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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL A. CRUZ, and JOHN D. HANSEN,)	Case Nos. 07-2050 SC
individually and on behalf of all)	07-4012 SC
others similarly situated,)	
)	
Plaintiffs,)	ORDER GRANTING IN
)	PART AND DENYING IN
v.)	PART DEFENDANT'S
)	<u>MOTION TO DECERTIFY</u>
DOLLAR TREE STORES, INC.,)	
)	
Defendant.)	

ROBERT RUNNINGS, individually, and)
on behalf of all others similarly)
situated,)
Plaintiffs,)
v.)
DOLLAR TREE STORES, INC.,)
Defendant.)

I. INTRODUCTION

This matter comes before the Court on the Motion to Decertify filed by Defendant Dollar Tree Stores, Inc. ("Defendant" or "Dollar Tree"). ECF No. 188.¹ Plaintiffs Robert Runnings, Miguel Cruz, and John Hansen (collectively "Plaintiffs") filed an Opposition, and Defendant submitted a Reply. ECF Nos. 212, 218. For the following reasons, the Court GRANTS IN PART and DENIES IN

¹ Cruz v. Dollar Tree, Case No. 07-2050 ("Cruz Action"), and Runnings v. Dollar Tree, Case No. 07-4012 ("Runnings Action"), have been consolidated. Unless otherwise noted, all docket numbers in this Order refer to docket entries in the Cruz Action.

1 PART the Motion to Decertify.

2
3 **II. BACKGROUND**

4 The Court assumes the parties are familiar with the
5 procedural and factual background of this dispute, which the Court
6 set out in its Order Granting the Amended Motion for Class
7 Certification. ECF No. 107 ("May 26, 2009 Order"). Plaintiffs
8 allege they were improperly classified as exempt employees. See
9 Runnings Action, ECF No. 1 ("Runnings Compl."); Cruz Action ECF
10 No. 23 ("Cruz Am. Compl."). As a result, Plaintiffs allege that
11 Dollar Tree failed to pay them overtime compensation and failed to
12 provide meal and rest breaks, in violation of California law. Id.
13 The class is currently defined as "[all persons who were employed
14 by Dollar Tree Stores, Inc. as California retail Store Managers at
15 any time on or after December 12, 2004, and on or before May 26,
16 2009." ECF No. 113 ("July 2, 2009") at 5. Starting the class
17 period at December 12, 2004 ensures that any eventual awards to
18 Dollar Tree Store Managers ("SMs") will not overlap with the
19 awards that resulted from a previous settlement. See May 26, 2009
20 Order. The class consists of 718 SMs who worked in 273 retail
21 locations in California. Mot. at 1.

22 As explained in the order certifying the class, Dollar Tree
23 requires its SMs to certify that they spend more than fifty
24 percent of their actual work time each week performing the
25 following duties and responsibilities:

- 26 1. Supervision of associates.
- 27 2. Oversee daily store activities, including opening
28 and closing store.

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3. Ensure customer and associate safety.
4. Protect all company assets, including store cash, merchandise and equipment.
5. Maintain proper sales, banking, inventory, accounting, productivity, payroll and time records.
6. Responsible for adequate staffing of store. Recruit, interview, hire, employ, and train sales associates. Train associates to properly use all equipment and technology as well as provide thorough merchandise display training.
7. Schedule and assign work to store personnel. Evaluate, motivate, counsel, develop, discipline and discharge sales associates appropriately. Maintain production reports to evaluate job performance of sales associates.
8. Provide leadership and direction to store personnel.
9. Communicate company policies to sales associates. Ensure associates comply with company policies and procedures, including safety guidelines and human resources policies.
10. Analyze sales, expenses, and profit, review reports, analyze competition, determine customer preferences, manage sales forecasting, meet sales and profit objectives and goals, determine product mix, determine most effective placement of product and ensure standards for merchandise presentation, displays and signage to maximize sales. Assist in developing promotions and advertisements as appropriate.
11. Control inventory. Supervise ordering, receiving, stocking and pricing of goods. Ensure goods are properly marked and mark downs are properly recorded.
12. Responsible for overall cleanliness and appearance of store.
13. Ensure highest level of customer service. Handle customer complaints and problems.
14. Ensure accident reports and damage reports are completed in timely and accurate manner.
15. Complete management reports in a timely and accurate manner.
16. Ensure compliance with applicable laws and regulations.
17. Communicate professionally and effectively with customers, subordinates and supervisors.

