

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIC STILLER and JOSEPH MORO,
on behalf of themselves individually
and all other similarly situated,

Plaintiffs,

v.

COSTCO WHOLESALE
CORPORATION and DOES 1 through
25, inclusive,

Defendants.

Case No. 3:09-cv-2473-GPC-BGS
**ORDER GRANTING COSTCO’S
MOTION TO DECERTIFY
CLASS AND COLLECTIVE
ACTIONS**
(ECF NOS. 146)

INTRODUCTION

In this collective and class action, plaintiffs Eric Stiller (“Stiller”) and Joseph Moro (“Moro”) (both, “Plaintiffs”) allege defendant Costco Wholesale Corporation (“Costco”) violated federal and state wage and hour laws through the implementation of closing procedures that resulted in unpaid, off-the-clock (“OTC”) time. (ECF No. 96-1, Fourth Amend. Compl.)

On December 13, 2010, prior to this case’s transfer to the undersigned, the Honorable Marilyn L. Huff, U.S. District Judge, certified a statewide California class under Federal Rule of Civil Procedure 23(b)(3) (“California Class”) and conditionally certified a nationwide collective action under the Fair Labor Standards Act (“FLSA Class”). (ECF No. 104 (“Certification Order”).)

1 With regard to the California Class, Judge Huff’s Certification Order did not
2 expressly “define the class and the class claims, issues, or defenses” as required by
3 Rule 23(c)(B). Neither did the Certification Order expressly define the FLSA Class.

4 The Certification Order did, however, direct the parties “to confer and submit a
5 joint proposed notice to the Classes.” After conferring, the parties agreed to correct the
6 liability period for the FLSA Class, and the Classes were ultimately defined as follows:

7 **California Rule 23 Class:** All persons who worked for Costco Wholesale
8 Corporation in California as hourly, non-exempt, non-union employees
9 who were subject to Costco’s closing lockdown procedures between May
10 15, 2005 and October 1, 2009.

11 **FLSA Class:** All persons who worked for Costco Wholesale Corporation
12 in the United States as full-time, hourly, non-exempt employees who were
13 subject to Costco’s closing lockdown procedures between March 1, 2008
14 and October 1, 2009.

15 (See ECF No. 217.)

16 Moro is the named plaintiff for the California Class, and Stiller is the named plaintiff
17 for the FLSA Class.

18 On April 13, 2012, Costco filed a motion to decertify the collective and class
19 actions (“Motion to Decertify”). (ECF No. 146.) On July 5, 2012, Plaintiffs filed a
20 response in opposition to Costco’s Motion to Decertify, (ECF No. 172), and on July
21 27, 2012, Costco filed a reply, (ECF No. 177). Thereafter, the parties filed several
22 supplemental documents. (See ECF Nos. 178, 190, 191, 193, 194, 195, 196, 197, 198,
23 199, 205, 206, 219, 220.)

24 On August 14, 2013, the Court granted Plaintiffs leave to submit additional
25 evidence in support of their Opposition to Costco’s Motion to Decertify. (ECF Nos.
26 181, 200, 208.) And, at the Court’s direction, Plaintiffs submitted a proposed trial plan
27 that outlines the common evidence that Plaintiffs would rely on if this case proceeded
28 to trial. (ECF No. 210.) Costco filed a response to Plaintiffs’ proposed trial plan.
(ECF No. 211.)

The Court held a hearing on Costco’s Motion to Decertify on September 27,
2013, at which counsel for Costco and Plaintiffs appeared. (ECF No. 216.)

1 After a thorough consideration of the parties' submissions, the arguments of
2 counsel, the record in this matter, and the applicable law, and for the reasons that
3 follow, the Court will **GRANT** Costco's Motion to Decertify.

4 **BACKGROUND**

5 **I. Costco's Closing Procedures**

6 Plaintiffs allege in their currently operative Fourth Amended Complaint that
7 "Plaintiffs and other hourly, non-exempt employees were regularly forced, against their
8 will, to remain locked inside of . . . [Costco] warehouses throughout California and the
9 United States, after clocking out at the end of closing shifts." (ECF No. 96-1 at 5.)
10 Plaintiffs allege that, "[d]uring this unpaid lock-in time, . . . Costco's Supervisors and
11 Managers . . . performed closing activities, such as removing jewelry from cases and
12 emptying cash registers." (*Id.*) Thus, following certification, Plaintiffs represent
13 classes of individuals who were subject to "Costco's closing lockdown procedures."
14 (*Id.* at 6-7.) In essence, Plaintiffs claim Costco had a uniform, companywide policy of
15 locking its employees in warehouses during closing lockdown procedures without pay.

