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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIGUEL A. CRUZ, and JOHN D. HANSEN, individually and on behalf of all others similarly situated,)	Case Nos. 07-2050 SC
)	07-4012 SC
Plaintiffs,)	<u>ORDER DECERTIFYING CLASS</u>
v.)	
DOLLAR TREE STORES, INC.,)	
Defendant.)	
<hr/>		
ROBERT RUNNINGS, individually, and on behalf of all others similarly situated,)	
)	
Plaintiffs,)	
v.)	
DOLLAR TREE STORES, INC.,)	
Defendant.)	
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I. INTRODUCTION

This is a certified class action brought by Plaintiffs Robert Runnings ("Runnings"), Miguel Cruz ("Cruz"), and John Hansen ("Hansen") (collectively, "Plaintiffs"), who allege that they and other current and former store managers at Defendant Dollar Tree Stores, Inc. ("Defendant" or "Dollar Tree") were misclassified as executive-exempt employees and thereby denied overtime pay and meal and rest breaks in violation of California law. On May 27, 2011, the Court conducted a hearing on the trial plans submitted by

1 Plaintiffs and Defendant. At the conclusion of the hearing, the
2 Court expressed concern over the continued propriety of class
3 treatment in this case and ordered the parties to submit briefs
4 addressing whether continued class treatment was appropriate. The
5 parties have submitted briefs in response to the Court's order.
6 ECF Nos. 314 ("Def.'s Br."), 317 ("Pls.' Br.").¹ After reviewing
7 these briefs, and many other papers submitted by the parties over
8 the course of this litigation, the Court finds that continued class
9 treatment is inappropriate and DECERTIFIES the class for the
10 following reasons.

11
12 **II. BACKGROUND**

13 The Court assumes the parties are familiar with the procedural
14 and factual background of this case, which the Court set out in its
15 May 26, 2009 Order Granting the Amended Motion for Class
16 Certification. ECF No. 107 ("Orig. Cert. Order"). Accordingly,
17 the Court provides a truncated version here.

18 Plaintiffs are former Dollar Tree employees who held the
19 position of store manager. On April 11, 2007, Cruz and Hansen
20 filed suit ("the Cruz action") on behalf of themselves and all
21 others similarly situated against Dollar Tree, alleging that Dollar
22 Tree improperly categorizes its store managers as executive-exempt
23 employees under California and federal labor laws. ECF No. 1
24 ("Compl."). In August 2007, Runnings filed a similar action in
25 state court (the "Runnings action"), which was subsequently removed

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27 ¹ Cruz v. Dollar Tree, Case No. 07-2050 ("Cruz action"), and
28 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 and consolidated with the Cruz action. See ECF No. 45.

2 On May 26, 2009, the Court certified a class of "all persons
3 who were employed by Dollar Tree Stores, Inc. as California retail
4 Store Managers at any time on or after December 12, 2004, and on or
5 before May 26, 2009," and appointed Plaintiffs as class
6 representatives. See Orig. Cert. Order. The class consisted of
7 718 store managers ("SMs") who worked in 273 retail locations. Id.

8 On June 18, 2010, in the wake of two Ninth Circuit decisions
9 regarding employment class actions -- In re Wells Fargo Home
10 Mortgage Overtime Pay Litigation, 571 F.3d 953 (9th Cir. 2009)
11 ("Wells Fargo I"), and Vinole v. Countrywide Home Loans, Inc., 571
12 F.3d 935 (9th Cir. 2009) -- Dollar Tree moved for decertification,
13 arguing that changes in the law made continued class treatment
14 inappropriate. ECF No. 188. On September 9, 2010, the Court
15 granted in part and denied in part Dollar Tree's motion for
16 decertification. ECF No. 232 ("Part. Decert. Order").

17 As explained in the Original Certification Order and the
18 Partial Decertification Order, Dollar Tree requires its SMs to
19 complete weekly payroll certifications indicating whether they
20 spent more than fifty percent of their actual work time each week
21 performing seventeen listed duties that Dollar Tree believes to be
22 "managerial" in nature. See Part. Decert. Order at 2. The
23 certification form states that SMs "may not spend more than a total
24 of 35% of his/her actual work time each week receiving product,
25 distributing and storing product, stocking product and cashiering."
26 Id. Each SM must certify "yes" if he or she spent the majority of
27 his or her time performing the seventeen duties and "no" if he or
28 she did not. Id. The payroll certification form further states

1 that if the SM responds no, "s/he must immediately provide an
2 explanation to both Payroll and Human Resources. No salary or wage
3 will be withheld because of non-compliance." Id. The form
4 provides a space for SMS to write an explanation. Id.