1 Kuehn Decl. Ex. 2 ("Weekly Payroll Certification").² The
2 certification form states that SMS "may not spend more than a
3 total of 35% of his/her actual work time each week receiving
4 product, distributing and storing product, stocking product and
5 cashiering." Id. A SM must certify "yes" if he or she spent the
6 majority of his or her time performing the seventeen duties, and
7 "no" if he or she did not. See id. If the SM responds no, "s/he
8 must immediately provide an explanation to both Payroll and Human
9 Resources. No salary or wage will be withheld because of non-
10 compliance." Id. The form provides a space for SMS to write in
11 their explanation. See id.

12 Dollar Tree's expert, Robert Crandall, MBA ("Crandall"),
13 analyzed certification responses comprising 29,431 workweeks
14 during the class period. ECF No. 190 ("Crandall Decl.") ¶ 15.
15 His analysis show that approximately 62 percent of SMS always
16 certified that they spent the majority of their workweeks on the
17 seventeen managerial tasks, 2.5 percent reported that they never
18 spent most of their time performing these tasks, and about 35
19 percent of SMS fall somewhere in between.³ Id. ¶¶ 22-23, Ex. 2

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21 ² Molly A. Kuehn, attorney for Plaintiffs, filed a Declaration
22 in Support of Plaintiffs' Opposition to Defendant's Motion to
Decertify the Class. ECF No. 214.

23 ³ Plaintiffs filed evidentiary objections to statements in
24 Crandall's declaration. ECF No. 213. The Court notes that
25 Crandall tends to treat the terms "managerial" and "exempt" as
26 synonymous, when in fact there has been no determination yet as to
27 whether SMS who spend a majority of their time performing the
28 seventeen tasks listed on the weekly payroll certifications are
properly classified as exempt. The Court does not rely on any
statement by Crandall that SMS engaged in exempt tasks. Plaintiffs
also object that these statements go to liability issues rather
than class certification issues, but as explained below, see Part

1 ("Summary of Managers' Weekly Responses"). As explained in Part
2 IV(E), infra, the Court regards the weekly payroll certifications
3 as a reliable source of information concerning how SMS were
4 spending their time at Dollar Tree.

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6 **III. LEGAL STANDARD**

7 The district court has discretion to certify a class under
8 Federal Rule of Civil Procedure 23. Dukes v. Wal-Mart Stores,
9 Inc., 603 F.3d 571, 579 (9th Cir. 2010). Rule 23(a) requires that
10 the plaintiff demonstrate (1) numerosity, (2) commonality, (3)
11 typicality, and (4) fair and adequate representation of the class
12 interest. Fed. R. Civ. P. 23(a). In addition to meeting
13 these requirements, the plaintiff must also show that the lawsuit
14 qualifies for class action status under one of the three criteria
15 found in Rule 23(b). See Dukes, 603 F.3d at 592-93. Here, the
16 Court previously ruled that Plaintiff had satisfied Rule 23(a) and
17 certified the class under Rule 23(b)(3), which requires that
18 "questions of law or fact common to the members of the class
19 predominate over any questions affecting only individual members,
20 and that a class action is superior to other available methods for
21 the fair and efficient adjudication of the controversy." Fed. R.
22 Civ. P. 23(b)(3).

23 A previously certified class is subject to modification at
24 the Court's discretion. See General Tel. Co. of the Southwest v.
25 Falcon, 457 U.S. 147, 160 (1982) (noting that even after a class

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27 IV.D, the two sets of issues cannot be kept entirely separate.
28 The Court OVERRULES Plaintiffs' objections.

1 is certified, the district court "remains free to modify it in the
2 light of subsequent developments in the litigation."); Fed. R.
3 Civ. P. 23(c)(1)(C) ("An order that grants or denies class
4 certification may be altered or amended before final judgment.");
5 Officers for Justice v. Civil Service Comm'n of City and County of
6 San Francisco, 688 F.2d 615, 633 (9th Cir. 1982) ("before entry of
7 final judgment on the merits, a district court's order respecting
8 class status is not final or irrevocable, but rather, it is
9 inherently tentative"); see also Marlo v. United Parcel Service,
10 Inc., 251 F.R.D. 476, 488 (C.D. Cal. 2008) (decertifying class
11 after subsequent discovery, motion practice, and trial
12 preparations revealed that requirement of predominance of common
13 issues was not satisfied). The standard applied by the courts in
14 reviewing a motion to decertify is the same as the standard used
15 in evaluating a motion to certify; namely, whether the
16 requirements of Rule 23 are met. O'Connor v. Boeing N. Am., Inc.,
17 197 F.R.D. 404, 410 (C.D. Cal. 2000).

