though each class member is a client of the class counsel.” Manual of Complex Litig. § 21.33, at 300 (4th ed. 2004). *See, e.g., Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985) (stating that, “[a]t a minimum, class counsel represents all class members as soon as a class is certified”); *Erhardt v. Prudential Group*, 629 F.2d 843, 845 (2d Cir. 1980) (stating that, “[o]nce a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel”); *Parks v. Eastood Ins. Servs.*, 235 F. Supp. 2d 1082, 1083 (C.D. Cal. 2002) (stating that, “[i]n a class action certified under Rule 23, . . . absent class members are considered represented by class counsel unless they choose to ‘opt out’”).

Including contact information for defense counsel in the class notice risks violation of ethical rules and inadvertent inquiries, thus engendering needless confusion. *See generally Stuart v. RadioShack Corp.*, No. C-07-4499 EMC (Docket No. 108).

(3) Per the Court’s case management order, the consent-to-join forms must be filed with the Court by August 2, 2010. *See* Docket No. 126 (order). Therefore, the Court agrees with Vector that Ms. Harris should build in time for the class administrator to receive the forms and then have those forms filed *with the Court* by the August 2 deadline.

(4) Vector objects that an original signature should be provided for the consent-to-join form and therefore consent via e-mail or Internet should not be permitted. The Court agrees. To ensure that there are no disputes regarding authenticity, an original signature should be provided. It does not pose any undue burden to require that a consent form be returned by mail or facsimile.

(5) Vector objects to the last portion of the consent-to-join form. However, the last portion is not particularly objectionable. Notably, even Vector’s proposed class notice states that no retaliation is permitted. Therefore, the last portion of the consent-to-join form may be included. The information may be duplicative, but it is neither prejudicial nor confusing.

(6) Vector contends that sending the postcard reminder notice after the class notice is harassing. The Court does not agree. Particularly since the FLSA requires an opt-in procedure, the sending of a postcard is appropriate. The Court also notes that a postcard is not especially invasive (*e.g.*, compared to a telephone call).

(7) Vector asks that the class members provide additional information on the consent-to-join form – *i.e.*, the dates of training, estimated training time, and location of training. The Court agrees that this information would facilitate discovery. However, to ensure that class members will not be deterred from opting in, the Court shall include language that the class members need only include the information requested to the best of their knowledge and that failure to do so will not prevent them from opting in.

(8) The parties include different language in their proposed consent-to-join forms as to whether the class member was a Sales Representative during the relevant time period. Vector's proposed language is problematic because what matters is whether the person was in training as of April 15, 2006, not whether the person signed a Sales Representative Agreement by that date. However, it is not unreasonable to include language stating that the person was in training at some point during the relevant time period.

Attached to this order is the Court's approved language to be used in the consent-to-join form and postcard.

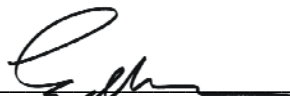
II. CONCLUSION

For the foregoing reasons, Ms. Harris's motion is granted. As noted above, the proposed class notice shall be e-filed and provided to the Court by May 20, 2010, at 12:00 p.m.

This order disposes of Docket No. 132.

IT IS SO ORDERED.

Dated: May 18, 2010


EDWARD M. CHEN
United States Magistrate Judge