5 In its Partial Decertification Order, after reviewing the
6 Ninth Circuit's decisions in Wells Fargo I and Vinole and examining
7 subsequent district court reactions, the Court decided that, with a
8 modification of the class definition, this case could proceed as a
9 class action. The Court held that Dollar Tree's payroll
10 certifications provided common proof of how SMS were spending their
11 time. Part. Decert. Order at 12-13. The Court reasoned that this
12 common proof -- which was lacking in other cases² where classes
13 were decertified after Vinole and Wells Fargo I -- would obviate
14 the need for much individual testimony from SMS concerning how they
15 spent their time. Id. However, the Court narrowed the class to
16 include only those SMS who certified "no" on a payroll
17 certification form at least once during the class period. The
18 Court reasoned that, in order to prove liability with regard to the
19 SMS who always certified "yes," Plaintiffs would need to show that
20 these SMS were not truthful when completing their payroll
21 certifications. Id. Such credibility determinations would require
22 individualized inquiries that would overwhelm the common issues in
23 the case. Id. By narrowing the class, the Court sought to avoid
24 this problem.

25 The Partial Decertification Order resulted in a class

26 _____
27 ² See, e.g., In re Wells Fargo Home Mortg. Overtime Pay Litig., 268
28 F.R.D. 604, 611 (N.D. Cal. Jan. 13, 2010) ("Wells Fargo II") (denying class certification because plaintiffs could not produce "common proof that would absolve this court from inquiring into how each [manager] spent their working day").

1 consisting of 273 members and defined as "all persons who were
2 employed by Dollar Tree Stores, Inc. as California retail store
3 managers at any time on or after December 12, 2004, and on or
4 before May 26, 2009, and who responded 'no' at least once on Dollar
5 Tree's weekly payroll certifications." Id. at 23. The class
6 definition has not been altered further.³

7 The Court subsequently reviewed motions from Plaintiffs and
8 Defendant addressing trial management issues, reviewed and denied a
9 motion for reconsideration of the Partial Decertification Order
10 filed by Plaintiffs, and held a May 27, 2011 hearing to discuss
11 trial management issues. See ECF Nos. 277 ("Def.'s Trial Plan"),
12 290 ("Pls.' Trial Plan"), 301 ("Mot. for Recon."). These
13 developments, along with the Ninth Circuit's decision in Marlo v.
14 United Parcel Serv., Inc., No. 09-56196, 2011 U.S. App. LEXIS 8664
15 (9th Cir. Apr. 28, 2011) ("Marlo II"), made the Court increasingly
16 concerned that individualized issues will predominate over class-
17 wide issues if this case proceeds to trial as a class action. The
18 Court thus decided to entertain further briefing from the parties
19 regarding the propriety of continued class treatment. The Supreme
20 Court's recent decision in Wal-Mart Stores, Inc. v. Dukes, No. 10-
21 277, 2011 U.S. LEXIS 4567 (June 20, 2011), has since heightened the
22 Court's concerns. Having considered the parties' briefings, recent

23
24 ³ On March 8, 2011, the Court granted in part Dollar Tree's Motion
25 to Dismiss Claims of Class Members Who Failed to Respond to
26 Discovery Requests. ECF No. 282 ("Mar. 8, 2011 Order"). The Court
27 dismissed the claims of eighty-nine class members who failed to
28 respond to limited discovery authorized by the Court despite
multiple warnings that failure to respond might result in
dismissal. Id. The Court declined to dismiss twenty class members
who did not receive the final warning letter sent by Plaintiffs'
counsel. The March 8, 2011 Order reduced the class to its current
size of 184 members.

1 developments in the case, and recent developments in the law of
2 class actions, the Court finds that decertification of the class is
3 warranted.