16 **A. Plaintiffs' Evidence**

17 It is undisputed that Costco had no express policy requiring its employees to be
18 locked in warehouses without pay while supervisors and managers performed closing
19 activities. Indeed, Plaintiffs do not contend that such an express policy existed.
20 Instead, Plaintiffs assert that it was a combination of Costco's closing, payroll, and
21 timecard policies—as set forth in various manuals, agreements, and other sources—that
22 resulted in a de facto companywide policy of locking employees in warehouses during
23 closing lockdown procedures without pay.

24 **1. Costco Manuals**

25 Plaintiffs rely heavily on language from various versions of Costco's "Member
26 Service and Loss Prevention Manual" and Costco's "Front End Manual" (both,
27 "Manuals"). The Member Service and Loss Prevention Manual offered by Plaintiffs
28 contains language from October 2004 stating:

1 After the last member has been served, all perimeter alarms must be set.
2 One door may be bypassed if a local audible alarm is installed and
3 activated. This door, used for employees to exit the building, should be
4 opened only on a fixed schedule (suggest 15 minute intervals). No
employees should be given access to or allowed to exit the building while
register tills are collected and secured in the vault.

5 The same manual provides that these procedures are “not meant to limit the warehouse
6 manager’s authority but are intended as minimum guidelines that must be followed to
7 protect all company assets.” The same manual further provides that, if management
8 deems it appropriate, more stringent procedures may be implemented at the regional
9 manager’s discretion.

10 Turning to the October 2006 Front End Manual, it states:

11 After the last member leaves the warehouse, the following tasks should
12 be accomplished as quickly as possible. The front door closed
13 immediately. Nobody should enter or exit the warehouse while the tills
14 and jewelry are being collected and secured in the Vault. This process
should be done as quickly as possible to minimize security risk, and to
minimize any delay in employees entering or exiting from the warehouse.
(Emphasis added.)

15 Plaintiffs refer to the foregoing language from Costco’s Manuals as Costco’s
16 “Lockdown Policy.”

17 **2. Costco’s Employee Agreements**

18 Plaintiffs also rely heavily on language from Costco’s March 2004 and March
19 2007 Employee Agreements (“EAs”). Both the 2004 and 2007 EAs provide that
20 employees must “swipe” in and out on Costco’s automated timecard system (“ATS”)
21 exactly at the start and end of their shifts. The EAs provide that “excessive” violations
22 of this “swipe” policy could result in escalating discipline (up to termination), and that
23 three separate “swipe” violations in a thirty-day period is considered “excessive.”
24 Costco’s Director of Human Resources and 30(b)(6) deponent, Mark Stalwick
25 (“Stalwick”), confirmed that an employee that regularly clocked out one minute after
26 his or her scheduled shift could be subject to disciplinary action.

27 Plaintiffs note that Costco’s EAs further provide that employees may not work
28 overtime without prior manager approval. On that topic, Plaintiffs provide training

1 materials which instruct managers to discipline employees that work unauthorized
2 overtime. Plaintiffs further provide the deposition transcript of class member Albert
3 Cooper, who testified: “[W]e would have to clock out as soon as our shift ended, so to
4 wait until we had seen a manager to clock out, they would write us up for – for not
5 clocking out when we were done with our shift.”

6 Plaintiffs further provide that, while Costco has an “Exception Log” to permit
7 managers to adjust “swipe” times, recording lockdown time was not an established use
8 for the log. Rather, Costco’s “Employee Instructions on How to Accurately Record
9 Their Time” provides that “The ATS Exception Log is only to be used in a situation
10 in which you cannot swipe your name badge or additional information is needed to
11 explain your recorded swipes.” A document entitled “Automated Timecard System
12 Policies” confirms: “The Exception Log will only be available to hourly employees if
13 the time clock is not functioning.”

14 Plaintiffs refer to the foregoing language from Costco’s EAs and Exception Log
15 documents as Costco’s “Timecard Policy” and “Compensation Policy.”

16 **3. Uncompensated Detention Time**

17 To establish that Costco’s so-called Lockdown, Timecard, and Compensation
18 Policies operate in a way that caused employees to remain locked in warehouses
19 without compensation, Plaintiffs rely on the deposition testimony and declarations of
20 several Costco employees.