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19 **IV. DISCUSSION**

20 The central issue in this case is whether Dollar Tree
21 misclassified its SMs as exempt. Dollar Tree contends the class
22 should be decertified based on changes in the law since class
23 certification and based on its continued development of facts
24 showing that individual issues predominate over common issues.
25 The Court begins by reviewing some of the applicable statutes,
26 regulations, and cases.

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1 **A. Overtime Pay and the Executive Exemption**

2 Section 510(a) of the California Labor Code provides that
3 "[a]ny work in excess of eight hours in one workday and any work
4 in excess of 40 hours in any one workweek and the first eight
5 hours worked on the seventh day of work in any one workweek shall
6 be compensated at the rate of no less than one and one-half times
7 the regular rate of pay for an employee." Cal. Lab. Code
8 § 510(a). Title 8, Section 11040 of the California Code of
9 Regulations prohibits employees from working more than eight hours
10 per workday or forty hours per workweek unless they are paid
11 overtime for all extra hours worked. Cal. Code Regs. tit. 8, §
12 11040(3)(A)(1).

13 Under California law, this requirement to pay overtime
14 compensation does not apply to "exempt" employees. See Cal. Lab.
15 Code § 515; Cal. Code Regs. tit. 8 § 11040. The executive
16 exemption is set forth in Industrial Welfare Commission Wage
17 ("ICW") Order 7-2001, Cal. Code Regs., tit. 8, § 11070. To
18 qualify as exempt, the employee must: (1) manage the enterprise, a
19 customarily recognized department, or subdivision thereof; (2)
20 direct the work of two or more other employees; (3) have the
21 authority to hire or fire, or have their recommendations to hire,
22 fire, or promote given weight; (4) exercise discretion and
23 independent judgment; (5) be primarily engaged in exempt activity
24 more than fifty percent of the time; and (6) earn a monthly salary
25 equal to twice the state minimum wage for full-time employment.
26 Cal. Code Regs. tit. 8, § 11070(1)(A)(1)(a)-(f).

27 "[T]he assertion of an exemption from the overtime laws is
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1 considered to be an affirmative defense, and therefore the
2 employer bears the burden of proving the employee's exemption."
3 Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 794-95 (1999).
4 The employer must establish that it realistically expected
5 managers to spend at least half their time on exempt tasks. Id.
6 at 802. In Ramirez, the court rejected the notion that an
7 employee's exempt status could be determined solely by looking to
8 the employer's job description or by examining the employee's
9 actual activities. Id. at 802. The Court explained:

10 On the one hand, if hours worked on [an exempt
11 activity] were determined through an employer's
12 job description, then the employer could make an
13 employee exempt from overtime laws solely by
14 fashioning an idealized job description that had
15 little basis in reality. On the other hand, an
employee who is supposed to be engaged in [an
exempt activity] during most of his working
hours and falls below the 50 percent mark due to
his own substandard performance should not
thereby be able to evade a valid exemption.

16 Id. In assessing the propriety of an exemption, the trial court
17 "must steer clear of these two pitfalls by inquiring into the
18 realistic requirements of the job." Id. In making that
19 determination,

20 the court should consider, first and foremost,
21 how the employee actually spends his or her
22 time. But the trial court should also consider
23 whether the employee's practice diverges from
24 the employer's realistic expectations, whether
25 there was any concrete expression of employer
displeasure over an employee's substandard
performance, and whether these expressions were
themselves realistic given the actual
requirements of the job.

26 Id.

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1 **B. Ninth Circuit Decisions in Vinole and Wells Fargo**

2 Subsequent to this Court's certification order, the Ninth
3 Circuit issued two opinions clarifying how a district court's
4 certification analysis should proceed in cases where an employer
5 asserts an exemption. In Vinole v. Countrywide Home Loans, Inc.,
6 the Ninth Circuit held that relying on a uniform exemption policy
7 to the near exclusion of other factors is insufficient to meet the
8 predominance requirement of Rule 23(b)(3). 571 F.3d 935, 946 (9th
9 Cir. 2009). The district court must consider "all factors that
10 militate in favor of, or against, class certification," and the
11 overarching focus remains "whether trial by class representation
12 would further the goals of efficiency and judicial economy." Id.