4
5 **III. LEGAL STANDARD**

6 The district court has the discretion to certify a class under
7 Federal Rule of Civil Procedure 23. See Molski v. Gleich, 318 F.3d
8 937, 946 (9th Cir. 2003). Rule 23(a) requires that the plaintiff
9 demonstrate (1) numerosity, (2) commonality, (3) typicality, and
10 (4) fair and adequate representation of the class interest. Fed.
11 R. Civ. P. 23(a). In addition to meeting these requirements, the
12 plaintiff must also show that the lawsuit qualifies for class
13 action status under one of the three criteria found in Rule 23(b).
14 Dukes, 2011 U.S. LEXIS 4567, at *12.

15 A district court's order to grant class certification is
16 subject to later modification, including class decertification.
17 See Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies
18 class certification may be altered or amended before final
19 judgment."). "If evidence not available at the time of
20 certification disproves plaintiffs' contentions that common issues
21 predominate, the district court has the authority to modify or even
22 decertify the class." Dukes v. Wal-Mart Stores, Inc., 603 F.3d
23 571, 579 (9th Cir. 2010), rev'd on other grounds, No. 10-277, 2011
24 U.S. LEXIS 4567 (June 20, 2011).

25 In considering the appropriateness of decertification, the
26 standard of review is the same as a motion for class certification:
27 whether the Rule 23 requirements are met. O'Connor v. Boeing N.
28 Am., Inc., 197 F.R.D. 404, 410 (C.D. Cal. 2000). "Although

1 certification decisions are not to focus on the merits of a
2 plaintiff's claim, a district court reevaluating the basis for
3 certification may consider its previous substantive rulings in the
4 context of the history of the case, and may consider the nature and
5 range of proof necessary to establish the class-wide allegations."
6 Marlo v. United Parcel Serv., Inc., 251 F.R.D. 476, 479 (N.D. Cal.
7 2008) ("Marlo I") (internal citations omitted).

8
9 **IV. DISCUSSION**

10 The central issue in this case is whether Dollar Tree
11 misclassified its SMSs as exempt. Here, the Court previously ruled
12 that Plaintiff had satisfied Rule 23(a) and certified the class
13 under Rule 23(b)(3). See Orig. Cert. Order. Dollar Tree argues
14 that continued certification under Rule 23(b)(3) is improper
15 because Plaintiffs have failed to provide common proof of
16 misclassification, and that therefore individual inquiries will
17 predominate at trial.⁴ Def.'s Br. at 1. Plaintiffs argue that
18 there have been no new developments in the facts of this case or in
19 the law that compel decertification. Pls.' Br. at 4. The Court
20 agrees with Dollar Tree.

21 Rule 23(b)(3) requires that "questions of law or fact common
22 to the members of the class predominate over any questions
23 affecting only individual members, and that a class action is
24 superior to other available methods for the fair and efficient
25 adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Among

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27 ⁴ Dollar Tree also argues that Plaintiffs fail to satisfy the
28 commonality requirement of Rule 23(a). Because the Court finds
that the predominance requirement is not met, it does not address
whether Rule 23(a) is satisfied.

1 the issues central to the predominance inquiry is whether the case,
2 if tried, would present intractable management problems. Fed. R.
3 Civ. P. 23(b)(3)(D).

4 Developments in this case and in the case law since the Court
5 issued its Partial Decertification Order in September 2010 have
6 persuaded the Court that individual issues predominate in this case
7 and trial as a class action would present unmanageable
8 difficulties. In particular, the basis for continued certification
9 of the present class in the Court's Partial Decertification Order -
10 - the determination that the payroll certification forms could
11 serve as reliable common proof of how SMS were spending their time
12 -- is no longer tenable. Both parties have repeatedly attacked the
13 reliability of the certification forms. Additionally, it has
14 become clear to the Court that "the crux" of Plaintiffs' proof at
15 trial will be representative testimony from a handful of class
16 members. See ECF No. 290 ("Pls.' Mot. for Pre-Trial Order") at 6.
17 The appropriateness of such a trial plan was a questionable
18 proposition under this circuit's case law at the time of the
19 Court's Partial Decertification Order.⁵ It is now untenable in
20 light of the Ninth Circuit's decision in Marlo II and the Supreme
21 Court's decision in Dukes.

