

1 Scott Edward Cole, Esq. (S.B. #160744)
Matthew R. Bainer, Esq. (S.B. #220972)
2 Molly A. Kuehn, Esq. (S.B. #230763)
SCOTT COLE & ASSOCIATES, APC
3 1970 Broadway, Ninth Floor
Oakland, California 94612
4 Telephone: (510) 891-9800
Facsimile: (510) 891-7030
5 Web: www.scalaw.com

6 Attorneys for Representative Plaintiffs
and the Plaintiff Class

7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

10
11 MIGUEL A. CRUZ and JOHN D.
12 HANSEN, individually, and on behalf
of all others similarly situated,

13 Plaintiffs,

14 vs.

15 DOLLAR TREE STORES, INC.

16 Defendant.

) **Case No.: C-07-4012 SC** (*Consolidated Action*)

) **CLASS ACTION**

) **PLAINTIFFS' AMENDED NOTICE OF
MOTION AND AMENDED MOTION FOR
CLASS CERTIFICATION; MEMORANDUM
OF POINTS AND AUTHORITIES**

17 ROBERT RUNNINGS, individually, and
on behalf of all others similarly situated,

18 Plaintiffs,

19 vs.

20 DOLLAR TREE STORES, INC.

21 Defendant.

) **Case No.: C-07-02050 SC** (*Consolidated Action*)

) Date: May 1, 2009
) Time: 10:00 a.m.
) Courtroom: 1, 17th Floor
) Judge: Hon. Samuel Conti

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

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SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTHFLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

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SCOTT COLE & ASSOCIATES, APC
 ATTORNEYS AT LAW
 THE WACHOVIA TOWER
 1970 BROADWAY, NINTHFLOOR
 OAKLAND, CA 94612
 TEL: (510) 891-9800

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SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTHFLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

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 ATTORNEYS AT LAW
 THE WACHOVIA TOWER
 1970 BROADWAY, NINTHFLOOR
 OAKLAND, CA 94612
 TEL: (510) 891-9800

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THE WACHOVIA TOWER
1970 BROADWAY, NINTHFLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

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NOTICE OF MOTION

To Defendant and its Attorneys of Record:

Please take notice that, on May 1, 2009 at 10:00 a.m., or as soon thereafter as this matter may be heard, before The Honorable Samuel Conti, United States District Court Judge, Courtroom 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, Representative Plaintiffs Robert Runnings, Miguel Cruz and John Hansen (“Plaintiffs”) will hereby and do move for an Order certifying this case as a class action under Fed. R. Civ. P. 23(a) and (b)(3). Plaintiffs will proceed upon this motion, the accompanying declaration, and any further briefing and arguments of counsel.

RELIEF SOUGHT

Plaintiffs request this Court grant class certification of this action under FRCP Rules 23(a) and 23(b)(3), appoint Plaintiffs’ counsel to serve as counsel to the class, and authorize notice to the class of the pending action and its members’ right to opt-out under FRCP Rule 23(d)(2).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

There is predictability that comes from patronizing a chain retailer such as Dollar Tree. Mere recognition of the company name and logo on the store’s facade engenders confidence as to what the consumer’s experience there will be, even before s/he sets foot inside. At Dollar Tree, customers can be sure that substantially the same items will be available for purchase and will be displayed in almost exactly the same manner as they are in every other store in the chain. Moreover, the mix and price of products is consistent, as is the service customers can expect. As expected, none of this would be possible without great effort by Dollar Tree to homogenize its workforce, store layouts, and operational standards, and without the use of Store Managers (“SMs” or “class members”) who are expected to obediently implement its directives at the retail level.

For a chain retailer specializing in moving a substantial amount of one dollar (or less) product, it is not difficult to imagine the controls and level of routinization required to maintain the profitability of thousands of retail stores nationwide. It is also not surprising that Dollar Tree’s

SCOTT COLE & ASSOCIATES, APC
ATTORNEYS AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTHFLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

1 policies and practices have manifested themselves consistently throughout the company; Dollar Tree
2 offers comprehensive and completely-uniform training and training-related materials to SMs,
3 imposes uniform and predictable job duties, policies and procedures, common computer applications
4 and a host of other tools and directives that are consistent class-wide and which ensure operational
5 consistency and ease of SM migration from store to store without retraining. Due to this
6 occupational uniformity of SMs’ job duties, Dollar Tree elected to categorically exempt them from
7 an entitlement to overtime pay, admittedly without concern for any variances between them. That
8 singular decision, the homogeneity between SMs’ duties, and the multiplicity of proceedings that
9 class certification would prevent are what makes the core issues in dispute here perfect for class
10 treatment.

11 It may go without saying that, through this motion, Plaintiffs do not seek liability
12 determinations (e.g., *which* SM job tasks are exempt, *how much* time SMs spend on any of them and
13 whether those answers allow Dollar Tree to *satisfy the quantitative legal standard* under California
14 state law¹), as those questions are distractions at the class certification stage; Plaintiffs only seek to
15 *join* the wage claims of California SMs so that the same case- and trial management tools can be
16 employed, just once, for all of them, with the singular goal of streamlining the litigation. Given the
17 homogeneity of SMs’ work and Dollar Tree’s expectations for that work, class treatment is clearly
18 the superior method for fairly and efficiently adjudicating the common claims.

20 II. STATEMENT OF FACTS

21 A. Dollar Tree’s Organizational Structure

22 Since 1986, Dollar Tree has “become the leading operator of discount variety stores offering
23 merchandise at the fixed price of \$1.00.” (Ex. A, p. 6). Based in Chesapeake, Virginia, it operates
24
25

26
27 ¹ *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal.4th 785 (1999) [applying a quantitative test
28 in deciding the exempt status of “white collar” workers and *distinguishing* California’s “engaged
in” test for overtime exemptions from the federal “primary duty” test].

1 thousands of stores nationwide, boasting impressive sales of \$4.24 billion.² Maintaining a low-cost
 2 operational structure is essential to its success, a feat that could only be accomplished with an
 3 incredibly-efficient and centrally-controlled business model. Dollar Tree “centrally manage[s] [its]
 4 store and distribution operations from [Virginia]” and connects merchandise allocation and
 5 inventory control to promote store efficiency. (Ex. A, pp. 6, 8)

6 Dollar Tree’s standardized chain store operation³ is designed to ensure that it knows exactly
 7 what SMs are doing, and that they are all doing the same or substantially similar tasks. Every store
 8 has the same management hierarchy with employees performing one of several highly-standardized
 9 job functions. Each store employs a SM,⁴ one or more Assistant Managers (“AMs”)⁵ and various
 10 part-time personnel holding non-management positions, the number assigned to each store being
 11 dictated by the payroll budget (which is handed down to SMs from their supervisors, the District
 12 Managers [“DMs”]).⁶ Specifically, at the store level, there are Stockers, who stock shelves and help
 13 merchandise the stores, Cashiers who ring up and bag merchandise, and otherwise attend to

14
 15 ² See, Ex. A, p. 8. Of these 3,411 stores (across 48 states), roughly 241 of them are situated
 16 in California, where the SMs worked. (*Id.*, p. 13); Ex. A, p. 18 [net sales of \$4.24 billion as of
 17 February 2, 2008]. Unless otherwise noted, all lettered Exhibits (“Ex.”) are to the Declaration of
 18 Scott Edward Cole, Esq. (“Cole Decl.”), unless otherwise indicated.

19 ³ Most Dollar Tree stores are small, relative to other major discount chains, with an
 20 “optimal store size of between 10,000 and 12,500 square feet.” (Ex. A, p. 6).

21 ⁴ Ex. B, p.18:22-19:2 [Each store employs a SM].

22 ⁵ Ex. B, p. 33:15-18 [goal is one or more AMs at each store]; Ex. C, pp. 54:16-55:5 [stores
 23 typically have multiple AMs]; Ex. C, pp. 128:11-129:3 [staff size tracks store size]; Ex. C, pp.
 24 21:18-22:2 [Regional HR Manager (“Reg. HR Mgr.”) produces reports regarding whether a
 25 store’s staffing level corresponds to sales volume]; Ex. B, p. 36:3-4 [AMs supervise associates];
 26 Ex. C, pp. 55:10-56:2 [AMs coach and guide associates]; Ex. B, p. 113:3-9 [AMs direct
 27 associates even when SM is present.]; Ex. B, pp. 24:1-25:1 [AM job not changed over time].

28 ⁶ Payroll hours and, thus, the number of associates at any store, is determined by a formula
 calculating Sales Per Employee Hour (SPEH), maintained at a fixed percentage and set by upper
 management. Ex. B, p. 281:15-20 [the number of employees depends mostly on the sales and
 labor budgets]; Ex. D, p. 98:1-9 [DM does not set labor budget]; Ex. E, pp. 30:21-31:5, 65:19-
 22 [SPEH is given by the Regional Director (“Reg. Dir.”) to the DM, who then gives it to the
 SM]; Ex. E, p. 238:6-12 [DM can ask for hours and give input on what each store needs, but
 Reg. Dir. pretty much sets the hours in stone].