13 In Vinole, the Ninth Circuit discussed the types of common
14 proof that could suffice to establish the predominance of common
15 issues. While an employer's "uniform application of an exemption
16 to employees" is one factor, district courts should also consider
17 "whether the employer exercised some level of centralized control
18 in the form of standardized hierarchy, standardized corporate
19 policies and procedures governing employees, uniform training
20 programs, and other factors susceptible to common proof." Id.
21 The Ninth Circuit cited the existence of "company-wide policies
22 governing how employees spend their time, or [] uniformity in work
23 duties and experiences" as the type of proof that tends to
24 "diminish the need for individualized inquiry." Id. at 947. In
25 contrast, "in cases where exempt status depends upon an
26 individualized determination of an employee's work, and where
27 plaintiffs allege no standard policy governing how employees spend

1 their time, common issues of law and fact may not predominate."
2 Id. at 946-47 (citation and quotation marks omitted).

3 On the same day, the Ninth Circuit also issued its decision
4 in In re Wells Fargo Home Mortgage Overtime Pay Litigation, 571
5 F.3d 953 (9th Cir. 2009) ("Wells Fargo I"). This case provides
6 further guidance on how the Court should conduct its certification
7 analysis. The Ninth Circuit expressly rejected the rule followed
8 in Wang v. Chinese Daily News, 241 F.R.D. 601 (C.D. Cal. 2005),
9 which "essentially creates a presumption that class certification
10 is proper when an employer's internal exemption policies are
11 applied uniformly to the employees." Wells Fargo I, 571 F.3d at
12 958. The Court noted that a "blanket exemption policy does
13 nothing to facilitate common proof on the otherwise individualized
14 issues." Id. In the context of discussing the outside
15 salesperson exemption, the Ninth Circuit noted that the exemption
16 often militates against certification because it requires a fact-
17 intensive inquiry into each potential plaintiff's employment
18 situation. Id. On the other hand,

19 A centralized policy requiring employees to be
20 at their desks for 80% of their workday would
21 change this individual issue into a common
22 one. Therefore, such a corporate policy would
23 be highly relevant to the predominance
24 analysis. A uniform exemption policy,
25 however, has no such transformative power.
26 Whether such a policy is in place or not,
27 courts must still ask where the individual
28 employees actually spent their time.

25 Id. at 959. The main concern in the predominance inquiry is "the
26 balance between individual and common issues." Id.

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1 **C. District Court Reactions to Vinole and Wells Fargo I**

2 On remand in the Wells Fargo case, Judge Patel in the
3 Northern District of California decertified the class, noting that
4 "when an employer asserts an exemption as a defense . . . the
5 resolution of which depends on how employees spend their time at
6 work, unless plaintiff proposes some form of common proof, such as
7 a standard policy governing how and where employees perform their
8 jobs, common issues of law or fact are unlikely to predominate."
9 In re Wells Fargo Home Mortg. Overtime Pay Litig., No. 06-1770,
10 2010 WL 174329, *7 (N.D. Cal. Jan. 13, 2010) ("Wells Fargo II").
11 She decertified the case because Plaintiffs could not come forward
12 with "common proof that would absolve this court from inquiring
13 into how each [manager] spent their working day." Id.

14 Similarly, after the Ninth Circuit's decisions in Vinole and
15 Well Fargo I, Judge Armstrong in the Northern District of
16 California decertified a case where managers alleged they had been
17 misclassified as executive-exempt employees. Whiteway v. FedEx
18 Kinkos Office and Print Servs., Inc., No. 05-2320 (N.D. Cal. Sept.
19 29, 2009). The order stated:

20 The Court is no longer persuaded that common
21 questions of fact or law will predominate over
22 questions affecting individual class members.
23 Though Plaintiff alleges that Defendant has a
24 policy of classifying Center Managers as
25 exempt, he has not pointed to any policy or
26 common practice demonstrating that these
27 employees as a class are required or expected
28 to allocate the majority of their time to non-
exempt tasks.