21 Plaintiffs provide deposition testimony and declarations from over 100
22 employees stating they were locked in warehouse without compensation while
23 managers and supervisors completed closing procedures. (See ECF No. 173-12.)
24 These employees testified or declared that they experienced unpaid delays from 50%
25 to 100% of the closing shifts they worked, and that they were delayed for periods of 5
26 to 60 minutes.

27 **4. Uniform, Companywide Enforcement**

28 As evidence that Costco sought uniform, companywide compliance with

1 language from its Manuals, Plaintiffs provide Stalwick's deposition testimony that the
2 Member Service and Loss Prevention Manual applies to all warehouses. Plaintiffs also
3 provide the 30(b)(6) deposition testimony of Yusuf Ahmed, who testified that the
4 Member Service and Loss Prevention Manual lays out opening and closing procedures
5 for all of the warehouses in the United States.

6 As to the uniform, companywide use of Costco's EAs, Plaintiffs provide the
7 deposition testimony of a Costco executive vice president, Mark Schutt, who stated that
8 the EAs are used companywide. Plaintiffs also note that the March 2004 EA states
9 (with regard to the standard of ethics for managers/supervisors) that managers "must
10 adhere to Company policies and directives in all aspects of operation."

11 Plaintiffs assert the "mandatory nature of these policies" is further evidenced "by
12 the fact that Costco's Warehouse Operations Department[] not only develops, but
13 actively audits compliance with the Manuals' procedures in every warehouse in the
14 country twice a year." Audit documents show that some 385 specific policies,
15 including "closing procedures" and the administration of the ATS and payroll, are
16 audited to identify "Audit Issues." Audit Memoranda discuss the Audit Issues,
17 referring managers to specific sections of the Manuals as correct procedures.

18 The audit reports are sent to Costco's Warehouse Operations Department, in
19 addition to executive, regional, and district VPs. The reports are reviewed by regional
20 vice presidents to assess compliance with the audit points. Plaintiffs assert that
21 Director of Warehouse Operations, Eric Harris, regularly pointed managers to the
22 Manuals to identify controlling policies and procedures.

23 As noted above, Plaintiff also filed two requests for leave to file supplemental
24 evidence, both of which the Court granted. The first request pertained to additional
25 audit documents, including Costco's Auditing Manual, audit checklists, and more audit
26 memoranda. The audit checklists and memoranda reiterate and cite the aforementioned
27 language from the Manuals. Plaintiffs also claim that these newly submitted Audit
28 Checklists and memoranda record instances of employees being delayed by Costco's

1 closing procedures. For example, one Audit Checklist states:

2 On 6/1, closing procedures were not completed as quickly as possible to
3 minimize the security risk and delay in employees exiting the warehouse.
4 After the last member left the building at 8:55 p.m., the jewelry procedure
5 was not completed until 9:37 p.m., and the till procedure was not
6 completed until 9:58 p.m. Several employees had to wait up to 20
7 minutes for the procedures to be completed before they were let out of the
8 building.¹

9 (ECF No. 181-7 at 5-6.)

10 Plaintiffs' second request for leave to file supplement evidence pertained to
11 internal email communications, memoranda, warehouse audit documents, and materials
12 stored on Costco's intranet. Several emails from upper-level management to
13 warehouse managers relate to compliance with Costco's policies and procedures. For
14 example, a May 30, 2008 email sent from executive VP Dennis Zook to all warehouse
15 managers after a robbery had occurred states:

16 It is imperative that we reiterate the necessity for strictly adhering to the
17 opening and closing procedures set forth in the operations policy and
18 procedures manual in the loss prevention section Again it is
19 imperative that we adhere strictly to the Opening/Closing guidelines to
20 protect both our people and other company assets. The link to the Loss
21 Prevention Portion of the operations manual [on Costco's intranet] is
22 below. Opening and Closing Procedures are section 6 and should be
23 reviewed at length with your staff.

24 (ECF No. 200-3 at 11-12.) Plaintiffs also provide documents showing that executive
25 VPs were copied on Audit Memoranda summarizing individual warehouse compliance
26 issues.

27 Plaintiffs also quote language from a Costco intranet page entitled, "Operations
28 Audit," which states that, "Critical Control Concerns are areas where locations are
deficient in related procedural controls, which combined, can create an environment
for fraud." (ECF No. 200-4 at 14.) The intranet page also states, "A need has been
established to focus on select locations in order to help them establish better controls.

¹ The Court notes that, while this evidence demonstrates Costco was aware that its closing procedures may have caused unpaid delays, it also demonstrates Costco took steps to avoid unpaid delays. This additional fact weighs against a finding that Costco had a de facto policy of detaining employees during lockdown closing procedures without pay.