1 customer purchases, and Greeters who recognize entering customers and, occasionally, point them
 2 in the right direction.⁷ According to Dollar Tree, the separation of duties between each position is
 3 clear and their responsibilities are limited, in turn resulting in a high degree of job routinization.⁸

4 Defendant's California field operations are divided geographically into regions, and then into
 5 districts. At the lowest operational level are the in-store management personnel (SMs and AMs) who
 6 report to their respective DMs.⁹ The DMs report to Reg. Dirs. (sometimes called Market Managers)¹⁰
 7 who, in turn, report to Zone Vice-Presidents ("Zone VPs"), and so on, up the corporate chain.¹¹ Each
 8 DM supervises roughly ten stores, where SMs work.

9 On the Human Resources ("HR") side, a clear hierarchy and lines of communication also
 10 exist. Dollar Tree maintains tight controls over in-store conduct through the development - at the
 11 home office in Chesapeake, Virginia - of a massive volume of policies and procedures, and the
 12 trickle-down dissemination of those directives to each chain retail location across the country.¹² Vis-
 13 a-vis its message to SMs to follow these mandates to the letter,¹³ Dollar Tree can ensure a high level

14
 15 ⁷ Stockers, Cashiers and Greeters are part-timers. (Ex. C, pp. 57:12-23, 58:3-25; Ex. F, pp.
 16 40:17-18, 41:3-17, 42:16-18.

17 ⁸ See, e.g., Ex. B, pp. 227:13 - 228:1) [Sales associate job description accurately represents
 18 what sales associates do today].

19 ⁹ Ex. B, pp. 110:20-22, 19:5-7 [a couple dozen DMs evaluate, hire and fire SMs]; Ex. C, p.
 20 16:20-24; Ex. F, pp. 126:21-127:9 [all DMs use same SM evaluation criteria].

21 ¹⁰ Ex. B, pp. 20:8-10, 21:3 -5 [four Reg. Dir's oversee California operations]; Ex. C, p.
 22 26:18-20 [among other duties, Reg. Dir. establishes SPEH levels for the stores].

23 ¹¹ Ex. C, pp. 26:22-27:3.

24 ¹² Ex. B, p. 187:4-12 [HR policies set by team in Virginia, not at regional level]; Ex. F,
 25 p.50:17-20 [Reg. HR Mgrs do not develop policies].

26 ¹³ Ex. B, pp. 187:13-22, 188:19-189:6, 192:13-17) [SMs *not allowed* to disregard policies
 27 or procedures]. As such, predictably, SMs *set neither policy nor procedure* (Ex. D, p. 124:3-4),
 28 just as their supervisors, the DMs, have no authority to create policies or procedures (Ex. C, p.
 56:8-16 [policies never set by AM, SM or DM]); all this is done, as one would expect in a large
 chain retail environment, at the corporate office.; Ex. C, p. 74:2-16 [Dollar Tree store policy
 mandates that "[n]o contracts are to be signed by anyone outside the Store Support Center."]; Ex.
 F, p. 56:3-4 [Store Support Center is at Virginia corporate office].

1 of consistency in its retail stores from a home office thousands of miles away.

2 Should SMs have questions concerning policies or procedures, the sources of information are
3 readily available, plentiful and uniform. In promoting a goal that all information and resources be
4 made equally available to all SMs, each SM can call upon Reg. HR Mgrs.^{14 15} for answers, just as
5 they are encouraged to reach out to management personnel in all departments and at all levels.¹⁶
6 Since SMs are not permitted to either set or alter policy,¹⁷ they can rest assured that the answers to
7 their questions will be up-to-date and consistent, no matter where they work.¹⁸

8
9 **B. Every Facet of Store Management Is Standardized**

10 **1. Store Managers Are Molded Through a Uniform Training Experience**

11 As a chain retail store, Dollar Tree's operations are necessarily highly standardized and, thus,

12 _____
13 ¹⁴ Ex. B, pp. 44:22-45:3 [SMs can call Reg. HR Mgrs. with questions about HR policy]; Ex.
14 B, pp. 45:4-6, 47:20-48:2) [two Reg. HR Mgrs (deponents Candace Camp and Reed Balderas)
support California SMs and DMs]; Ex. C, pp. 6:4-11, 9:14-10:3, 12:4-7.

15 ¹⁵ Ex. B, pp. 65:11-14, 65:16-66:1, 66:2-67:1 [Dollar Tree has a three-step (i.e., verbal
16 warning, written warning, then termination) progressive disciplinary policy with regard to
17 associates]; Ex. C, pp. 70:4-17, 153:2-6 [SM required to follow Dollar Tree's statewide
18 progressive discipline policy]; Ex. C, p. 152:10-19 [SM must get DM's and/or HR's approval
19 before terminating employees]; Ex. B, pp. 67:8-15, 232:1-4, 232:16-19 [requirement of DM
20 approval for suspensions and terminations is a California-wide policy]; Ex. D, p. 56:2-9
[partnering with HR before an employee termination is part of SM training]; Ex. C, p. 34:4-11;
Ex. F, p. 120:6-11 [highest pay increase SM can request for store associates is 3 percent]; Ex. C,
pp. 147:17-25, 181:25-182:17 [DM must approve pay increases].

21 ¹⁶ Ex. F, p. 23:17-24 [open door policy exits by which SMs can call HR or Operations with
22 any question]; Ex. F, p. 19:4-15 [SMs can contact DMs, the Reg. Dir. or Zone VP directly with
23 questions]; Ex. F, pp. 16:23-17:2 [SMs are given a list of people at the corporate office to contact
about various issues]; Ex. F, p. 72:16-18 [numerous positions are involved in SM development].

24 ¹⁷ Ex. B, pp. 186:20-22, 187:1-3 [SMs do not set policy or procedure]; Ex. F, pp. 50:25-
25 51:9, 54:15-55:1 [Neither DMs nor SMs set policy]; Ex. D, pp. 50:15-51:5 [Since HR policy is
developed in the Virginia corporate office, Reg. HR Mgrs. do not make policy]. With no
26 authority to set policy or procedure at a local level, all SMs look to a common East Coast source.

27 ¹⁸ Ex. F, pp. 78:10-79:11 [SMs and AMs also have access to Dollar Tree's intranet (a.k.a.
28 "Dollar Tree Central") through a back office computer which provides, among numerous other
things, the most current company-wide policies and procedures].

1 so are the training programs that direct how those operations are to be performed. SMs are required
 2 to complete a comprehensive Manager in Training (“MIT”) program,¹⁹ which is standardized as to
 3 substance,²⁰ instruction protocol,²¹ length,²² oversight²³ and materials utilized,²⁴ even before being
 4 assigned to a store as its manager.²⁵ Due to this extensive level of training and resultantly high
 5 degree of homogenous instruction (which serves to further standardize the manner in which SMs
 6 perform their duties), class members can enjoy a consistent work experience, irrespective of any
 7 potential store-to-store variations and without the need for retraining upon transfer.²⁶

8
 9 ¹⁹ Ex. B, pp. 54:20-55:4 [SM training program developed by corporate training
 10 department]; Ex. F, p. 64:19-24 [company’s goal is to be as consistent as possible with SM
 11 training].

12 ²⁰ Ex. B, pp. 82:19-83:7, 190:16-19) [SMs training is the same, without regard to the store
 13 Dollar Tree intends to assign him/her]; Ex. F, p. 74:13-18 [MIT is consistent nationwide].

14 ²¹ Ex. C, pp. 29:17-23, 60:13-18, 61:1-10, 62:5-7 [uniformity in SM training is ensured
 15 through each region’s use of a dedicated Regional Training Manager (“Reg. Training Mgr.”)
 16 who oversees all new SM training]; Ex. C, pp. 85:25-86:17 [Reg. Training Mgr., along with a
 17 District Store Trainer, ensures that MIT is consistent from person-to-person]; Ex. B, p. 107:3-20
 18 [MIT manual sets order and pace for each section of SM training].

19 ²² MIT is an eight week program. Ex. F, p. 72:22-23; Ex. D, p. 59:4-6.

20 ²³ Ex. B, pp. 106:13-107:2 [during MIT process, Reg. Training Mgr. is in close contact with
 21 SM to see how s/he is doing in the program]; Ex. B, p. 104:16-21 [trainer uses a checklist to
 22 confirm that each SM has completed all training modules]; Ex. C, p. 92:21-93:3 [Reg. Training
 23 Mgr. uses standardized checklist to verify each MIT segment is completed].

24 ²⁴ Ex. B, pp. 105:7-13, 105:20-22, 190:8-15 [MIT follows a uniform manual]; Ex. B, pp.
 25 55:15-21, 82:19-83:7, 83:8-11 [documents used in MIT are developed by Lisa Hall, Director of
 26 the corporate training department, located in Virginia]; Ex. C, pp. 84:24-85:8 [Lisa Hall creates
 27 the SM training materials]; Ex. F, pp. 75:23-76:4 [set of documents used for MIT is consistent
 28 throughout the nation]; Ex. C, pp. 86:22-87:1 [Associate Handbook, Policy and Procedures and
 Safety Manual are some of the documents used in MIT].

