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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

VINCENT BOVA, on behalf of himself, and
on behalf of all persons similarly situated,

Plaintiffs,

vs.
WASHINGTON MUTUAL BANK, and
DOES 1 through 10,

Defendants.

CASE NO. 07cv2410 WQH (JMA)
ORDER

HAYES, Judge:

The matter before the Court is the motion to dismiss or, in the alternative, to stay Plaintiffs' California class allegations and private attorney general action allegations filed by Defendant Washington Mutual Bank. (Doc. # 9).

PROCEDURAL HISTORY

On December 26, 2007, Plaintiff Vincent Bova filed the complaint in this action (Doc. # 1) against Defendant Washington Mutual Bank, on behalf of himself and a proposed class of "individuals who are or previously were employed by Defendant Washington Mutual Bank (WAMU) as Underwriters, Senior Underwriters and other persons similarly situated." (*Id.* at 1.) Plaintiff alleged that Defendant erroneously classified members of the proposed class as exempt employees and thereby denied them the various statutory rights afforded to non-exempt employees under the Fair Labor Standards Act and the California Labor Code.

On January 29, 2008, the parties jointly moved to stay the Defendant's response to

1 Plaintiff's complaint (Doc. # 3) until after a decision was rendered in *Creese v. Washington*
2 *Mutual Bank*, Case No. B193931.¹ The issue on appeal in *Creese* was whether the trial court had
3 properly denied class certification to a proposed class of underwriters in an employment action
4 against Washington Mutual Bank. The *Creese* plaintiffs alleged that the underwriters were
5 wrongly classified as exempt under the California Labor Code and moved for class certification
6 pursuant to California Code of Civil Procedure § 382. The proposed class was defined as "all
7 current and former employees of Defendant who were employed as underwriters and classified as
8 exempt from overtime by Defendant at their mortgage lending business locations in the state of
9 California within four years of the filing of this complaint through the resolution of this lawsuit."
10 (Doc. # 9 Ex. G at 2).

11 The state trial court denied class certification, finding that Plaintiffs had "failed to meet the
12 requisite burden for a person seeking certification." (*Id.* at 4.) The trial court explained that a
13 class may be certified under Cal. Civ. Code § 382 "when common questions of law and fact
14 predominate over individualized questions." (*Id.*) The trial court held that the predominating
15 question in *Creese* were not sufficient to warrant class action treatment explaining:

16 The nature and type of level of discretion and independent judgment depends on many
17 factors, as set forth in defendant's evidence. Such factors include the different
18 products underwritten: retail, wholesale, loans to emerging markets, custom
construction, and Government loans. Variations also can be based on geography and,
naturally, on individual competency.

19 It is this court's opinion that these differences and variations defeat commonality in
20 this case, and, if this class were certified as proposed by plaintiffs, the trial would
devolve into a series of complicated mini-trials needed to address the variations noted.

21 (*Id.* at 7-8.) The trial court also concluded that plaintiffs had "not established by a preponderance
22 of the evidence, that the class action proceeding is Superior to alternate means for a fair and
23 efficient adjudication of the litigation." (*Id.* at 9.) On March 12, 2008, the trial court's denial of
24 class certification was upheld on appeal. The California Supreme Court denied the *Creese*
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27 ¹ The Court takes judicial notice of the Los Angeles Superior Court's July 24, 2006 Minute
28 Order denying class certification in *Creese v. Washington Mutual Bank*, Case No. BC 323376. (Def.'s
Request for Judicial Notice, Ex. G) and the subsequent appeal in *Creese v. Washington Mutual Bank*,
Case No. B193931, 2008 Cal. App. Unpub. LEXIS 2060 (Cal. Ct. App., 2nd Dist., Div. 2); (Def.'s
Request for Judicial Notice, Ex. K).

1 plaintiffs' petition for review and the order denying class certification is now final. *Creese v.*
2 *Washington Mutual Bank*, Case No. S162915, 2008 Cal. LEXIS 7186.