22 The Court begins by briefly reviewing the California labor law
23

24 ⁵ See, e.g., Wells Fargo II, 268 F.R.D. at 612 ("[T]he court has
25 been unable to locate any case in which a court permitted a
26 plaintiff to establish the non-exempt status of class members,
27 especially with respect to the outside sales exemption, through
28 statistical evidence or representative testimony."); Beauperthuy v.
24 Hour Fitness USA, Inc., 2011 U.S. Dist. LEXIS 24768, *59-60
(N.D. Cal. 2011) (rejecting the use of representative testimony
where deposition testimony "show[ed] that for every manager who
says one thing about his or her job duties and responsibilities,
another says just the opposite.").

1 at issue in this case and then proceeds to explain why continued
2 class treatment is no longer appropriate.

3 **A. California's Executive Exemption in Class Actions**

4 California law requires that all employees receive overtime
5 compensation and authorizes civil actions for the recovery of
6 unpaid compensation. Cal. Lab. Code §§ 510, 1194. However, the
7 law recognizes an exemption for "executive" employees who meet six
8 criteria. To qualify as executive-exempt, an employee must: (1)
9 manage the enterprise, a customarily recognized department, or
10 subdivision thereof; (2) direct the work of two or more other
11 employees; (3) have the authority to hire or fire, or have their
12 recommendations to hire, fire, or promote given weight; (4)
13 exercise discretion and independent judgment; (5) be "primarily
14 engaged" in exempt duties; and (6) earn a monthly salary equal to
15 twice the state minimum wage for full-time employment. Cal. Code
16 Regs. tit. 8, § 11070(1)(A)(1)(a)-(f).

17 The "primarily engaged" prong of the exemption inquiry
18 requires a week-by-week analysis of how each employee spent his or
19 her time. Marlo II, 2011 U.S. App. LEXIS 8664, at *14. The
20 applicable regulations state that in determining whether an
21 employee is "primarily engaged" in exempt work, "[t]he work
22 actually performed by the employee during the course of the
23 workweek must, first and foremost, be examined and the amount of
24 time the employee spends on such work . . . shall be considered."
25 Cal. Code Regs. tit. 8, § 11090(1)(A)(1)(e). California courts
26 have construed this requirement to mean that "the Court must
27 determine whether any given class members (or all the class
28 members) spend more than 51% of their time on managerial tasks in

1 any given workweek." Dunbar v. Albertson's, Inc., 47 Cal. Rptr. 3d
2 83, 86 (Ct. App. 2006) (emphasis added).

3 In order to satisfy Rule 23(b)(3), Plaintiffs must provide
4 common proof that "misclassification was the rule rather than the
5 exception." Marlo II, 2011 U.S. App. LEXIS 8664, at *12. Thus,
6 Plaintiffs must provide common proof that, among other things,
7 class members were spending more than fifty-one percent of their
8 time on managerial tasks in any given workweek. In its Partial
9 Decertification Order, the Court held that the payroll
10 certification forms could provide this proof. Subsequent
11 developments have demonstrated that the certification forms cannot
12 serve as reliable common proof and that Plaintiffs instead intend
13 to rely on individual testimony by exemplar class members at trial.

14 **B. Changes in the Legal Landscape Favor Decertification**

15 Two developments in the law of employment class actions since
16 the Court issued its Partial Decertification Order bear heavily on
17 the Court's decision that class treatment in this case is no longer
18 proper.

19 First, the Ninth Circuit's recent decision in Marlo II affirms
20 the impropriety of relying on representative testimony where
21 plaintiffs have provided no reliable means of extrapolating that
22 testimony to the class as a whole. In Marlo II, the Ninth Circuit
23 affirmed the decision of this district court decertifying a class
24 of employees who alleged they were misclassified as executive-
25 exempt. 2011 U.S. App. LEXIS 8664, at *17. The district court
26 found that the plaintiffs had failed to satisfy Rule 23(b)(3)'s
27 predominance requirement because they had failed to provide common
28 evidence of misclassification that would obviate the need for

1 individualized inquiries. Marlo I, 251 F.R.D. at 485. The court
2 explained that the plaintiffs' primary evidence at trial would be
3 the testimony of individual class members. Id. at 486. The court
4 concluded:

5 Without more than this individual testimony, the Court
6 cannot conceive how the overtime exemption will be
7 presented to the jury as a common issue for class-wide
8 adjudication, as opposed to a number of individualized
9 inquiries. There is a significant risk that the trial
would become an unmanageable set of mini-trials on the
particular individuals presented as witnesses.