²⁵ SM to finish MIT before being assigned to a store. Ex. B, pp. 55:5-8, 56:8-14, 57:14-19;
 Ex. D, p. 71:8-14.

²⁶ Ex. B, pp. 132:11-133:21, 190:20-191:1 [SMs can be transferred, temporarily or
 permanently, to other stores without any form of retraining since the stores have similar
 practices; if transferred, SMs just apply what they already know to a new environment and
 different set of circumstances]; Ex. D, pp. 127:5-128:25 [SMs given the same MIT and the same

1 Dollar Tree policy favors promotion to the SM position of individuals who are already
 2 employees of the corporation,²⁷ a policy which bears directly on personnel practices within the
 3 stores. Thus, before an employee becomes a SM, s/he will oftentimes have already been thoroughly
 4 steeped in the Dollar Tree culture and be intimately familiar with its retail operations, sometimes
 5 through assignment to numerous retail locations.²⁸ Since SMs and non-management personnel alike
 6 are reassigned or permitted to transfer from one store to another, company operations and policies
 7 and procedures are, through this migration of its workforce from store to store, widely disseminated,
 8 and job duties are performed in adherence to corporate policy, rather than any disparate local mores.

10 2. Irrespective of the Store, SMs Are Given and Directed to Use Common Tools

11 Regardless of the store to which they may ultimately be assigned, once trained, SMs can
 12 expect and have probably already experienced a high level of consistency at Dollar Tree's retail
 13 facilities and in their specific job duties. Even beyond the trademark look and feel that Dollar Tree
 14 strives to maintain throughout its retail chain,²⁹ the company has homogenized the SM position for
 15 years³⁰ through trickle-down management directives and a strong corporate culture which focuses
 16 on corporate-centralization of operations and promoting customer service goals by all retail

17 _____
 18 program materials, irrespective of the type of store to which they may be assigned].

19 ²⁷ Dollar Tree promotes from within whenever possible. Ex. B, p. 71:5-7; Ex. D, p. 68:1-3.

20 ²⁸ Ex. F, p. 65:4-8 [Orientation and training also uniform for entry level positions [revealing
 21 that, prior to promotion to SM, employees are already cast uniformly]; Ex. F, p. 65:15-23 [all
 22 SMs use a checklist for orientation]; Ex. F, p. 71:21-72:2 [AM training materials are uniform];
 23 Ex. C, p. 79:5-13 [consistency in associate training ensured by having Reg. HR Mgr. and/or DM
 24 ensure SMs follow uniform new hire orientation]; Ex. D, pp. 71:23-25, 72:15-20, 74:17-20 [SM
 25 uses standardized new employee packet to ensure consistency and completeness of orientation].
 Finally, SMs are expected to lead by consistent example, meaning that they are, in their own
 work, consistent. Ex. C, pp. 105:13-106:5; Ex. F, p. 95:6-9.

26 ²⁹ Ex. B, p. 196:2-4 [Dollar Tree would not want to look like a Walgreens or Rite Aid].

27 ³⁰ Ex. F, pp. 124:25-125:7 [SM and AM job duties have not changed over the years]; Ex. C,
 28 pp. 141:20-142:25 [SM job duties constant over time; no change in how SMs fulfilled their
 duties; neither new products nor new tools affect SMs' job duties or how they perform them].

1 personnel.

2 This centralization of operations is most evident in Dollar Tree’s universally-available policies
 3 and procedures and their enforcement by upper management. Indeed, the process of pouring over
 4 countless documents does not start and end with MIT; on the job, these workers are provided with
 5 myriad written and electronically-accessible documents,³¹ computer applications³² and an electronic
 6 ordering system.³³ Moreover, with even greater frequency than updates are made to those resources,
 7 Dollar Tree bombards SMs with bulletins and planners³⁴ which direct them how to merchandise/set-

8
 9
 10 ³¹ Using “Dollar Tree Central,” SMs can find company-wide policies and procedures, check
 11 email, operational and HR updates, promotional materials (Ex. B, pp. 99:12-18, 100:1-3, 155:3 -
 12 155:10), Lawson – a HR tool available to SMs, COMPASS (Ex. C, pp. 38:19-25, 65:10-66:24,
 13 95:15-20), newsletters, forms, benefits (Ex. F, p. 57:3-7), weekly bulletins, Freight Flow
 14 standards, ARS and merchandise display standards (Ex. D, pp. 83:11-20, 98:24-99:22, 103:12-
 15 24, 118:7-9). While Exs. G-L have evolved, the current versions are available through Dollar
 16 Tree Central and used in SM training, including an enormous Forms & Procedures Manual (Ex.
 17 L); Ex. C, p. 121:5-22 [forms must be used by SMs without exception; SMs cannot create forms;
 18 forms are also available online]. Ex. F, p. 139:17-22 [not even DMs can create forms].

19 ³² Associates are consistently supervised by the COMPASS scheduling system. (Ex. B, p.
 20 121:14-22 [COMPASS universally used by SMs to create advance schedules.]; Ex. F, pp. 33:25-
 21 34:19 [COMPASS is a statewide tool]; Ex. C, p. 96:17-19 [SMs trained on COMPASS during
 22 MIT]). COMPASS warns when associates take short or long meal periods, are early or late for
 23 work, or work overtime. Ex. M; Ex. E, pp. 46:13-19, 182:19-24 [overtime is unacceptable unless
 24 DM pre-authorized]; Ex. E, p. 113:20-25 [COMPASS writes a schedule based on trends, etc.].

25 ³³ Ex. C, p. 106:7-18 [ARS tracks cashier sales and, when a product reaches a pre-defined
 26 quantity, ARS will automatically re-order that item]. Dollar Tree maintains ARS for various
 27 products. For other products, ordering is done via reference to an order book which recommends
 28 a quantity to the SM, based on the store’s selling history of the item. (Ex. B, pp. 76:3-13, 77:18-
 19, 78:9-17). Ex. E, p. 191:4-7 [“...ARS sets, which is store specific, store shelving specific,
 where it tells you, after you order 10, if you need to order 12, it orders 12 for you.”].

29 ³⁴ Ex. B, p. 197:2-17 [Dollar Tree communicates to SMs how to distinguish its stores from
 30 its competitors through the monthly planner and weekly merchandise bulletins]; Ex. F, p. 58:5-
 31 10 [a Monthly Planner gives store management a floor schematic to use]; Ex. F, p. 59:5-11 [floor
 32 prints sent out to the entire company are broken down by size of store; SM has to use the plan
 33 that matches his/her store]; Ex. E, p. 17:19-22 [when a Store Coordinator sets up a new store, the
 34 SM can see first-hand where items are to go]; Ex. C, pp. 112:11-113:2, 114:11-21 [“Daily
 Planners” require the SM to perform certain tasks throughout the day]; Ex. D, p.12:24-25 [a
 Sales planner is distributed to SMs every couple of months from the Zone Sales Director].

1 up their stores.³⁵ DMs even provide SMs with a “Playbook,”³⁶ where they are to keep the weekly and
 2 monthly planning instructions, designs and rules for endcaps and directions for getting freight to the
 3 floor. All SMs follow the Playbook, once again demonstrating uniformity at all retail stores.

4 Through these tight controls, Dollar Tree strips SMs of nearly all discretion over
 5 merchandising -- arguably, the *essence* of retailing. SMs are *directed* by the home office regarding
 6 what products to carry, how much to order of each,³⁷ what price points to establish for them,³⁸ and
 7 where,³⁹ when and how to display those pre-selected retail items.⁴⁰ Specifically, Dollar Tree’s
 8 corporate office frequently provides each store with a fresh and detailed pre-set schematic for retail

9 _____
 10 ³⁵ Ex. D, p. 42:8-14 [Dollar Tree uses plan-o-grams (a layout of a department); a specific
 11 item goes on a specific shelf and is given a shelf label to reflect the price, the UPC and
 12 information about the item]; *note that some deponents call these “plan-o-guides.” See, also, Ex.*
 13 *N. Ex. B, p. 96:18-22 [Dollar Tree provide SMs with a monthly promotional guides which has a*
 14 *floor print showing primarily the front of the store. When the store opens, the store gets a floor*
 15 *print of their store, a merchandised floor print.]*

16 ³⁶ Ex. E, pp. 59:15-18, 60 [the Playbook is the “nuts and bolts of the business of each
 17 store”]; Ex. O; Ex. E, p. 60:11-14 [SMs can pull all their information off the computer, all the
 18 numbers they need, stats, data, and input it in the playbook; they also use it to write orders]; Ex.
 19 E, pp. 59:25-60:2 [Tellstrom encourages and requires his SMs to use the Playbook].

20 ³⁷ *See, fn 33, supra; Ex. E, pp. 185:22-186:2 [Over and above the ARS, some or all DMs*
 21 *just tell SMs what to order]; Ex. L [Bates No. DTC02919] [“Checklisting is making sure that*
 22 *every SKU in the Order Book is represented in your store in sufficient quantities to adequately*
 23 *display them. Any exceptions must be approved by your District/Regional Manager.”]*

24 ³⁸ Ex. C, pp. 41:24-42:3 [All pricing set by corporate office, **not** SMs].