26 Id. at 5.

27 In Weigele v. FedEx Ground Package System, Inc., the District

1 Court decertified a case where FedEx managers alleged they were
2 improperly classified as exempt. 267 F.R.D. 614, 622 (S.D. Cal.
3 2010). The court found that common issues did not predominate
4 because of the "massive number of tasks" performed by Dock Service
5 Managers and the variability in the amount of time they spent on
6 these tasks, and the Court noted that FedEx's common processes and
7 training "would provide no help to the Court in determining the
8 actual work mix performed by the Plaintiffs." Id.

9 **D. Modifying the Class Definition**

10 Dollar Tree contends that these recent developments compel
11 decertification. See Mot. at 5-7. Plaintiffs contend there is no
12 need for the Court to re-examine its previous order certifying the
13 class. Opp'n at 6-7. The Court agrees partially with Dollar Tree
14 and partially with Plaintiffs.

15 In this case, unlike in Wells Fargo II, Whiteway, and
16 Weigele, Plaintiffs have common proof of how SMS were actually
17 spending their time. Plaintiffs can rely on the certification
18 forms that SMS signed every week to, in the words of the Ninth
19 Circuit, transform what would otherwise be an individual issue
20 into a common one. See Wells Fargo I, 571 F.3d at 959. However,
21 the Ninth Circuit's reasoning in Vinole and Wells Fargo I
22 persuades the Court of the need to narrow the class definition to
23 include only SMS who responded "no" on their certification forms
24 during the class period. Narrowing the class in this way ensures
25 that common issues will predominate over individual ones, and
26 significantly lessens the risk that the class consists of both
27 injured and uninjured parties.

1 In this case, Plaintiffs "must show that it is more likely
2 than not that [Dollar Tree's] exemption as applied to [SMs] was a
3 policy or practice of misclassification." Marlo, 251 F.R.D. at
4 483. In order to make this showing, Plaintiffs can point to
5 common evidence including Dollar Tree's decision to uniformly
6 classify SMs as exempt, Dollar Tree's employment hierarchy and
7 structure, its standardized policies and training procedures for
8 SMs, the common tools it requires SMs to utilize, and, most
9 importantly of all, the fact that SMs often certified on a weekly
10 basis that they were not spending most of their time on managerial
11 tasks. Dollar Tree's common policy of having SMs fill out weekly
12 certifications obviates the need for much individual testimony
13 from SMs concerning how they spent their time.

14 The Court is persuaded that common issues will predominate
15 over individual ones only if it narrows the class to SMs who
16 responded "no" at least once on the weekly payroll certification
17 forms. According to Dollar Tree's analysis of certification forms
18 comprising 29,431 workweeks, approximately 62 percent of SMs
19 always certified that they spent a majority of their time
20 performing managerial tasks. Crandall Decl. ¶¶ 15, 22-23. If the
21 class were to continue to include SMs who always certified "yes,"
22 then Plaintiffs would be required to show that these SMs were not
23 always being truthful, and this issue could not be resolved
24 without resorting to individualized inquiries that would quickly
25 overwhelm the common issues in this case.

26 No such individualized inquiries are necessary if the Court
27 focuses its attention on SMs who certified "no." Dollar Tree
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1 classified this group of employees as exempt, yet they certified
2 at least once that they were spending most of their time during
3 particular workweeks performing non-managerial tasks. With regard
4 to this group of employees, Plaintiffs can use the weekly payroll
5 certifications and the other evidence of Dollar Tree's
6 standardized practices and procedures in their attempt to convince
7 the jury that "misclassification was the rule rather than the
8 exception" at Dollar Tree. See Sav-On Drugs Stores, Inc. v.
9 Super. Ct., 34 Cal. 4th 319, 330 (2004).

10 Plaintiffs may object that by narrowing the class to SMS who
11 responded "no," the Court is weighing the merits of Plaintiffs'
12 underlying claims. Indeed, Plaintiffs' Opposition repeatedly
13 suggests that merits-based or liability issues can be neatly
14 separated for questions relating to class certification. See
15 Opp'n. However, according to the Ninth Circuit, "[t]he district
16 court may consider the merits of the claims to the extent that it
17 is related to the Rule 23 analysis." Vinole, 571 F.3d at 947 n.
18 15 (citing Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th
19 Cir. 1992); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480
20 (9th Cir. 1983)); see also Dukes, 603 F.3d at 590 ("A district
21 court must sometimes resolve factual issues related to the merits
22 to properly satisfy itself that Rule 23's requirements are met. .
23 . ."). As stated by the Third Circuit,

24 Because the nature of the evidence that will
25 suffice to resolve a question determines
26 whether the question is common or individual,
27 a district court must formulate some
28 prediction as to how specific issues will play
out in order to determine whether common or
individual issues predominate in a given case.