1 These locations will receive operations audits on a 90-day schedule until specific and
2 measurable improvement has been achieved.”

3 Plaintiffs also point to the fact that warehouse managers were expected to
4 conduct self-audits on a quarterly basis to confirm compliance with Costco’s policies
5 and procedures. An April 6, 2009 Warehouse Self Audit Checklist provides,
6 “Warehouses should conduct quarterly self-audits. Audits should be performed more
7 frequently, if directed by Regional Managers. CHECKLISTS FOR COMPLETED
8 SELF-AUDITS SHOULD BE SUBMITTED TO YOUR WAREHOUSE REGIONAL
9 MANAGER ON A QUARTERLY BASIS.” (ECF No. 200-4 at 16.) Audit points in
10 the checklist include compliance with what Plaintiff’s coin as Costco’s Lockdown,
11 Timecard, and Compensation Policies.

12 Plaintiffs also provide documents indicating that warehouse managers were
13 required to send responses to audits to Costco headquarters and regional managers. For
14 example, Plaintiffs provide an email from the Warehouse Operations Department to a
15 warehouse manager stating: “AUDIT RESPONSE DUE: FEBRUARY 12, 2008.
16 Please ‘Forward’ Response to ‘Warehouse Operations’ Outlook Mail and to ALL the
17 CC mail recipients,” which included Warehouse Operations staff, executive VPs,
18 regional VPs, and district VPs. (ECF Nos. 200-4 at 47, 200-5 at 2.) In their responses,
19 managers explained the reasons for any lack of compliance with Costco’s policies and
20 procedures and the steps taken to remedy any deficiencies.

21 Plaintiffs also assert that Costco was aware that its lockdown, timecard, and
22 compensation policies and procedures created unpaid delays. Plaintiffs provide a letter
23 from class member Joshua Blum to Costco personnel specialist Jamie Cox stating:

24 On Tuesday the 7th of April 2009 . . . I was scheduled to work from 12:30
25 p.m. to 9:00 p.m. . . . [After I clocked out], I walked to the exit door to
26 find that it had been locked I went back to the front end to clock
27 back in and help clean while I was waiting to be let out. My manager,
28 Billy Ware, told me that I could not clock back in and work because he
did not want to pay for the overtime

I asked, “Why, if I was scheduled until 9:00p.m., didn’t you wait to let me
out and then lock the door?” He said he needed to pull the “tills.” I said,
“I understand, but if I’m scheduled to get off at a certain time, then I

1 expect to get off at that time. If I cannot, then I should be able to remain
2 working.” Again, he said, “no”. Also, I was not the only employee
scheduled to be off at this time—this is a common occurrence

3 When I was finally let out it was past 9:15pm.

4 (ECF No. 200-6 at 2.)

5 Cox asked for Stalwick’s input with regard to Blum’s letter, and Stalwick
6 responded: “If it’s true [Blum] is right we need to call the GM and sure he/she is aware
7 that employees need to be paid for any time under the control of the employer,
8 including time pulling tills and jewelry if they can’t leave. [¶] What state is this in?”²

9 Plaintiffs also provide documents pertaining to Costco’s decision to change the
10 language in its Manuals to ensure employees were compensated for any OTC detention
11 time. Plaintiffs provide an email from a warehouse manager to his regional manager
12 in which the warehouse manager suggests, as a remedy to the “employees off the clock
13 during jewelry and till pull lawsuit,” a requirement that all buildings “pull jewelry and
14 tills at roughly the same time,” and the installation of “a lockout on the time clock
15 scanning system (ATS) during this time.” (ECF No. 200-6 at 7.)

16 Plaintiff provides that, in late 2009, Costco amended its Front End Manual to
17 provide:

18 During the jewelry and till pull, station a manager at the exit door to allow
19 clocked-out employees to exit as soon as the outside observer gives an
20 “all clear.” Where safety or security concerns require delays in employees
exiting, have them do “go backs” or otherwise use the time clock or use
the exception log to claim compensation for delays.

21 Plaintiffs assert that, consistent with Costco’s “top-down policy-making, the
22 2009 change in Costco’s Lockdown, Timecard and Compensation policies was
23 executed first through memoranda from the [executive VPs] to all warehouse
24 managers[] and then revisions to the Manuals.” Plaintiffs provide a memo from
25 executive VP Joe Portera to lower-level management, stating in part: “During the
26 closing procedures of our buildings, we may be detaining employees from exiting the

27
28 ² The Court again notes that, while this evidence demonstrates Costco was aware that its
closing procedures may have caused unpaid delays, it also demonstrates Costco took steps to avoid
unpaid delays.