25 ³⁹ Ex. B, p. 97:10-13. *See, also, fn. 35, supra; Ex. G, p. DTC00725; Ex. D, p. 90:6-9 [SMs*
 26 *expected to follow merchandise display standards].*

27 ⁴⁰ For example, Weekly Merchandise Bulletins, sent from Virginia, instruct SMs on
 28 specific displays to build, when and how seasonal merchandise should be brought to the floor,
 stockroom organization, and other processes. *See, e.g., Ex. G [Bates No. DTC00613].* Moreover,
 Dollar Tree provides SMs with a “Routine & Guidelines” (Ex. K) which dictates what they
 should be doing throughout the day and provides task checklists; Ex. B, pp. 127:8-11,
 201:21-202:6; Ex. D, p. 110:3-25 [“Daily and Weekly Store Routine” sets SM routine]; *See e.g.,*
 Ex. E, pp. 60:5-18, 275:2-6 [Mondays are “office” days per company policy]; Ex. B, pp. 119:1-
 13, 206:20-22 [SMs “walk the floor” – conduct visual store inspections -- typically three times a
 day]; Ex. C, pp. 111:18-112:1 [“Daily Floor Walk”]; Ex. D, pp. 114:24-115:5, 115:16-20
 [corporate office tells SM what to look for during the “Store Walk”].

1 product display and store organization which is designed to ensure continuity throughout the chain,
 2 leaving SMs with virtually no control over this major retail function.

3 To be certain that SMs are, in fact, adhering to Dollar Tree's directives, SMs receive regular
 4 evaluative store visits, not just from their immediate supervisors, the DMs,⁴¹ but also from Reg.
 5 Dirs., the Reg. Training Mgrs., Asset Protection Managers ("Asset Mgrs.") and even Zone VPs,⁴²
 6 all for the purpose of ensuring uniformity and profitability at the store level.⁴³ Moreover, if SMs
 7 should have questions about any of the policies and procedures they are required to follow, they
 8 have access to the Support Center, a Technology Help Desk,⁴⁴ fellow SMs (many having experience
 9 at numerous Dollar Tree stores as SMs and/or in subordinate positions), multiple HR Managers,
 10

11 ⁴¹ Ex. E, pp. 18:2-4, 19:4-9 [DMs travel to all stores, spending two to four hours in each];
 12 Ex. B, pp. 138:9-12, 140:15-19, 141:1-5, 246:7-13 [DMs perform store "I-visits," then meet SMs
 13 to go over company's established practices]; Ex. C, pp. 32:6-22 [DMs visit stores to witness
 14 store operations and generate a report]; *see also*, Ex. F, p. 25:9-18; Ex. C, pp. 124:16-125:2 [I-
 15 visit serves as SM training tool]; Ex. D, pp. 136:19-25, 138:4-5 [DMs also conduct "Ops Store
 16 Visits" to evaluate store performance, using the same form for all stores]; Ex. D, p. 130:17-21
 17 [DMs expected to give SMs verbal feedback regularly]; Ex. C, pp. 110:24-111:8 [during a "store
 18 walk," the DM and SM, and occasionally the associates, walk the store together ensuring it is
 19 clean and products are set to the plan-o-gram]. Ex. B, pp. 110:17-22, 239:13-20; Ex. C, pp.
 20 155:1-156:6 [uniform SM reviews]). The evaluation protocol for other in-store positions also
 21 consistent (Ex. B, p. 239:13-16; Ex. C, pp. 147:7-9, 148:1-20 [SMs use same form to evaluate
 22 AMs; DM then signs to ensure SM completed it properly]); Ex. F, pp. 122:14-123:1, 128:14-23.

19 ⁴² Ex. B, pp. 141:21-142:15, 148:16-22, 153:17-19 [Reg. Dirs., Mrkt Mgrs, Reg. Training
 20 Mgrs, Asset Mgrs. and Zone VPs each conduct store visits between three and four days/week];
 21 Ex. B, pp. 153:22-154:12 [Zone VP visits stores three to four days a week, looking at sales, store
 22 presentation, staff friendliness, safety, shrink programs and whether SMs are following
 23 merchandising directions]; Ex. B, pp. 143:2-15, 144:11-145:5 [Asset Mgr. also conducts surprise
 24 night visits weekly, during which he waits in the parking lot for the store to close to evaluate
 25 closing procedures]; Ex. C, p. 31:14-23 [Asset Mgr. conducts night visits]; Ex. B, p. 152:17-20
 26 [Reg. Dir. visits may be surprise, which keeps SMs alert]; Ex. C, p. 14:10-15 [Reg. HR Mgr
 27 perform store audits]; Ex. C, pp. 15:15-16:11 [Reg. HR Mgrs. report non-compliance with
 28 merchandising standards to DMs].

25 ⁴³ Ex. B, pp. 153:22-154:12 [Zone VP visits stores three to four days/week to examine sales
 26 and sales trends, store presentation, customer service, safety, effectiveness of "shrink" programs,
 27 and whether SMs are following company merchandising directives]. Ex. F, pp. 127:21-128:5 [to
 28 ensure DMs evaluate SMs consistently, SM evaluations are scrutinized at many levels].

⁴⁴ Ex. F, pp. 17:24-18:11 [IT Help Desk (for SMs) maintained in Virginia].

1 DMs⁴⁵ and various upper management personnel.⁴⁶

2 Finally, and not surprisingly for such a large chain retailer, Dollar Tree maintains an advanced
3 information technology system which permits the corporate office and/or local upper management
4 to monitor and control a multitude of daily operations⁴⁷ in each retail store, right down to the music
5 played and store temperature.⁴⁸ These systems watch point-of-sale data, inventory replenishment,
6 employee scheduling, breaks and time punches, basic HR functions and sales reporting. Through
7 this approach, Dollar Tree ensures that all retail stores function in a relatively-uniform manner.
8

9 3. Dollar Tree Endorses Uniform Treatment of All Class Members

10 Due to SMs' occupational uniformity, Dollar Tree long ago elected to deprive these workers
11
12

13 ⁴⁵ Ex. E, pp. 20:8-12, 21:10-11 [aside from his physical visits to stores, deponent
14 communicates with SMs by e-mail, phone calls and SM meetings]. To further promote
15 consistency, DMs have regular telecoms with other DMs, Reg. Dirs. and/or other positions. Ex.
16 E, pp. 263:15-264:2) [DMs discuss sales, payroll, merchandise bulletins, HR, hiring, retaining,
MITs, people planner and operations objectives].

17 ⁴⁶ See, fn 16, *supra* [open door policy whereby all SMs can contact any level of upper
18 management to determine how to handle any situation]; Ex. C, p. 60:2-12 [Reg. Dirs. hold
19 monthly conference calls with DMs, HR, and Asset Mgrs. to discuss operational and HR issues];
20 Ex. D, p. 131:1-9 [SMs get feedback from various field positions, such as Asset Mgrs., HR
Mgrs. and Reg. Dirs.]; Ex. E, p. 262:5-13 [DMs and Reg. Dir's talk weekly]; Ex. E, p. 264:3-6
[regional weekly conference to discuss store sales, payroll and merchandising]].

21 ⁴⁷ Ex. A, pp. 6, 8; Register sales are transmitted in "real-time" to the home office so it can
22 track sales immediately and constantly. The Reg. VP requires DMs to monitor sales and payroll
23 daily and weekly. (Ex. B, p. 151:4-10 [DMs can look at payroll, inventory and sales for any of
24 their stores.]; Finally, DMs can remotely monitor store ordering, completion of advertisement
25 purchasing, payroll levels and customer service scores daily; Ex. C, pp. 179:9-23, 181:8-10 [DM
26 "Dashboard" allows DM to monitor daily sales updates and inventory levels for any store]; Ex.
B, pp. 149:22-150:16, 151:12-14 [corporate office has real-time access to all stores' sales,
including activity on the cash registers and tender type received]; Ex. B, pp. 150:20-151:4)
[payroll through COMPASS is available in a real-time manner to the corporate office].

27 ⁴⁸ Ex. B, pp. 156:9-16, 158:3-12 [SMs limited regarding the heating and music systems in
28 place.]; See, also, Ex. C, p. 135:9-18; Ex. C, pp. 136:22-137:11 [company dictates some scripts
of what should be announced over the P.A. system to advertise new products or promotions].

1 of overtime pay, categorically holding them out as subject to the executive exemption.⁴⁹ The
 2 propriety of this decision is what Plaintiffs challenge through this litigation. While Dollar Tree is
 3 expected to oppose class certification by arguing that SMs' work is so individualized as to make it
 4 impossible to meaningfully examine these employees as a group, this position ignores its own
 5 conduct; indeed, so long as it remained convenient and profitable to do so, Dollar Tree *endorsed* the
 6 use of a blanket classification of all SMs, never once suggesting these workers were anything but
 7 a cohesive group, so homogeneous in their work duties that a singular classification was appropriate.
 8 It cannot "have its cake and eat it too" by flipping its long-standing position now.