3 On March 28, 2008, Plaintiff in this case filed a First Amended Complaint (FAC) against
4 Washington Mutual Bank on behalf of California loan underwriters employed by Defendant and
5 allegedly misclassified as exempt from overtime compensation. (Doc. # 8). Plaintiff revised the
6 proposed class definition to include:

7 all individuals in California employed by WAMU as non-supervisory underwriters and
8 non-supervisory senior underwriters who by reason of their position and in accordance
9 with the Defendant's job duties for these positions were required to follow strict,
10 uniform, written criteria with limited and expressed exception authority in determining
whether each proposed loan met the criteria established by the Defendant for loan
approval of a residential loan during the period commencing on the date four years
prior to the filing of this complaint and ending on the class period cutoff date.

11 (Doc. # 8 at 6-7).

12 The First Amended Complaint states class allegations in claims two through seven for: (2)
13 failure to pay overtime compensation in violation of California Labor Code §§ 510, 515.5, 551,
14 552, 1194 and 1198, *et seq.*; (3) failure to provide wages when due in violation of Cal. Lab. Code
15 § 203; (4) failure to provide meal and rest periods in violation of Cal. Lab. Code § 226.7 and 512;
16 (5) failure to provide accurate itemized statements in violation of Cal. Lab. Code § 226; (6) unfair
17 competition in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*; and (7) Labor Code Private
18 Attorney General Act [Labor Code § 2698].² (Doc. # 8 at 1). Plaintiff alleges that the members of
19 the putative class “lacked the required level of independent judgment and discretion for the
20 administrative exemption to apply to them” and that they were “required to perform within this
21 expressed written criteria established by the management of the company.” (*Id.* at 7.) Plaintiff
22 alleges that as a result of the class members’ lack of authority to deviate from established written
23 criteria in performing their underwriting duties, “there was no variance between what the members
24 of the class were required to do on a daily basis.” (*Id.*) The proposed class “includes all such
25 persons, whether or not they were paid by commission, by salary or by part commission and part
26 salary.” (*Id.*)

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28 ² The first claim in the First Amended Complaint is brought as a collective action under the
Fair Labor and Standards Act (FLSA), 29 U.S.C. § 201, *et seq.* for failure to pay regular and overtime
compensation. Plaintiff does not allege a Rule 23 class for the FLSA claim.

1 Plaintiff alleges that Defendant “intentionally and knowingly, on the basis of job title alone
2 and without regard to the actual overall requirements of the job, systematically misclassified the
3 Plaintiff and the other members of the California Class as exempt from overtime wages and other
4 labor laws in order to avoid payment of overtime wages.” (*Id.*) Plaintiff alleges that Defendant
5 “maintains records from which the Court can ascertain and identify each of Defendants’
6 employees who as class members have been systematically, intentionally, and uniformly
7 misclassified as exempt.” (*Id.* at 15.) Plaintiff alleges he will “seek leave to amend the complaint
8 to include the specific job titles or designations for the members of the California class when they
9 have been identified.” (*Id.*)

10 On May 5, 2008, Defendant filed a Rule 12(b)(6) motion to dismiss Plaintiff’s California
11 class allegations and private attorney general action allegations.³ (Doc. # 9). On May 23, 2008,
12 Plaintiff filed an opposition to Defendant’s motion to dismiss. (Doc. # 12). On June 2, 2008,
13 Defendant filed a reply to Plaintiff’s opposition. (Doc # 13). On June 16, Plaintiff filed a notice
14 of new authority by the United States Supreme Court. (Doc. # 15). On June 20, 2008, Defendant
15 filed a notice of the California Supreme Court’s denial of review in the *Creese* matter and reply to
16 Plaintiff’s notice of new authority by the United States Supreme Court. (Doc. # 16). On October
17 21, 2008, Plaintiff filed a notice of new authority by the California Court of Appeals. (Doc. # 20).

18 **CONTENTIONS OF THE PARTIES**

19 Defendant contends “that Plaintiff Vincent Bova cannot maintain both a Rule 23 opt-out
20 class and a class-based Private Attorney General Act claim when a virtually identical class was
21 already denied class certification because the proposed class lack commonality . . . [P]laintiffs are
22 collaterally estopped by the state court’s decision in *Creese v. Washington Mut. Bank.*” (Doc. # 9
23 at 2). Defendant contends that under California law, “denial of class certification bars subsequent
24 litigation of substantially identical class claims.” (Doc. # 9 at 2). Defendant contends that because
25 the *Creese* class definition is “virtually identical” to the Bova class definition, the doctrine of
26 collateral estoppel prevents relitigation of issues previously argued and resolved in a prior

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28 ³ Defendant moved in the alternative to stay the proceedings pending the resolution of the
Creese plaintiffs’ petition for Supreme Court review. The Supreme Court denied the petition. (*Creese*
v. Washington Mutual Bank, Case No. S162915, 2008 Cal. LEXIS 7186).