10 Id. In affirming the district court's decision, the Ninth Circuit
11 held that the plaintiffs' evidence did not support predominance,
12 and that the district court did not abuse its discretion by holding
13 that representative testimony did not support a class-wide
14 determination. Marlo II, 2011 U.S. App. LEXIS 8664, at *15-17. As
15 explained below, given that the payroll certification forms in the
16 instant case can no longer be considered reliable proof,
17 Plaintiffs' evidence in this case closely parallels that in Marlo
18 II and fails to establish predominance for the same reasons.

19 Second, the United States Supreme Court's recent decision in
20 Dukes provides a forceful affirmation of a class action plaintiff's
21 obligation to produce common proof of class-wide liability in order
22 to justify class certification. In Dukes, the Court reversed
23 certification of a class of current and former female Wal-Mart
24 employees who alleged that Wal-Mart discriminated against them on
25 the basis of their sex by denying them equal pay and promotions in
26 violation of Title VII of the Civil Rights Act of 1964. 2011 U.S.
27 LEXIS 4567, at *37-38. The Court found that the plaintiffs had
28 failed to satisfy the commonality requirement of Rule 23(a). Id.

1 The Court emphasized that it was not enough to pose common
2 questions; rather, those questions must be subject to common
3 resolution. Id. at *19. The evidence of commonality the
4 plaintiffs offered -- consisting of statistical evidence of pay and
5 promotion disparities, anecdotes from class members, and the
6 testimony of a sociologist who opined that Wal-Mart had a culture
7 of sex discrimination -- failed to provide the "glue" necessary to
8 render all class members' claims subject to common resolution. Id.
9 at *27-34. Similarly here, as explained below, Plaintiffs have
10 failed to provide common proof to serve as the "glue" that would
11 allow a class-wide determination of how class members spent their
12 time on a weekly basis. In the absence of such proof, the
13 commonality threshold, let alone the predominance inquiry of Rule
14 23(b)(3), has not been met.

15 Also of importance to this case, Dukes rejected a "Trial by
16 Formula" approach to damages akin to that which Plaintiffs have
17 proposed here. Id. at *48-51. The Dukes plaintiffs intended to
18 determine each class member's damages using a formulaic model
19 approved by the Ninth Circuit in Hilao v. Estate of Marcos, 103
20 F.3d 767, 782-87 (9th Cir. 1996). Id. In Hilao, compensatory
21 damages for 9,541 class members were calculated by selecting 137
22 claims at random, referring those claims to a special master for
23 valuation, and then extrapolating the validity and value of the
24 untested claims from the sample set. See Dukes, 603 F.3d at 625-
25 26. The Ninth Circuit in Dukes concluded that a similar procedure
26 could be used by allowing Wal-Mart "to present individual defenses
27 in the randomly selected sample cases, thus revealing the
28 approximate percentage of class members whose unequal pay or

1 nonpromotion was due to something other than gender
2 discrimination." Id. at 627 n.5. The Supreme Court rejected this
3 "novel project" as a "Trial by Formula" that would deprive Wal-Mart
4 of its right to assert statutory defenses to the individual claims
5 of all class members. Dukes, 2011 U.S. LEXIS 4567, at *48-51.
6 Here, Plaintiffs rely on Hilao to propose determining
7 individualized damages "in a formulaic manner." Pls.' Mot. for
8 Pre-Trial Order at 4 n.10. In light of the Supreme Court's
9 rejection of this approach, it is not clear to the Court how, even
10 if class-wide liability were established, a week-by-week analysis
11 of every class member's damages could be feasibly conducted.

12 **C. Recent Developments in this Case Compel Decertification**

13 Since issuing its Partial Decertification Order, the Court has
14 learned that the payroll certification forms cannot serve as
15 reliable common proof of misclassification, and that Plaintiffs
16 intend to rely primarily on individual testimony by exemplar class
17 members to prove their case. These developments lead the Court to
18 conclude that individual issues will predominate at trial.