9 While Plaintiffs believe that Dollar Tree simply got it wrong (i.e., it *mis*-classified SMs),
 10 Plaintiffs agree that uniform treatment of these employees is proper. In fact, Dollar Tree is so sure
 11 of its SMs' work consistency that, since 2005, it has required all SMs to complete a weekly
 12 "Certification" report, wherein they must verify they are spending most, if not all, of their time
 13 performing the items listed in their job description.⁵⁰ Given the existence of this program⁵¹ and the
 14 extraordinarily-high affirmative response rate to it by SMs, Dollar Tree cannot legitimately now
 15 argue that SM work is so varied as to call into question the utility of class treatment.

16 For myriad reasons, this case is ideal for certification. Since Dollar Tree categorically exempts
 17 all SMs from California's overtime laws, each will make the same legal allegations and rely on a
 18 core set of facts, the same witnesses and documents. This is precisely the type of case wherein "each
 19 individual plaintiff would present, in duplicative proceedings, the same or essentially the same
 20 arguments and evidence, including expert testimony," and for which the California Supreme Court
 21 has advocated class treatment. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 340

22
 23 ⁴⁹ Ex. F, p. 138:16-24 [SMs have always been overtime exempt].

24 ⁵⁰ Ex. F, pp. 134:25-135:2 [SMs fill out Certifications weekly]; Ex. B, pp. 250:18-251:7
 25 [goal was to match Certification to job description]; Ex. C, p. 163:9-24; Ex. B, pp. 25:3-13,
 26 27:19-28:7) [SM responsibilities unchanged]; Ex. C, p. 52:13-24 [SM position unchanged after
 Certification process started]; Ex. C, p. 166:14-18 [Certification list exhaustive of what SMs do].

27 ⁵¹ Dollar Tree's use of a "Certification" process is instructive, insofar as it articulates, in
 28 Dollar Tree's own words, what all SMs are expected to do, and that Dollar Tree approves the use
 of surveys to determine the propriety of its exemption defense.

1 (2004); *see also* *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 608 (C.D.Cal. 2005).

2
3
4 **III. LEGAL ARGUMENT**

5 **A. Standard for Class Certification**

6 Federal Civil Procedure Rule 23 “provides district courts with broad discretion to determine
7 whether a class should be certified, and to revisit that certification throughout the legal proceedings
8 before the court.”⁵² *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1176 (9th Cir. 2007). Certification is
9 warranted when each of the four requirements of Rule 23(a) and at least one requirement of Rule
10 23(b) are met. Here, Plaintiffs move this Court under Rules 23(a) and 23(b)(3)⁵³ for an Order
11 certifying a class of: *All persons who were employed by Dollar Tree Stores, Inc. as California retail*
12 *Store Managers at any time on or after December 12, 2004.*⁵⁴

13 _____
14 ⁵² Although Courts advocate the use of the class action (*See, e.g., Earley v. Super. Court*, 79
15 Cal.App.4th 1420, 1434 (2000)), the Court retains the discretion to later decertify the class if
16 individual issues are found to predominate, or if it appears that a determination of damages
17 would be unmanageable. Rule 23(c)(1)(c) [providing that such orders “may be altered or
18 amended before final judgment”]; *Armstrong v. Davis*, 275 F.3d 849, 872 n.28 (9th Cir. 2001)
19 [“district courts {have} broad discretion to determine whether a class should be certified, and to
20 revisit that certification throughout the legal proceedings before the court”]; 3 *Newberg* (4th ed.)
21 § 7:24 at 79; *See also, O’Connor v. Boeing North American, Inc.*, 197 F.R.D. 404 (C.D.Cal.
22 2000). Moreover, although numerous and substantial common issues do exist here, “[e]ven if the
23 common questions do not predominate over the individual questions ... Rule 23 authorizes the
24 district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and
25 proceed with class treatment of these particular issues.” 2 *Newberg* (4th ed.) § 4:25 at 174;
26 *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986).

27 ⁵³ Rule 23(b)(3) requires that common questions of law or fact predominate over individual
28 issues and that class resolution is superior to other available methods of adjudication.

29 ⁵⁴ Separate from the Rule 23(a) and (b) requirements, as a threshold analysis, the proposed
30 class must be *ascertainable* (i.e., be “a distinct group of plaintiffs whose members [can] be
31 identified with particularity.” *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th
32 Cir. 1978)). Class membership here is easily ascertainable through examination of payroll
33 records which Dollar Tree, by law, is required to keep. Conversely, the class is *not defined* in
34 any way that would require liability adjudications before membership status can be determined,
35 although even individualized showings as to “eligibility for recovery” do not render class
36 treatment inappropriate. *Sav-On*, 34 Cal.4th at 333; *see also, Harper v. 24 Hour Fitness, Inc.*,

1 A motion for class certification is not an occasion for examination of the merits of the case.⁵⁵
 2 *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983); *Jordan v. County of Los Angeles*,
 3 669 F.2d 1311 (9th Cir. 1982). “There is nothing in either the language or history of Rule 23 that
 4 gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to
 5 determine whether it may be maintained as a class action. . . .” *Eisen v. Carlisle & Jacquelin*, 417
 6 U.S. 156, 177 (1974). Instead, to evaluate this motion, the Court need only determine if it satisfies
 7 Rule 23, *not* weigh competing evidence. *Staton v. Boeing Company*, 327 F.3d 938 (9th Cir. 2003).

8
 9 **B. The Rule 23(a) Requirements Are Satisfied**

10 **1. The Proposed Class is Sufficiently Numerous**

11 Numerosity does not require joinder of all members be *impossible*, only *impracticable*. *Arnold*
 12 *v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D.Cal. 1994); Rule 23(a)(1); *see also*,
 13 *German v. Fed. Home Loan Mortg. Corp.*, 885 F. Supp. 537, 552 (S.D.N.Y. 1995) (“Impracticability
 14 means difficulty or inconvenience of joinder; the rule does not require impossibility of joinder.”).
 15 Evidence of exact class size is not required (1 *Newberg* [4th Ed.] § 3:5 at 233-35), nor is a specific
 16 number of members;⁵⁶ rather, impracticability depends on the facts of each case. *General Tel. Co.*
 17 *v. EEOC*, 446 U.S. 318, 330 (1980). Here, joinder is impracticable.

18
 19 _____
 20 167 Cal.App.4th 966 (2008); *Bufile v. Dollar Financial Group, Inc.*, 162 Cal.App.4th 1193
 21 (2008); *Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th 715, 744 (2004) [most class actions
 22 contemplate the eventual individual proof of damages, which impliedly entails the potential that
 23 *some class members will have none*]. As such, whether some SMs may, ultimately, be found
 exempt is not relevant now, so long as manageability tools exist with which to adjudicate that
 issue later.

24 ⁵⁵ While the gravamen of Plaintiffs’ liability case is that Dollar Tree’s establishment of
 25 occupational uniformity strips SMs of nearly all discretion and independent judgment, Plaintiffs
 concede that the *correctness* of this position has *no bearing* on the outcome of this motion.

26 ⁵⁶ “[T]he difficulty inherent in joining as few as 40 class members should raise a
 27 presumption that joinder is impracticable, and the plaintiff whose class is that large or larger
 28 should meet the test of Rule 23(a)(1) on that fact alone.” 1 *Newberg* (4th ed.) § 3:5 at 246-7.
 Here, the class is represented to be at least 655 members. Ex. P.

2. The Class Representatives' Claims Are Typical

Rule 23(a)(3) requires a showing of typicality, which the Ninth Circuit interprets permissively. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Typicality requires that the named plaintiffs be members of the class they represent and “possess the same interest and suffer the same injury” as class members. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982). The named plaintiffs’ claims *need not be identical* to the claims of the class to satisfy typicality; rather, the claims are typical if they are “reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d at 1020. It is sufficient for plaintiffs’ claims to “arise from the same remedial and legal theories” as the class claims. *Arnold*, 158 F.R.D. at 449; *California Rural Legal Assistance v. Legal Services Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990) (class representatives and members of the class need only “share a common issue of law or fact”). Given that the proposed class representatives possess the same interests, and allege violations impacting other SMs, the typicality requirement is met.⁵⁷

3. The Proposed Class Representative Will Adequately Represent the Class

Since the proposed representatives have no conflicts of interest with the proposed class and are represented by qualified counsel, Rule 23(a)(4)’s adequacy requirement is met. *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998); *Lerwill*, 582 F.2d at 512. Mere divergence of opinion between the class and its representative is not sufficient. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). In this case, there is no evidence of antagonism between the proposed representatives, or their attorneys, and the putative class and, even if there were, any SM who wishes to opt out will be afforded that opportunity. Moreover, Plaintiffs’ attorneys are very experienced class action litigators, devoted almost exclusively to the prosecution of overtime class actions. Finally, Plaintiffs and their counsel are willing to pursue this action vigorously on behalf of the class, as they have done so to date.⁵⁸

⁵⁷ Declaration of Molly Kuehn (“Kuehn Decl.”), ¶ 18; Exs. P-II [SM declarations].