1 In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d
2 Cir. 2008) (citations and internal quotation marks omitted).

3 Here, the Court expresses no opinion on the merits of
4 Plaintiffs' claims. The Court simply seeks to fulfil its
5 obligation to ensure that common issues predominate. The SMSs who
6 responded "no" on the certification forms are the ones whose
7 grievance against Dollar Tree can be adjudicated on a class-wide
8 basis. Plaintiffs' counsel would not be able to advocate in this
9 case on behalf of those who always responded "yes" without
10 resorting to individualized testimony to explain why they filled
11 out the weekly certification forms inaccurately. This testimony
12 from individual SMSs would overwhelm the common issues.

13 Narrowing the class to include only SMSs who certified "no"
14 avoids a second problem. Courts have expressed concern about
15 overbroad classes that include both injured and uninjured parties.
16 See Wells Fargo II, 2010 WL 174329 at *8; see also In re Neurontin
17 Mktg. and Sale Practices Litig., 244 F.R.D. 89, 114 (D. Mass.
18 2007) (finding plaintiff's inability to propose method for
19 separating injured from uninjured precluded class certification).
20 Here, one clear group of potentially injured parties are SMSs who
21 certified that they were not spending the majority of their time
22 on managerial tasks, and therefore the Court narrows the class
23 definition accordingly.

24 Nonetheless, the Court recognizes that some SMSs may have
25 always certified "yes" even though they were not spending most of
26 their time on managerial tasks. The Court does not want to
27 preclude these SMSs from pursuing their misclassification claims on

1 an individual basis. The Court is willing to entertain a motion
2 to equitably toll the statute of limitations on their
3 misclassification claims so as to preserve their right to pursue
4 individual claims against Dollar Tree. See Marlo, 251 F.R.D. at
5 476, 488 (after decertification of case, inviting parties to brief
6 question of whether statute of limitations on plaintiff's
7 individual claims should be tolled).

8 **E. The Weekly Payroll Certifications**

9 In their Opposition, Plaintiffs seek to rely on the weekly
10 payroll certifications to show homogeneity among SMs. See Opp'n at
11 5 ("it is each SM's statement that s/he, in fact, performs the
12 same job, every week, as every other, SM"). But Plaintiffs eschew
13 reliance on the weekly payroll certifications when it comes to
14 determining liability, presumably because most SMs respond "yes"
15 on the forms. Instead, Plaintiffs propose that Dollar Tree's
16 liability should be determined based on "a survey of class members
17 regarding the amount of time spent on their work duties." Id.
18 However, the Court sees no need for such a survey because the
19 weekly payroll certifications already provide a week-by-week
20 measure of how SMs were spending their time.

21 The Court anticipates that Plaintiffs may be concerned that
22 SMs who responded "no" may have been spending more weeks
23 performing non-managerial tasks than is indicated by their weekly
24 certifications. In response, the Court notes that if this case
25 proceeds to trial, the Court is likely to divide the trial into a
26 liability and damages phase. If there is a finding of liability,
27 then the Court is likely to appoint a special master to handle the
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1 particular damages claims of class members. While the weekly
2 payroll certifications provide one measure of how many weeks
3 individual SMS spent the majority of their time engaged in non-
4 managerial tasks, there may be more scope for individual testimony
5 from class members at the damages phase of the litigation. The
6 Court does note, however, that having relied on the weekly payroll
7 certifications to get this case certified, it may be difficult for
8 Plaintiffs to challenge the overall accuracy of those
9 certifications at later stages of this case.