19 **1. The Payroll Certification Forms Can No Longer Be**
20 **Considered Reliable Common Proof**

21 In its Partial Decertification Order, the Court found that the
22 payroll certifications appeared reliable based on the analysis of
23 Dollar Tree's expert Robert Crandall. See Part. Decert. Order at
24 17-20. In making this determination, however, the Court expressly
25 noted that "[t]he Court is not bound by these determinations as the
26 litigation progresses. If persuaded by the parties to do so, the
27 Court can revise its determination concerning the overall
28 reliability of the certifications." Id. at 20. The Court has

1 since learned that approximately sixty percent of class members
2 stated under oath that either (1) they were not truthful when
3 submitting their weekly payroll certifications, or (2) their "yes"
4 responses did not in fact indicate that they spent more than fifty
5 percent of their actual work time performing the tasks listed on
6 the form. ECF No. 298-1 ("Vandall Decl. ISO Objections to Ngo
7 Decl.") at ¶ 4.⁶ An additional twenty-five percent of the class
8 could not recall whether they were truthful when submitting their
9 weekly certifications or provided no response at all. Id.

10 In addition, Plaintiffs themselves have argued on numerous
11 occasions since the Court's Partial Decertification Order that the
12 payroll certifications are not an accurate indication of how class
13 members spent their time. They have made this argument despite the
14 Court's repeated admonition that "if Plaintiffs intend to argue
15 that the certifications do not provide a reliable measure of weeks
16 when SMS were not spending most of their time performing managerial
17 tasks, then it is not clear to the Court how this case can proceed
18 as a class action." Part. Decert. Order at 17; see also ECF No.
19 294 ("Order Granting Leave to File Mot. for Recons.") at 2 (same).
20 Indeed, in opposition to Defendant's motion for summary
21 adjudication, Plaintiffs argued that "the certification responses
22 are clearly unreliable." Runnings action, ECF No. 337 ("Pls.' Opp.
23 To MSA") at 10. Plaintiffs argued that class members were confused
24 about how to complete the forms, that the analysis of Defendant's
25

26 ⁶ When it issued the Partial Decertification Order, the Court was
27 only presented with evidence that ten class members indicated they
28 were not truthful when submitting their payroll certifications.
See Part. Decert. Order at 17. Dollar Tree has subsequently
provided evidence that 111 class members indicated the same.
Vandall Decl. ISO Objections to Ngo Decl. at ¶ 4.

1 expert Crandall was based on old data compiled prior to the
2 narrowing of the class, and that there are a large number of weeks
3 for which class members did not fill out certification forms. Id.
4 Similarly, in Plaintiffs' motion for reconsideration filed on April
5 22, 2011, Plaintiffs argued that "[r]ecent events . . . have
6 revealed that Dollar Tree's [payroll certification] records are
7 wrought with problems and have therefore provided an unreliable
8 basis by which to establish eligibility for class membership." ECF
9 No. 301 at 1.

10 Plaintiffs now argue that the certification forms are indeed
11 reliable common proof of how class members were spending their
12 time. Pls.' Br. at 8-10. Their argument, however, amounts to
13 nothing more than pointing to the Court's determination in the
14 Partial Decertification Order and noting that Dollar Tree has used
15 the process for years. Id. This does nothing to overcome the fact
16 that a majority of class members have stated under oath that their
17 certifications were not truthful or did not accurately reflect the
18 time they actually spent performing the tasks listed on the form.

19 In sum, the Court's certification of the current class was
20 premised on the reliability of the payroll certifications as common
21 proof of misclassification. Subsequent briefing by both parties
22 has made this premise no longer sustainable. As a result, it is no
23 longer possible to view the negative responses as, in the words of
24 the Supreme Court, the "glue" that holds all of the individualized
25 experiences of the class members together. See Dukes, 2011 U.S.
26 LEXIS 4567, at *24.

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1 2. Representative Testimony Cannot Properly Serve as
2 Common Proof of Class-wide Liability in This Case

3 Plaintiffs indicated in their trial plan that they intend to
4 make representative testimony "the crux" of their case. Pls.' Mot.
5 for Pretrial Order at 6 ("exemplar plaintiffs' testimony will be
6 the crux of the Plaintiffs' case"); id. at 8 ("the liability issues
7 in this case should be driven by the actual work performed by the
8 class members as evidenced by the exemplar plaintiffs'
9 testimony."). They now contend that this Court already decided
10 that representative testimony of exemplar plaintiffs would be
11 binding on the rest of the class when it chose to certify this case
12 as a class action. Pls.' Br. at 19. According to Plaintiffs,
13 "this Court should simply order that the testimony of five exemplar
14 plaintiffs will be extrapolated to the class as a whole." Id. The
15 Court declines to do so. In its Partial Decertification Order, the
16 Court noted that "representative testimony seems appropriate as
17 part of Plaintiffs' case-in-chief." Part. Decert. Order at 21 n.5.
18 However, as the order makes clear, this statement was premised on
19 the determination that the payroll certifications provided the glue
20 necessary to justify extrapolation from a subset of class members
21 to the class as a whole. As explained above, this conclusion is no
22 longer tenable.