⁵⁸ Cole Decl. ¶¶ 19-20; Ex. Q.

1 **C. The Common Question Standards of Rule 23(a)(2) and 23(b)(3) Are Satisfied**

2 **1. The Commonality Standard(s)**

3 Plaintiffs move this Court for an Order certifying this case as a class action under Fed. R. Civ.
4 P. 23(a) and 23(b)(3). Rule 23(a)(2) requires the Court find that questions of law or fact common
5 to the class exist, a standard widely held to be construed “permissively” (*Hanlon*, 150 F.3d at 1019),
6 with even “one significant issue common to the class [being] sufficient to warrant certification.”
7 *Dukes*, 509 F.3d at 1177.⁵⁹ Moreover, class certification under Rule 23(b)(3) is satisfied if:

8 the court finds that the questions of law or fact common to class
9 members predominate over any questions affecting only individual
10 members, and that a class action is superior to other available
11 methods for fairly and efficiently adjudicating the controversy.

12 “Rule 23(b)(3) focuses on the relationship between common and individual issues.” *Wang*,
13 231 F.R.D. at 613 [finding common questions of law and fact to predominate in an overtime
14 misclassification case]; *see also, Mullen v Treasure Chest Casino, LLC*, 186 F.3d 620, 627 (5th Cir.
15 1999) (predominance is determined not by *counting* the number of common issues, but by weighing
16 their *significance*). As explained in Newberg’s treatise, while the meaning of “predominance” has
17 remained enigmatic, “[m]ost courts have agreed on what the predominance test does not entail.” 2
18 *Newberg* (4th ed.) § 4:25 at 169. Specifically, as Professor Newberg explains:

19 The test was not meant to require that the common issues will be dispositive of the
20 controversy or even be determinative of the liability issues involved. ... In addition,
21 the predominance requirement is not a numerical test that identifies every issue in
22 the suit as suitable for either common or individual treatment and determines
23 whether common questions predominate by examining the resulting balance on the
24 scale. A single common issue may be the overriding one in the litigation, despite the
25 fact that the suit also entails numerous remaining individual questions. ... In finding
26 that common questions do predominate over individual ones in particular cases,
27 courts have pointed to such issues that possess the common nucleus of facts for all
28 related questions, have spoken of a common issue as the central or overriding
question, or have used similar articulations. ... Implicit in all these articulations of
satisfaction of the predominance test is the notion that adjudication of the common
issues of the particular suit has important and desirable advantages of judicial
economy compared to all other issues, or when viewed by themselves. 2 *Newberg*

26 ⁵⁹ *Parra v. Bashas’, Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008) (“Where the circumstances
27 of each particular class member vary but retain a common core of factual or legal issues with the
28 rest of the class, commonality exists.”). Indeed, the Ninth Circuit considers the requirements for
finding commonality under Rule 23(a)(2) to be “minimal.” *Hanlon*, 150 F.3d at 1020.

1 (4th ed.) § 4:25.

2
3 In the overtime exemption context, the predominance of common issues has been frequently
4 expressed. In such cases, “[w]here . . . the “predominate issue in dispute is whether the various tasks
5 in which [class members] actually engaged should be classified as exempt or non-exempt,” common
6 questions are likely to predominate. *Sav-On*, 34 Cal.4th at 330-31. Specifically, as *Sav-On*
7 explained, it is sufficient, for class treatment, that plaintiffs show either the likelihood of a
8 standardized or uniform policy of deliberate misclassification or simply that the defendant’s uniform
9 practices likely led to widespread de facto misclassification. *Sav-On*, 34 Cal.4th at 329;⁶⁰ *See also*,
10 *Wang*, 231 F.R.D. at 614 (“Defendant cannot, on the one hand, argue that all [class members] are
11 exempt from overtime wages and, on the other hand, argue that the Court must inquire into the job
12 duties of each [class member] in order to determine whether that individual is exempt. . . Plaintiffs
13 are challenging Defendant’s policy of classifying [class members] as ‘exempt.’”) (emphasis in
14 original). Here, the questions of law are completely common, and questions of common fact have
15 already been framed for adjudication by Dollar Tree’s own chain retailing policies and procedures.

16 2. All Class Claims Share the Same Questions of Law

17 The class members do not simply share *some* common legal issues; they share them all.
18 Indeed, the legal theories advanced by each claimant are *identical* – a point that weighs heavily in
19 favor of granting this motion. Whereas the common question of defendant’s liability, vis-à-vis a
20 determination of the exempt/non-exempt character of SMs’ job duties, will be a dominant issue at
21 trial, the numerous *legal* determinations which naturally flow therefrom are equally common. For
22

23
24 ⁶⁰ In *Sav-On*, the California Supreme Court expressly endorsed the use of the class action
25 procedure in wage and hour cases, reasoning that, because there exists a “clear public policy ...
26 that is specifically directed at the enforcement of California’s minimum wage and overtime laws
27 for the benefit of workers,” (*Sav-On*, 34 Cal.4th at 340) the class action device *should be used* to
28 enforce these laws wherever this device “would be the most efficient way of adjudicating the
class members overtime claims.” *Id.*, at 330. In that situation, the court should consider only, as
an analytical matter, whether the *theory of recovery* advanced by the proponents of certification
is amenable to class treatment. *Id.*, at 327.

1 example, if SMs' entitlement to overtime pay is proven, class-wide determinations regarding SMs'
 2 entitlement to meal and rest periods (*see, Cal. Labor Code* § 226.7, 512), restitution under Cal. Bus.
 3 & Prof. Code § 17200, *et seq.*, and injunctive relief, the adequacy of Dollar Tree's record-keeping
 4 and payroll deduction statement practices (*see, Cal. Labor Code* § 226), and whether a "good faith"
 5 dispute (so as to avoid *Cal. Labor Code* § 203 "waiting time" penalties) exists will be necessary.
 6 There is no good reason to resolve these secondary issues *seriatim* for hundreds of individual SMs.

8 **3. Common Questions of Fact Predominate**

9 In evaluating the utility of class treatment, the Court must also examine whether questions of
 10 *fact* common to class members predominate over questions affecting only individual members. Here,
 11 the "one size fits all"⁶¹ nature of the SM job and Dollar Tree's resultant policy of *categorically*
 12 treating (and taking of steps to confirm) all SMs as overtime-exempt (i.e., not based upon any
 13 individual analysis),⁶² literally begs for class treatment of these workers' claims.

15 **a. Dollar Tree's Certification Process Ensures SM Conformity**

16 Dollar Tree goes to great lengths to bombard SMs with communications concerning the
 17 routinization of their job duties. Unlike other chain retailers that simply adopt uniform policies and
 18 procedures and then trust that they are followed with precision, Dollar Tree also insists that SMs
 19 certify weekly that the expected tasks are being performed and in the expected frequency, which
 20 further serves to micro manage their work. Since Dollar Tree cannot directly observe California SMs

22 ⁶¹ Plaintiffs do not suggest that SMs' work will be identical from day to day or even from
 23 SM to SM. The commonality here is *what* tasks SMs do, the resources they use to do it, the
 24 environment within which they do it, and the directives from Dollar Tree's corporate office; the
 25 fact that a SM may primarily perform "ordering" functions one day, and "receiving" duties the
 next, is of no consequence. *All* SMs order *and* receive product in varying degrees, and the *impact*
that this has on liability (i.e., how *often* they do these tasks) is a question for another day.

26 ⁶² Ex. B, p. 269:6-20 [Dollar Tree does not evaluate, on a weekly basis, whether SMs
 27 should be paid as hourly employees, even when a SM "certifies" the mix of work tasks renders
 him/her non-exempt.]. This is all despite the fact that the person in the best position to explain
 28 what a particular SM is doing would, admittedly, *be that SM*. (Ex. B, pp. 269:21-270:3).

1 from a vantage point in Virginia, confirmation that its policies and procedures are being followed
2 homogenizes the SM position and, by extension, the look, feel and success of every store.⁶³

3 Saying that the Certification process is calculated to ensure this uniformity is not just
4 advocacy; Dollar Tree admits it. Dollar Tree intended for the Certification's language to track that
5 of the job description, which becomes obvious upon their comparison. Moreover, so that SMs would
6 be completely clear about what they were certifying, Dollar Tree held meetings with SMs across
7 California to describe the process and field questions when the Certification process was rolled out.⁶⁴
8 Today, if a SM fails to submit a Certification for a given week, HR makes contact to find out why.⁶⁵
9 If any SM's work deviates from the norm, steps are taken to get his work back on track. Indeed, to
10 argue now that SM's work is more random simply defies credibility. *Wang*, 231 F.R.D. at 608-09.

11
12 **b. How Much Time Managers Spend on Any Work Task Is Presently Irrelevant**

13 In this motion, Plaintiffs do not seek a liability determination or to challenge Defendant's
14 likely argument that variations exist in the mix of actual work activities undertaken by individual
15 class members or the amount of time spent from one day to the next on these tasks. Indeed, it is of
16

17 ⁶³ Ex. B, p. 165:22-166:21 [SMs' duties/responsibilities are about the same in all states].