10 The certifications can be regarded as a source of common
11 proof because Dollar Tree's expert declares that they provide
12 valid measures of weeks when SMS were not spending more than fifty
13 percent of their time performing managerial duties. Crandall
14 Decl. ¶ 16; see also ECF No. 191 ("Rebuttal Decl. of Crandall") ¶
15 2 ("the weekly Certification Forms produce valid measures of
16 potentially non-exempt weeks"). Crandall supports this opinion by
17 pointing to statistically significant relationships between SM
18 responses and operational factors that were occurring in the store
19 during the week in question. Crandall Decl. ¶ 16. While Dollar
20 Tree points to the testimony of ten SMS who stated that they were
21 not truthful when they submitted their certifications, Mot. at 10-
22 11, the analysis performed by Dollar Tree's own expert indicates
23 that overall the certifications can be treated as a reliable
24 source of information concerning how SMS spent their time.

25 Crandall compares certification responses with fixed store-
26 level attributes, such as the number of full-time employees and
27 the level of customer flow per associate. Id. ¶ 36. Crandall

1 finds that managers with a higher percentage of full-time
2 employees are less likely to certify "no." Id. ¶ 38. According
3 to Crandall, this finding makes sense, as SMs with experienced
4 employees would be able to devote more of their time to managerial
5 tasks. Id.

6 Crandall finds that SMs who oversaw stores with high volume
7 sales and high customer flow per associate were more likely to
8 report that they spent a majority of their time on non-managerial
9 tasks. Id. ¶ 40. Crandall attributes this statistically
10 significant relationship to the fact that SMs in such stores "may
11 have a tendency to compensate by assisting with certain non-
12 managerial functions." Id. ¶ 39. Overall, these fixed store-
13 level attributes "exhibit clear statistical relationships with
14 SMs' responses provided on the Certification Forms." Id. ¶ 41.

15 Crandall also compares changes in SMs' weekly certification
16 reports to store-level attributes that varied from week to week.
17 Id. ¶ 35. Crandall finds that SMs were more likely to certify
18 "no" during weeks when they were understaffed, during weeks with
19 below-average staff hours, and during weeks when a store lost an
20 employee. Id. ¶¶ 43, 44. Again, it makes sense to the Court that
21 SMs may have spent more time on non-managerial tasks, such as
22 "receiving product, distributing and storing product, stocking
23 product and cashiering" during such workweeks. Based on these
24 comparisons, Crandall concludes that "the certifications have a
25 strong tendency to reflect actual in-store conditions and are
26 likely to accurately represent the activities performed by each
27 manager during the week." Id. ¶ 35.

1 Plaintiffs' expert, David Lewin, Ph.D. ("Lewin"), contends
2 that "the Certification Forms do not provide any information about
3 the work activities that SMS performed or the amount of time they
4 spent performing such activities." Vandall Decl. Ex. JJ ("Lewin
5 Resp. to Crandall Decl.") ¶ 10.⁴ While the weekly payroll
6 certifications do not provided a detailed, task-by-task breakdown
7 of the amount of time that SMS were spending performing specific
8 activities, they do provide the Court with the kind of information
9 it needs to allow this case to continue as a class action; namely,
10 information concerning weeks during which SMS were not spending
11 most of the time performing managerial tasks.

12 Lewin also faults Crandall for failing to provide "sufficient
13 statistical evidence for the correlations between SMS'
14 Certification Form responses and manager-specific/store-specific
15 relationships." Id. ¶ 10. He points out that Crandall failed to
16 conduct "either multivariate (regression) analysis or correlation
17 analysis of these relationships." Id. However, Plaintiffs'
18 expert appears to have conducted no studies of his own related to
19 the weekly payroll certifications.

20 The Court finds that Crandall's evidence of statistically
21 significant relationships is sufficient to determine that the
22 certifications are reliable overall, and that they can be relied
23 upon to provide what was missing in cases like Wells Fargo II,
24 Whiteway, and Weigele; namely, evidence of how managers were

26 ⁴ Matthew P. Vandall ("Vandall"), attorney for Defendant,
27 filed a Declaration in Support of Defendant's Motion to Decertify.
28 ECF No. 189.

1 spending their time and therefore a source of common proof that
2 transforms what would otherwise be an individual issue into a
3 common one. The Court is not bound by these determinations as the
4 litigation progresses. See Dukes, 603 F.3d at 594. If persuaded
5 by the parties to do so, the Court can revise its determination
6 concerning the overall reliability of the certifications.

7 However, if Plaintiffs intend to argue that the certifications do
8 not provide a reliable measure of weeks when SMs were not spending
9 most of their time performing managerial tasks, then it is not
10 clear to the Court how this case can proceed as a class action.