1 proceeding, and applies to an order denying class certification in another lawsuit brought by
2 plaintiffs. (*Id.* at 7.)

3 Plaintiff contends that the doctrine of collateral estoppel cannot apply as a bar to Plaintiffs'
4 complaint because the issue of class certification, as decided in *Creese*, is not identical to the issue
5 before this Court. (Doc. # 12). Plaintiff contends that the proposed class in this case is “far
6 narrower” than the proposed class definition in *Creese*:

7 For example, Plaintiff Bova is only asserting claims on behalf of non-supervisory, as
8 opposed to all underwriters, including supervisors. Plaintiff Bova has also limited the
9 class to only those underwriters who gave approval to residential loans, pursuant to
10 strict criteria set forth in their job duties by Defendants. These modifications were
11 intentionally made in the FAC to address and correct the problems that caused the
12 California state court to deny certification of the class alleged in *Creese*. Consequently,
13 the question of whether Plaintiff Bova’s class claims should be certified does not
14 present the Court with the same issues that were litigated and decided in *Creese*.

15 (*Id.* at 2.) Plaintiff asserts the doctrine of collateral estoppel may only be applied on the basis of a
16 prior class action ruling if the issue that was previously adjudicated is identical to the issue
17 presented in a subsequent action. Plaintiff contends that the Defendant has not made a sufficient
18 showing that the issues decided in *Creese* are identical to those now before this Court. (*Id.*)
19 Plaintiff contends that the factors weighing against collateral estoppel include assertion of a unique
20 class and representation by unique counsel. (*Id.*)

21 In reply, Defendant contends that the changes Plaintiff has made to the proposed class
22 definition are “distinctions without differences.” (Doc. # 13). Defendant asserts that the changes
23 Plaintiff made to the proposed class definition “do not – and can not – address the infirmities that
24 doomed the *Creese* class. Because the classes are functionally equivalent, the doctrine of
25 collateral estoppel applies to bar Plaintiff from attempting to certify his group as a class.” (*Id.* at
26 3.)

27 STANDARD OF REVIEW

28 Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure
to state a claim upon which relief can be granted. Such a dismissal can be based on either the lack
of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). The court may not
dismiss a complaint in which the plaintiff alleged “enough facts to state a claim to relief that is

1 plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1973, 167 L. Ed. 2d 929
2 (2007). In applying this standard, the court must treat all of plaintiff’s factual allegations as true.
3 *Experimental Eng’g, Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980).
4 However, the court is not bound to assume the truth of legal conclusions simply because they are
5 stated in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th
6 Cir. 1981). In ruling upon a motion to dismiss, the court may consider only the complaint, any
7 exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence
8 201. *See Mir v. Little Co. of Mary Hospital*, 844 F.2d 646, 649 (9th Cir. 1988).

9 DISCUSSION

10 Collateral estoppel prevents relitigation of issues of fact or law that were litigated in a prior
11 proceeding. *Robi v. The Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). “In both offensive
12 and defensive use situations the party against whom estoppel [issue preclusion] is asserted has
13 litigated and lost in an earlier action.” *Id.* “Collateral estoppel, like the related doctrine of res
14 judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical
15 issue with the same party or his privy and of promoting judicial economy by preventing needless
16 litigation.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

17 “Assuming a full and fair opportunity to litigate, . . . federal courts must accord preclusive
18 effect to state court judgments.” *Marquez v. Gutierrez*, 51 F. Supp. 2d 1020, 1026 (E.D. Cal.
19 1999); *see also* 28 U.S.C. § 1738. State law governs the extent and elements of collateral estoppel.
20 *Valley Wood Preserving, Inc. v. Paul*, 785 F.2d 751, 753 (9th Cir. 1986). In order to apply
21 collateral estoppel under California state law,

22 (1) the issue must be identical to that decided in the prior proceeding; (2) the issue
23 must have been actually litigated in the prior proceeding; (3) the issue must have been
24 necessarily decided in the prior proceeding; (4) the decision must have been final and
on the merits; and (5) preclusion must be sought against a person who was a party or
in privity with a party to the prior proceeding.