1 warehouse,” and thus managers should let employees exit with “[n]o delays!” This
2 memo was received, reviewed, and signed by warehouse managers under Portera.
3 (ECF No. 200-6 at 9-62.)

4 **B. Costco’s Rebuttal Evidence**

5 Costco’s evidence is comprised almost entirely of deposition testimony and
6 declarations from various Costco employees. (See ECF Nos. 146-2 through 155-1.)

7 Costco asserts Plaintiffs have not offered substantial evidence showing that
8 Costco had a uniformly enforced policy of locking class members in warehouses during
9 closing procedures without pay. Costco contends that, to the contrary, its only
10 uniformly enforced, companywide policy was, and is, to compensate employees for all
11 time worked. In support of its contention, Costco provides Stalwick’s Declaration,
12 which states:

13 Costco requires that nonexempt employees accurately record the hours
14 they work on the Automated Timecard System (“ATS”). To correct errors
15 in ATS-recorded time, employees may use the daily ATS Time Card
16 Exception Log and state the reason for the exception. Employees are paid
17 for all hours worked, including hours recorded on the ATS clock system
18 and hours recorded through Costco’s exception log. Costco does not
19 permit nonexempt employees to work off the clock and requires those
20 employees to accurately record all time worked. If employees believe that
21 they have not been paid for all hours worked or if they feel there are
inaccuracies regarding their recorded time, they may speak to their
managers or the payroll department to have any errors corrected. Costco
does not encourage managers to discipline or performance-coach
employees for adjusting their time records by using an exception log,
except to the extent that the use of the exception log shows that an
employee has repeatedly failed to use the swipe card or has repeatedly
forgotten to clock in or out.³

22 In support of his Declaration, Stalwick cites Section 11.9 of the 2004 EA and Section
23 11.10 of the 2007 and 2010 EAs. These sections are nearly identical and provide in
24 relevant part:

25 Timecards refer to both manual timecards and the Automated Timecard
26 System. The Automated Timecard System accurately records your time as
27 you swipe your employee badge through the reader. You are responsible
for accurately recording your time. Failure to accurately record your time

28 ³ Stalwick similarly testified in his deposition that Costco’s policy was, and is, to compensate
its employees for all hours worked.

1 is a violation of Company Policy.

2 Please record the exact time of the following:

- 3 1. When you begin your shift.
- 4 2. When you leave for your meal period.
- 5 3. When you return from your meal period.
- 6 4. When you end your shift.

7 It is your responsibility to be at your position when your shift begins. All
8 time spent preparing for work (hanging up your coat, etc.) should be
completed before you sign in. Other important points are as follows:

- 9 1. Never fill in a timecard ahead of time.
- 10 2. Always sign your timecard at the end of your last shift.
- 11 3. Never fill in another person's timecard.
- 12 4. All overtime requires Supervisor approval PRIOR to working overtime.

13 [The 2007 and 2010 EAs vary with regard to these "Other important
14 points." The 2010 Agreement provides:]

- 15 1. Never fill in a timecard ahead of time.
- 16 2. Always sign your timecard at the end of your last shift.
- 17 3. Never fill in another person's timecard.
- 18 4. All overtime requires Supervisor approval PRIOR to working overtime.
19 If you work overtime without prior approval, you must still accurately
20 record all of your time worked.
- 21 5. Review, approve, and sign your time card each pay period. Excessive
failure to sign the time records may result in disciplinary action.
- 22 6. Pick up your check or direct-deposit form each pay period.

23 Costco then provides the deposition testimony of employees who indicated they
24 were able to resolve any payroll issues (e.g., incorrect or short hours) by talking to their
25 managers or other payroll personnel. This includes plaintiff Stiller who testified in his
26 deposition that, other than not being paid for time waiting at the door, he never had a
problem with getting paid for the hours he worked or correcting payroll errors.

27 Turning to its closing procedures, Costco provides deposition testimony and
28 declarations indicating that its warehouses posted closing times of 8:30 p.m. on

1 weekdays and 6:00 p.m. on weekends, but that managers did not uniformly close the
2 customer doors at these times because of variations in: when the number of remaining
3 customers in the warehouse could be counted, the availability of personnel to
4 accomplish the closing process, and the possibility of customers entering just before
5 the posted closing time. Thus, according to the deposition testimony and declarations
6 of Costco personnel, the customer doors were typically closed between 5 and 15
7 minutes after the posted closing time.