11 The Court does not rely exclusively on these certifications
12 to determine that this case can continue to be adjudicated on a
13 class-wide basis. Plaintiffs also intend to rely on Dollar Tree's
14 "common training, common directives (e.g. policies, procedures,
15 merchandising 'plan-o-grams'), common job duties, common
16 expectations, and a common evaluation process" to establish that
17 SMs were misclassified as exempt. See Opp'n at 2. Plaintiffs
18 intend to show the "one size fits all" nature of the SM job based
19 on the "tasks SMs perform, the resources they use, the environment
20 within which they work, and the directives received from Dollar
21 Tree's corporate office." Opp'n at 14 n.14. Based on the
22 standardized nature of the SM position, Plaintiffs intend to argue
23 that SMs should not have been classified as managers, a position
24 that should be reserved for employees who exercise discretion and
25 independent judgment. Whether employees who spent a majority of
26 their time performing the seventeen tasks on the weekly payroll
27 certifications were engaged in exempt work is also a question that

1 can be answered on a class-wide basis.⁵

2 Dollar Tree points to evidence of variability in the
3 experiences of SMs based on such factors as store size, management
4 style of District Managers, SM training, and management tools.
5 Mot. at 11-18. Dollar Tree also contends that SMs had varying
6 approaches to ordering and displaying merchandise and that they
7 had varying experiences with human resources functions, such as
8 their duty to hire and fire. Mot. at 18-21. Even though the
9 Court has relied on Crandall's analysis to support the overall
10 accuracy of the weekly payroll certifications, the Court also
11 notes Crandall's finding of wide variability in SMs' experiences.
12 See Crandall Decl.

13 Defendants can rely on this evidence to contest Plaintiffs'
14 contention that SMs at Dollar Tree occupied a "one size fits all"
15 position, and to support the company's contention that it

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17 ⁵ The Court expresses no opinion on whether this last question
18 can be answered in motion practice or only at trial. In Sav-On
19 Drug Stores, the California Supreme Court stated that "task
20 classification is a mixed question of law and fact." 34 Cal. 4th
21 at 330. The Court also is not opposed, in principle, to the
22 parties' use of representative testimony. While Judge Patel
23 questioned the use of such testimony in a case dealing with the
24 outside salesperson exemption, see Wells Fargo II, 2010 WL 174329,
25 at *8, in such cases employees act without supervision and with
26 unfettered autonomy, which is precisely why representative
27 testimony concerning where and how such employees were spending
28 their time is problematic. Here, the Court is not dealing with the
outside salesperson exemption. Plaintiffs contend that Dollar Tree
SMs had little discretion and followed standardized company-wide
directives, and representative testimony seems appropriate as part
of Plaintiffs' case-in-chief. Defendant, of course, can attempt to
counter the suggestion that Dollar Tree SMs exercised little or no
discretion with SM testimony of its own. If this case goes to
trial, however, the Court does not anticipate allowing each side to
call more than a handful of SMs as witnesses as part of the
liability phase of the trial.

1 realistically expected SMS to spend most of their time performing
2 exempt work. In short, Dollar Tree's evidence of variability is
3 not a reason to decertify the class in its entirety, but it is
4 evidence that Dollar Tree can use to defend its classification of
5 SMS as exempt in later stages of these proceedings or at trial.

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1 **V. CONCLUSION**

2 For the reasons stated above, the Court GRANTS IN PART and
3 DENIES IN PART the Motion to Decertify filed by Dollar Tree
4 Stores, Inc. The Court redefines the class as: All persons who
5 were employed by Dollar Tree Stores, Inc. as California retail
6 Store Managers at any time on or after December 12, 2004, and on
7 or before May 26, 2009, and who responded "no" at least once on
8 Dollar Tree's weekly payroll certifications.

9 In light of this new definition of the class, it is not clear
10 to the Court if Robert Runnings, Miguel Cruz, and John Hansen can
11 continue as Class Representatives. The Court invites Class
12 Counsel to file a motion to equitably toll the statute of
13 limitations on the misclassification claims of current or former
14 Dollar Tree Store Managers who are no longer part of the class to
15 preserve their right to pursue individual claims against Dollar
16 Tree. The Court encourages the parties to resolve this issue by
17 stipulation.

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19 IT IS SO ORDERED.

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21 Dated: September 9, 2010

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24 UNITED STATES DISTRICT JUDGE