25 *Alvarez v. May Dep’t Stores*, 143 Cal. App. 4th 1223, 1233 (2006). “The party asserting collateral
26 estoppel bears the burden of establishing these requirements.” *Pacific Lumber v. SWRCB*, 37 Cal.
27 4th 921, 943 (2006). “If all five elements required for application of collateral estoppel are
28 present, the doctrine is fully applicable to preclude relitigation of issues finally resolved as part of

1 a class certification determination in a prior proceeding.” *Johnson v. GlaxoSmithKline, Inc.*, 166
2 Cal. App. 4th 1497, 1510 (Cal. Ct. App. 2008).

3 In *Alvarez v. May Department Stores*, the defendant employer in Alvarez had previously
4 defeated class certification in a previous action in which the interested parties, their claims, and
5 their counsel were the same. *Alvarez v. May Dep’t Stores*, 143 Cal. App. 4th 1223, 1238 (2006).
6 The trial court ruled that the employees were barred under the doctrine of collateral estoppel from
7 relitigating the class certification issue. (*Id.* at 1231.) The California Court of Appeal affirmed the
8 trial court, stating:

9 The only difference we can discern between the parties is the name of the
10 representative plaintiff. The interested parties, their claims, and their counsel are the
11 same. We also examine whether the first party had the same interest as the precluded
12 party and the motive to present the same claim. The [previous] plaintiffs had a strong
13 motive to assert the same interest as appellants, as each group’s goal was
14 identical—each wanted its class certified. As noted, the [previous] plaintiffs had a full
15 opportunity to present their case. The circumstances are such that appellants should
16 reasonably have expected to be bound by the [previous] decision. As appellants would
17 have enjoyed the fruits of a favorable outcome, fairness dictates that they should be
18 bound by the effect of the decision against them. Ultimately, applying the doctrine of
19 collateral estoppel does not lead to an unfair result, as appellants remain free to litigate
20 the merits of their personal claims.

21 (*Id.* at 1238.)

22 In this case, the Court concludes that the Defendant has not met its burden to prove that the
23 issue decided in *Creese* is identical to the issue presently before the Court. “Being a matter of
24 issue preclusion, collateral estoppel is naturally confined to issues actually litigated. A corollary is
25 that the issue decided previously be identical with the one sought to be precluded.” *Johnson*, 166
26 Cal. App. 4th 1497, 1513 (citations omitted). The plaintiffs in *Creese* moved for class certification
27 under Cal. Civ. Code § 382 of a class defined as: “all current and former employees of Defendant
28 who were employed as underwriters and classified as exempt from overtime by Defendant at their
mortgage lending business locations in the state of California.” (Doc. # 9, Ex. G at 2). In an effort
to avoid the *Creese* ruling, Plaintiff in this case defines the proposed class as “non supervisory
underwriters and non supervisory senior underwriters who by reason of their position and in
accordance with the Defendant’s job duties for these positions were required to follow strict,
uniform, written criteria with limited and expressed exception authority in determining whether
each proposed loan met the criteria established by the Defendant for loan approval of a residential

1 loan.” (Doc. # 8 at 6-7). The *Creese* class would have included all underwriters classified as
2 exempt in their class definition, which would have required the court to examine the job
3 description of each exempt underwriter to determine whether he or she could be included in the
4 *Creese* class. The trial court stated that such an inquiry “would devolve into a series of
5 complicated mini trials needed to address the variations noted.” (Doc. # 8 at 8). The Plaintiff in
6 this case has narrowed the proposed definition in an attempt to overcome this defect and meet the
7 class requirements under Rule 23. Based on the pleadings, the Court cannot conclude as a matter
8 of law that the class definition in this case is identical to the class definition in *Creese* and that
9 collateral estoppel applies to bar this action.

10 **CONCLUSION**

11 IT IS HEREBY ORDERED that Defendant’s motion to dismiss or, in the alternative,
12 motion to stay Plaintiff’s California class allegations and private attorney general action
13 allegations (Doc. # 9) is DENIED.

14 DATED: November 3, 2008

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16 **WILLIAM Q. HAYES**
United States District Judge

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