23 Courts in this district have repeatedly decertified classes in
24 overtime exemption cases where Plaintiffs have provided no reliable
25 means of extrapolating from the testimony of a few exemplar class
26 members to the class as a whole. In Marlo I, the Court explained
27 that:

28 Plaintiff's evidence at trial primarily would be

1 individual [class members'] testimony The
2 exempt/non-exempt inquiry focuses on what an employee
3 actually does. The declarations and deposition
4 testimony of [class members] submitted by the parties
5 suggest variations in job duties Without more
6 than this individual testimony, the Court cannot
7 conceive how the overtime exemption will be presented
8 to the jury as a common issue for class-wide
9 adjudication, as opposed to a number of individualized
10 inquiries.

11 251 F.R.D. at 486. The court decertified the class because the
12 plaintiff failed "to provide common evidence to support
13 extrapolation from individual experiences to a class-wide judgment
14 that is not merely speculative." Id. The Ninth Circuit affirmed,
15 as explained supra. See also Wells Fargo II, 268 F.R.D. at 612
16 (denying class certification in overtime exemption case because
17 differences among class members rendered representative testimony
18 insufficient common proof of misclassification); Whiteway v. FedEx
19 Kinkos Office and Print Servs., Inc., No. 05-CV-02320 (N.D. Cal.
20 Oct. 2, 2009) (decertifying class in overtime exemption case
21 because plaintiff could not show how testimony of 10-20 class
22 members could be extrapolated to the class).

23 Because it is no longer viable to consider the payroll
24 certifications reliable common proof of how class members were
25 spending their time, there is no basis for distinguishing this case
26 from those in which this district has found certification improper.
27 As in those cases, the failure of Plaintiffs here to offer a basis
28 for extrapolation of representative testimony to the class as a
whole is fatal to continued certification.

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1 3. Plaintiffs' Other Evidence Does Not Provide Common
2 Proof of How Class Members Spent Their Time

3 Plaintiffs contend that, even if the payroll certification
4 forms are not reliable, class-wide liability may be tried by a
5 plethora of other common evidence. Pls.' Br. at 10. Plaintiffs
6 have presented evidence of Dollar Tree's centralized operational
7 and human resources hierarchy. See Runnings action, ECF No. 124
8 ("Pls.' Am. Mot. for Class Cert."). They have likewise presented
9 evidence that all store managers are given uniform training and
10 training-related materials, use the same on-the-job tools, receive
11 "daily planners" that require them to perform certain tasks, and
12 are subject to other Dollar Tree policies intended to standardize
13 the experiences of all store managers. Id.

14 While this evidence does provide some proof that class members
15 shared a number of common employment experiences, it does not
16 provide common proof of whether they were spending more than fifty
17 percent of their time performing exempt tasks. As the Ninth
18 Circuit explained in Marlo II, the existence of "documents
19 explaining the activities that [managers] are expected to perform,
20 and procedures that [managers] should follow . . . does not
21 establish whether [the managers] actually are 'primarily engaged'
22 in exempt activities during the course of the workweek." 2011 U.S.
23 App. LEXIS 8664, at *13. This evidence is therefore insufficient
24 to establish that common issues will predominate over
25 individualized ones at trial.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court finds that continued
3 class treatment is not appropriate in this case and DECERTIFIES the
4 class. The Court invites Class Counsel to file a motion to
5 equitably toll the statute of limitations on the misclassification
6 claims of former class members to preserve their right to pursue
7 individual claims against Dollar Tree. The Court encourages the
8 parties to resolve this issue by stipulation.

9 The parties shall appear for a Case Management Conference on
10 September 9, 2011 at 10:00 a.m. in Courtroom 1, on the 17th floor,
11 U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102.

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14 IT IS SO ORDERED.

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16 Dated: July 7, 2011

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UNITED STATES DISTRICT JUDGE

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