18 ⁶⁴ Ex. B, pp. 253:17-254:10 [Q&A sessions held with all SMs regarding Certification
19 process]; Ex. C, pp. 157:11-158:19 [two So. Cal. meetings with SMs to introduce Certification
20 procedures]; Ex. F, pp. 130:17-20, 132:7-133:24 [two meetings where SMs asked questions
21 about Certification process; 3+ hour meeting in Sacramento].

22 ⁶⁵ Ex. B, pp. 251:12-18, 259:8-13; Ex. F, pp. 135:3-12, 136:11-14 [if a SM checks "no" on
23 the certification, Candace Camp typically has a phone conversation with David McDearmon
24 [Director of Field HR] and the SM to go over the SM's explanation and turn it into a "yes"]; Ex.
25 B, pp. 115:12-20, 166:18-167:11 [that SMs are following the job description is reinforced
26 through the regional management team, including Reg. Dirs. and DMs]; Ex. C, p. 176:5-9 [SMs
27 never get paid overtime, *even if* they check "no" for a given week]. What this shows is that
28 Dollar Tree could not care less what answer SMs put on the Certification form; Dollar Tree is
confident it already knows what SMs do, categorically, and it believes that the work is exempt,
an expectation which creates a common issue for trial. *Accord*, Ex. F, p. 143:7-20. What this
also shows is that Dollar Tree *endorses* class-wide treatment of SMs without the need for an
"individual inquiry" into the nature of their work. Defendant cannot now convincingly argue that
the information and assumptions upon which it decided to exempt SMs were inadequate.

1 no consequence to admit that some degree of uniqueness exists between any two people holding any
 2 singular job position.⁶⁶ Certification of a worker class does not demand complete uniformity at levels
 3 of minutia – only that the common issues *predominate* in their importance to the overall dispute.

4 Although Dollar Tree will likely oppose this motion by irrelevant references to the various
 5 nuances that impact the *amount of time* spent on particular tasks, it cannot have it both ways by
 6 homogenizing its policies and procedures and endorsing a blanket exemption of SMs, and then
 7 opposing class certification by denouncing the use of representational evidence. *Wang*, 231 F.R.D.
 8 at 614 [explaining the inconsistency of this approach in the context of an overtime exemption case].

9 While certainly not the first lawsuit wherein certification was approved,⁶⁷ *Wang* presents a
 10 robust and instructive list of the common factual issues present in cases such as this. Indeed, the
 11 common factors which predominated in *Wang* also predominate here. They are whether:

12 (1) Defendant has a uniform policy of unlawfully treating certain classifications of
 13 employees as “exempt”; (2) Defendant conducted an appropriate investigation to support a
 14 good faith defense of this policy; (3) Defendant failed to pay overtime compensation to non-
 15 exempt employees; (4) Defendant deprived employees of meal and rest breaks and failed to
 16 pay appropriate penalties for missed breaks; (5) Defendant failed to keep accurate records
 17 of hours worked⁶⁸; (6) Defendant failed to provide accurate itemized wage statements to
 18 employees; (7) Defendant failed to pay all wages due to employees at the time that their
 19 employment was terminated. Additional questions of fact include: (8) class members receive
 20 their pay through a common compensation program or payroll system; (9) Defendant
 21 performed studies to determine the amount of hours its employees actually spent on exempt
 22 versus non-exempt work; and (10) Defendant has centralized oversight and supervision of
 23 its employees. A common inquiry is the most efficient and appropriate way to answer these
 24 questions. Most differences among putative class members, such as the amount of overtime
 25 premium pay owed or the number of breaks that have been missed, affect *damages*, not
 26 Defendant’s liability. *Wang*, 231 F.R.D. at 612-13 (numbering, footnotes and emphasis
 27 added).

28 Here, however, the list continues, and includes common issues such as whether Defendant
 acted in good faith (*Cal. Labor Code* § 203) in classifying SMs as exempt, whether punitive

23 ⁶⁶ “[N]either variation in the mix of actual work activities undertaken during the class
 24 period by individual [class members], nor differences in the total unpaid overtime compensation
 25 owed each class member, bars class certification as a matter of law.” *Sav-On*, 34 Cal.4th at 335.

26 ⁶⁷ This preponderance of common issues on similar facts is why this matter is hardly the
 27 first retail manager case to achieve certification status. *See*, Kuehn Decl. ¶¶ 3-17; Exs. A-O.

28 ⁶⁸ Ex. C, pp. 183:3-22, 184:3-16 [no requirement to track hours or meal/rest breaks]; Ex. B,
 p. 271:7-9 [SMs do not record hours actually worked].

1 damages are recoverable and whether Dollar Tree engaged in an unfair business practice (*Cal. Bus.*
 2 *& Prof. Code* § 17200). Thus, the most substantial⁶⁹ questions would be decided at the class-wide
 3 liability trial, leaving discrete questions addressing how much time each SM spent on common tasks
 4 and damages to be determined on an individual, yet substantially-streamlined, basis.^{70, 71}

6 **D. A Class Action Is the Superior Method of Adjudicating These Claims**

7 The superiority of class treatment to other available methods of litigating these claims is clear.
 8 As courts considering the complexity of overtime cases have previously observed:

9 [a]bsent class treatment, each individual plaintiff would present in separate, duplicative
 10 proceedings the same or essentially the same arguments and evidence, including expert

11 _____
 12 ⁶⁹ See, e.g., Kuehn Decl. ¶14; Ex. L, p. 8:2-5] [“If the common questions ‘present a
 13 significant aspect of the case and they can be resolved for all members of the class in a single
 14 adjudication, there is clear justification for handling the dispute on a representative rather than
 15 on an individual basis ’” *Hanlon*, 150 F.3d at 1022 (citation omitted).”] Moreover, as noted *supra*,
 16 even the *amount of time* each employee spends on work tasks presents an opportunity for
 17 resolution through the use of common tools.

18 ⁷⁰ Since potential individual issues do not predominate, the common questions before this
 19 Court may be preliminarily determined. Individual issues requiring that each class member
 20 individually establish his/her eligibility to make a claim or their specific damages do not render
 21 class treatment inappropriate as long as these issues may be effectively managed. *Sav-On*, 34
 22 Cal.4th at 334-335; *Employment Dev. Dept. v. Superior Court*, 30 Cal.3d 256, 266 (1981); See
 23 also, *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1354 (1987) (the
 24 appropriate method to determine class members’ damages “need not be resolved until the
 25 class-wide issues have been determined”). In any event, individual damages can be determined
 26 through well-established, efficient and easily-managed procedures, including, for example, the
 27 use of questionnaires, surveys or representative sampling and testimony. See, e.g., *Bell*, 115
 28 Cal.App.4th at 750 (approving use of statistical sampling in a class action stating that it “does
 not dispense with proof of damages but rather offers a different method of proof”).

29 ⁷¹ Not only do individual issues regarding each class member’s specific amount of damages
 30 not render class treatment inappropriate, the correct formula for determining wages due presents
 31 yet another class-wide issue for determination. Such formulaic approaches have been found
 32 particularly useful where, as here, defendant’s lack of records would make reconstructing the
 33 precise number of hours worked a cumbersome process. (See, e.g., *Stewart v. General Motors*
 34 *Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *EEOC v. O & G Spring & Wire Forms Spec. Co.*,
 35 38 F.3d 872, 876 (7th Cir. 1994) and accepted by the Ninth Circuit (*Hilao v. Estate of Marcos*,
 36 103 F.3d 767, 782-87 (9th Cir. 1996); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-
 37 45 (9th Cir. 1984)).

1 testimony. The result would be a multiplicity of trials conducted at enormous expense to
 2 both the judicial system and the litigants. “It would be neither efficient nor fair to anyone,
 3 including defendants, to force multiple trials to hear the same evidence and decide the same
 4 issues.” *Sav-On*, 34 Cal.4th at 340 (citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58,
 5 67 (S.D.Ohio 1991)).

6 It would be far more costly and time consuming for each individual class member separately
 7 to seek and compel discovery of Defendant’s policies and procedures, take multiple depositions to
 8 discover Defendant’s reasons for exempting the SM position from overtime, retain a multitude of
 9 different experts to analyze such information for each individual case, and otherwise litigate
 10 numerous issues concerning entitlement to various kinds of damages and penalties than it would be
 11 to adjudicate all claims within the already-pending action. Moreover, separate lawsuits would
 12 require analysis of the same core evidence by a multitude of courts and juries. Finally, the disparity
 13 in resources between class members and an extraordinarily-large private employer such as Dollar
 14 Tree could easily intimidate and dissuade potential plaintiffs from proceeding individually.⁷²

15 If there *was* ever uncertainty over the *superiority* of the class action vehicle in the employment
 16 law arena, the California Supreme Court’s decision in *Gentry v. Superior Court*⁷³ has erased such
 17 doubts. Indeed, in *Gentry*, the Court held there is, sometimes, justification for class certification *even*
 18 *in* cases where certain statutory requirements for certification are “otherwise questionable.” Without
 19 a doubt, Defendant will vigorously contest liability, meaning that, without certification, the
 20 multiplicity of trials will result in an enormous waste of judicial and party resources. In the end, as

21 ⁷² “[I]t is no accident that ‘wage and hour disputes...routinely proceed as class actions.’”
 22 *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1538 (2008), citing *Prince v. CLS*
 23 *Transportation, Inc.*, 118 Cal.App.4th 1320, 1328 (2004); *Sav-On*, 34 Cal.4th at 340; Kuehn
 24 Decl. ¶16; Ex. N, p. 15:11-13 [“A class action is superior to multiple individual lawsuits. The
 25 needless expenditure of additional time, effort and money that would be attendant to numerous
 26 individual suits is greatly reduced, and the potential for differing outcomes is avoided as well.”].