8 Costco provides deposition testimony and declarations indicating that, after the
9 customer doors were closed, managers would wait up to 40 minutes to begin a “soft
10 push” or “sweep” to encourage any remaining customers to migrate to the front of the
11 warehouse for checkout. According to deposition testimony and declarations, this
12 could take from 5 to 15 minutes, depending on: the types of items purchased, the time
13 the last customer of the day entered the warehouse, whether customers lingered in the
14 food court, the day of the week, and the time of the year. Thus, according to deposition
15 testimony and declarations of Costco personnel, the time that the last customer actually
16 left the warehouse varied from 5 to 45 minutes after the posted closing time.

17 Once the last customer left, Costco asserts its managers would then “decide”
18 whether to close all doors and set the perimeter alarm or act otherwise by, for example,
19 letting clocked-out employees exit before locking down the warehouse. Costco asserts,
20 for example, that if the last customer exited the warehouse at 8:55 p.m., and a group
21 of employees was scheduled to clock out at 9:00 p.m., the manager could let the
22 clocked-out employees exit before locking down the warehouse.⁴ Costco provides
23 several deposition transcripts and declarations that state clocked-out employees could
24 exit without delay as long as a customer was still in the warehouse, which makes sense
25 because the customer doors remained open until the last customer exited.

26
27 ⁴ In support of this assertion, Costco cites: “Hyatt Dec. ¶ 9, Vasquez Dec. ¶ 7.” Neither of
28 these sources, however, supports Costco’s assertion. The Hyatt Declaration is not listed in Costco’s
Appendix of Evidence. (See ECF No. 146-2.) And the Vasquez Declaration does not say at ¶ 7 that
managers could wait for clocked-out employees to exit after the last customer departed before locking
down the warehouse. (See ECF No. 146-13 at 99-100.)

1 Costco asserts that, after the customer doors were closed, managers and
2 supervisors would begin pulling register tills and jewelry. Costco asserts the amount
3 of time it would take to do this would vary. Costco provides deposition testimony and
4 declarations of its personnel indicating that some managers would begin the till and
5 jewelry pulls immediately, while other managers waited for clocked-out employees to
6 leave. For example, Costco cites the Chelini Declaration, which states:

7 sometimes we kept the member exit door open for a few minutes after the
8 last member exited if we saw employees who had clocked out walking
9 towards the door . . . [or] if we saw Costco employees wearing orange
vests on “cart duty” approaching the member exit door so they could exit
the warehouse and begin collecting the carts from the parking lot.

10 Costco also provides the deposition transcript of Robin Gau, who testified “there was
11 not one day where her shift ended and she could clock out and leave” if the tills were
12 being pulled. Gau testified, “Pretty much everybody got stuck there. It’s like as soon
13 as they rolled the [customer] door down, you had a 15-minute grace period before they
14 would pull the tills.” “So in that 15-minute window, a manager would go over to the
15 man door or the exit door and wait and people could get out then.”

16 Costco provides deposition testimony and declarations showing the length of the
17 till and jewelry pull process could take from 3 to 30 minutes depending on the methods
18 used (e.g., pulling tills and jewelry simultaneously or consecutively, using more/fewer
19 employees to complete process).

20 Taking on the Loss Prevention Manual language stating that managers “should
21 not” allow employees to exit during till pulls, Costco provides deposition testimony
22 and declarations of its personnel demonstrating variations in the amount of time, if any,
23 that Costco’s closing procedures caused clocked-out employees to suffer delays in
24 exiting.

25 Costco provides deposition testimony and declarations indicating that some
26 managers: would sometimes warn employees that the warehouse was going to be
27 locked down in an effort to allow clocked-out employees to exit; would sometimes
28 allow employees to stay on the clock and/or to clock back in during the pulls; believed

1 they had the ability to permit, and indeed sometimes permitted, employees to record
2 their lockdown time on an exception log⁵; and attempted to avoid unpaid detention time
3 by scheduling employees to work shifts outside the window in which jewelry and till
4 pulls were likely to occur.

5 Costco also offers deposition testimony and declarations indicating
6 that—contrary to the Manuals’ instruction that no one should be allowed to enter or
7 exit during pulls—some managers sometimes allowed employees to exit during the till
8 and jewelry pulls. Deposition transcripts and declarations similarly show that some
9 managers would station someone near the employee exit door to let clocked-out
10 employees leave or would require employees to check with managers before clocking
11 out.