27 ⁷³ *Gentry v. Superior Court*, 42 Cal.4th 443 (2007) [summarizing the policy considerations
 28 favoring class action usage, to wit: (1) individual awards in such cases tend to be modest so the
 availability of class action claims play “an important function by permitting employees a
 relatively inexpensive way to resolve their disputes,” (2) the class action vehicle allows many
 employees, whom may not otherwise file an individual suit due to fear of retaliation, to safely
 have their day in court as a member of the class, and (3) class actions serve to inform and protect
 employees who, for one reason or another, may not otherwise become aware that their rights are
 even being violated]; *See also*, *Ghazaryan*, 169 Cal.App.4th 1524 (2008).

1 a practical matter, the only alternatives to certifying this class are to force hundreds of current and
 2 former SMs to file individual actions or abandon their rights altogether.

3
 4 **E. Class Certification Permits Use of a Streamlined Trial Plan**

5 Individual issues requiring each SM establish his/her right to recover do not render class
 6 treatment inappropriate as long as they may be effectively managed. *Wang*, 231 F.R.D. at 613, citing
 7 *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Sav-On*, 34 Cal.4th at 334-35; *B.W.I. Custom*
 8 *Kitchens*, 191 Cal.App.3d at 1354 [the appropriate method to determine class members' damages
 9 "need not be resolved until the class-wide issues have been determined."]. Moreover, the existence
 10 and/or amount of individual damages can be formulaically-addressed⁷⁴ at trial through
 11 well-established and efficient procedures, such as the use of questionnaires, surveys or
 12 representative testimony. *Bell*, 115 Cal.App.4th 715. For these reasons, the presence of individual
 13 damages issues does not undermine the common-sense conclusion that resolution of hundreds of
 14 claims at once substantially promotes judicial economy, particularly when a plethora of innovative
 15 tools are available to the parties. Indeed, as the *Sav-On* Court noted:

16 For decades "[t]his court has urged trial courts to be procedurally innovative" in managing
 17 class actions, and "the trial court has an obligation to consider the use of ... innovative
 18 procedural tools proposed by a party to certify a manageable class" *Sav-On*, 34 Cal.4th at
 339.

19 Such "innovative procedural tools" can take on many appearances⁷⁵ and, obviously, a trial

20 _____
 21 ⁷⁴ Not only do individual issues regarding each class member's specific amount of damages
 22 **not** render class treatment inappropriate, the correct formula for determining back wages due
 23 presents yet another class-wide issue for determination. Such formulaic distributions of back pay
 24 have been found particularly useful where, as here, Defendant's lack of adequate records would
 25 make any attempt at reconstructing the precise number of hours worked by affected employees a
 26 cumbersome process, to say the least. Formulaic distributions of back pay have been successfully
 used in other actions. *See, e.g., Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th
 Cir. 1974); *Domingo*, 727 F.2d at 1444-45. Moreover, such an approach is similar to that
 accepted by the Ninth Circuit in *Hilao*, 103 F.3d at 782-87; 4 *Newberg* (4th ed.) § 9:63 at 451.

27 ⁷⁵ Here, these issues may be addressed using surveys/questionnaires, statistical evidence,
 28 exemplar plaintiffs, separate judicial or administrative mini-proceedings, expert testimony,
 and/or other descriptors of Defendant's centralized practices, each of which has been adopted

1 plan specifically tailored toward the particular litigation has the best chance of achieving the desired
 2 effect. While the Court has the discretion to use any plan it sees fit, a bifurcated approach could
 3 effectively manage all common and individual issues. Specifically, in Phase I thereof, the Court
 4 would adjudicate the exempt/non-exempt character of each of the job position's duties, *just once*,
 5 for all class members; in Phase II, each member (or a sampling) of the class would identify the
 6 percentage of time spent thereby on each task/task group,⁷⁶ and then state the total number of
 7 overtime hours worked. Through this approach, Phase II would account for any possible variations
 8 between SM experiences due to varying store sizes, sales volume and the like.⁷⁷ Without suggesting
 9 that these common factors are exhaustive, Plaintiffs propose that trial be conducted as follows:

10
 11 **Phase I (Common Issues):**

12 Questions common to all SMs (and which dispose of the named plaintiffs' claims) include:

- 13 • Which SM duties (hereinafter, the "Task List") are legally exempt under California law?;
- 14 • Did Defendant violate *Cal. Labor Code* §§ 226.7 and/or 512 by failing to provide meal and/or
 15 rest periods to SMs?;

16 _____

17 successfully in prior matters. *See, O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311
 18 (C.D.Cal. 1998) (questionnaire); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988)
 19 (exemplar plaintiffs); Deskbook on the Management of Complex Civil Litigation § 2.61(3);
 20 Manual for Complex Litigation (2008) § 11.493 (exemplar plaintiffs); *Labor/Community*
 21 *Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001) (Special
 22 Master); Rule 23(c)(4)(B) (subclasses). Indeed, due process objections to handling individual
 23 damages issues via such approaches are unpersuasive. *Day v. NLO*, 851 F.Supp. 869, 876
 24 (S.D.Ohio 1994) [Such devices permit defendants to "present their opposition, and to raise
 25 certain affirmative defenses"]; *Sav-On*, 34 Cal.4th at 339-40.

26 ⁷⁶ "[T]he fact is the tasks discussed in both defendant's and plaintiffs' submissions
 27 comprise a reasonably definite and finite list. ... This is an issue [whether work tasks are
 28 'managerial' or 'non-managerial'] that can easily be resolved on a class-wide basis by assigning
 each task to one side of the 'ledger' and makes the manageability of the case not the daunting
 task Defendant has sought to portray." *Sav-On*, 34 Cal.4th at 331.

⁷⁷ Any variances in SMs' work merely impact the *amount* of time spent on certain tasks, not
 the task list itself; Phase II's checklist-type approach addresses these variances. *See, Day*, 851
 F.Supp. at 876 [such devices permit defendants to "present their opposition, and to raise certain
 affirmative defenses."]; *Sav-On*, 34 Cal.4th at 339-40.

- 1 • Was Dollar Tree’s conduct arbitrary, unreasonable and/or in bad faith (for purposes of
- 2 determining “waiting time” penalties under *Cal. Labor Code* § 203)?;
- 3 • Did Defendant violate *Cal. Labor Code* § 1174 by failing to record SMs’ hours of work?;
- 4 • Are SMs entitled to an award of punitive damages and, if so, in what amount?;
- 5 • Is injunctive relief appropriate and, if so, in what form?

6 If Plaintiffs prevail in Phase I, a “ledger”-type trial tool could be developed to allow SMs to
 7 report the amount of time spent performing each task, a process that would thereby answer the
 8 question (employing remedial arithmetic) of which SMs are entitled to overtime pay.

9
 10 **Phase II (Individual Issues):**

11 Phase II could be held either immediately after the conclusion of Phase I or following an
 12 additional round of discovery. Phase II would determine the number of overtime hours worked,
 13 missed meal/rest periods, amount of penalties due and the time spent on each task/task group, an
 14 approach not dissimilar from that discussed by the *Sav-On* Court as being useful in that similar chain
 15 retailing scenario. Here, common trial tools, such as the use of a Special Master or a survey, would
 16 likely be most useful. Through this phased trial plan, common *and* individual issues would be
 17 addressed in one highly-streamlined proceeding -- and the logic of *that* is undeniable.

18 **IV. CONCLUSION**

19 Rule 23 was designed to prevent repetitious litigation and to allow courts to manage cases on
 20 a representative basis. The class here meets all the requirements of Rule 23(a) and 23(b)(3) in
 21 multiple respects. Accordingly, Plaintiffs respectfully request this Court enter the [proposed] Order.
 22

23 Dated: March 25, 2009

24 Respectfully Submitted,

25 **SCOTT COLE & ASSOCIATES, APC**

26 By: /s/ Scott Edward Cole
 27 Scott Edward Cole, Esq.
 28 Attorneys for Representative Plaintiffs
 and the putative Plaintiff Class

SCOTT COLE & ASSOCIATES, APC
 ATTORNEYS AT LAW
 THE WACHOVIA TOWER
 1970 BROADWAY, NINTHFLOOR
 OAKLAND, CA 94612
 TEL: (510) 891-9800