12 Costco further provides deposition testimony and declarations showing that
13 employees themselves made choices that affected whether they would experience pull-
14 related delays. Costco cites the Gardner Declaration, for example, in which Gardner
15 states:

16 My managers have told me that I’m not supposed to clock out unless a
17 manager is already there and ready to let me out. On occasion, I might
18 clock out before a manager is there to let me out if I want to socialize a bit
19 before leaving. Because it’s my choice to stay a little longer to socialize,
I don’t feel right about being on the clock for this time, so I’ll talk for a
minute or so while waiting for a manager to walk up to let me out.
(ECF No. 154-1 at 70.)

20 Costco also provides deposition testimony and declarations indicating that
21 pharmacy departments in warehouses closed before the posted closing times, and thus
22 pharmacy employees did not experience any unpaid detention time.

23 Finally, Costco offers deposition testimony and declarations demonstrating that
24 some employees experienced exiting delays after the pulls were completed. Costco
25 cites the deposition transcript of Chris Anglin, who testified that he was delayed in

26
27 ⁵ Only one manager, however, stated that employees actually used the exception log to record
28 detention time resulting from Costco’s closing procedures. (ECF Nos. 148-1 at 52, 146-12 at 14-15.)
Thus, even if the Exception Log were theoretically available to employees to record detention time
resulting from Costco’s closing procedures, Costco has offered practically no evidence demonstrating
that the Exception Log was in fact used for this purpose.

1 exiting by an average of ten to fifteen minutes due to post-pull activities, such as
2 managers counting money in the vault or “be[ing] in back, doing receiving
3 procedures.” (ECF No. 146-4 at 25, 31.) Costco also cites, for example, the deposition
4 testimony of Shevon Cunningham, claiming she “only waited to exit during shifts
5 ending at 10 p.m., half the time she waited five minutes, but it could take up to 20
6 minutes.” (ECF No. 152-1 at 44.) Cunningham, however, did not testify that she
7 “only waited to exit during shifts ending at 10 p.m.” She testified that, from the time
8 the tills and jewelry were put away, she waited anywhere from 10 to 30 (typically 20)
9 minutes to be released. (ECF No. 146-4 at 223-24.) Regarding her shifts that ended
10 at 10:00 p.m., Cunningham testified that she experienced exiting delays after
11 approximately 50% of her shifts for an average of 5 minutes. (Id. at 226-27.)

12 **DISCUSSION**

13 The Court will first address Costco’s Motion to Decertify as it pertains to the
14 California Class, after which the Court will consider Costco’s Motion as to the FLSA
15 Class.

16 **I. Rule 23 Class**

17 **A. Legal Standard**

18 “An order that grants or denies class certification may be altered or amended
19 before final judgment.” Fed. R. Civ. P. 23(c)(1)(C); Rodriguez v. West Publ’g Corp.,
20 563 F.3d 948, 966 (9th Cir. 2009) (“A district court may decertify a class at any time.”).
21 In deciding whether to decertify a class, a court may consider “subsequent
22 developments in the litigation.” Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 160
23 (1982). “In considering the appropriateness of decertification, the standard of review
24 is the same as a motion for class certification: whether the Rule 23 requirements are
25 met.” Marlo v. United Parcel Serv., Inc., 251 F.R.D. 476, 479 (N.D. Cal. 2008).

26 “A party seeking class certification must affirmatively demonstrate his
27 compliance with [Rule 23(a)]—that is, he must be prepared to prove that there are in
28 fact sufficiently numerous parties, common questions of law or fact, etc.” Wal-Mart

1 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) A court must thus conduct a
2 “rigorous analysis” in determining whether the prerequisites of Rule 23(a) have been
3 satisfied. Id. This “rigorous analysis” frequently “entail[s] some overlap with the
4 merits of the plaintiff’s underlying claim.” Id.

5 “Just as the party moving for class certification bears the burden of
6 demonstrating that the proposed class satisfies the elements of Rule 23, the party
7 moving for class decertification . . . bears the burden of demonstrating that an element
8 of Rule 23 is not satisfied.” Iorio v. Allianz Life Ins. Co. of N. Am., 2008 WL
9 8929013, at *23 (S.D. Cal. July 8, 2008) (citing Gonzalez v. Arrow Fin. Servs. LLC,
10 389 F. Supp. 2d 1140 (S.D. Cal. 2007)). To prevail on a motion to decertify, the
11 defendant “faces a heavy burden because doubts regarding the propriety of class
12 certification should be resolved in favor certification.” Gonzalez, 389 F. Supp. 2d at
13 1154 (internal quotation marks omitted) (citing Slaven v. BP America, Inc., 190 F.R.D.
14 649, 651 (C.D. Cal. 2000)).

15 **B. Analysis**

16 Costco argues Rule 23(a)’s commonality requirement and Rule 23(b)’s
17 predominance and superiority requirements are no longer satisfied. The Court will
18 address these requirements in turn.

19 **1. Commonality**

20 **i. Legal Standard**

21 A class may remain certified only if “there are questions of law and fact common
22 to the class.” Fed. R. Civ. Proc. 23(a)(2). Commonality requires the plaintiff to
23 demonstrate that the “class members have suffered the same injury.” Dukes, 131 S. Ct.
24 at 2551 (quotation marks omitted). Whatever the common theory of liability is, it
25 “must be of such a nature that it is capable of classwide resolution—which means that
26 determination of its truth or falsity will resolve an issue that is central to the validity
27 of each one of the claims in one stroke.” Id.

28 The commonality inquiry does not require plaintiffs to demonstrate the

1 “predominance” of common issues over individualized ones, nor the “cohesion” of the
2 class. Negrete v. Allianz Life Ins. Co. of N. Am., 287 F.R.D. 590, 601-02 (C.D. Cal.
3 2012) (citing Dukes, 131 S. Ct. at 2556 (disclaiming any intent to overlap “Rule
4 23(a)(2)’s commonality requirement with Rule 23(b)(3)’s inquiry into whether common
5 questions ‘predominate’ over individual ones”). When considering commonality,
6 dissimilarities should not be considered “to determine whether common questions
7 predominate,” as Rule 23(b)(3) requires; “even a single common question will do.”
8 Dukes, 131 S. Ct. at 2556.

9 **ii. Analysis**

10 In finding the commonality requirement satisfied, Judge Huff found that Moro
11 had sufficiently demonstrated “that Costco’s 2004 Loss Prevention Procedures Manual,
12 which provided the guidelines for closing procedures, including lockdowns, applied
13 to all of its United States Warehouses.” (ECF No. 104 at 8.) Judge Huff found,
14 “Common factual issues include whether these policies forced class members to spend
15 unpaid time in lockdowns.” (Id.) In sum, Judge Huff concluded “the claims of the
16 Plaintiff and the prospective class share central questions of fact and law regarding
17 Costco’s official centralized policy which caused employees to be detained without pay
18 during lockdowns.” (Id. at 8-9.)

19 Costco argues the commonality requirement is no longer satisfied because, under
20 the more exacting standard announced in Dukes, liability for unpaid detention time
21 cannot be established in one stroke under the circumstances of this case. Costco asserts
22 the question of whether its closing practices caused class members to “remain at work
23 without pay after clocking out for the day” cannot be answered the same way for each
24 class member. Costco argues that, instead, “[t]he success of Plaintiffs’ theory of
25 liability depends on which class member testifies.”

26 Costco argues “[t]he alleged till-pull policy Moro relies upon does not establish
27 commonality, because that alleged policy, even if established, would not establish
28 liability for the class in one stroke.” Costco contends that:

1 [e]ven if every warehouse followed a supposed policy that employees not
2 exit during a register till pull, there would not necessarily be liability to
3 each class member, because liability in every case would turn on answers
to numerous additional questions implicating the differing scheduling and
release practices that different managers followed at different warehouses.

4 Costco provides that, “Many class members could exit the warehouse before the exit
5 door closed,[] and other class members worked shifts that ended only after till pulls
6 were completed.” “Other class members, if they reached the time clock without
7 realizing the doors were closed, could simply stay on the clock and continue working
8 while the tills were pulled or use exception logs to be paid for delays.” Costco thus
9 asserts that:

10 whether any employee actually incurred significant unpaid waiting time
11 because of till pulls would entail individualized inquiries as to (1) whether
12 the exiting employee experienced a delay, and even if so, whether it was
13 more than a de minimis delay,[] (2) whether the employee waited in the
14 warehouse as a matter of personal choice, (3) whether the employee
remained clocked in, or clocked back in, during till pulls (and thus
received pay), and (4) whether the employee was paid for any delay
through use of an exception log—among many other reasons.

15 Moro argues in response that, contrary to Costco’s position, discovery taken
16 since Judge Huff certified the California Class “has confirmed—through a variety of
17 evidence, including admissions—that Costco’s policies caused unpaid lockdown time
18 across California and the United States.” Moro argues that Costco has produced no
19 new and determinative evidence that demonstrates a lack of commonality. Citing
20 Schulz v. Qualxserv, LLC, 2012 WL 1439066, at *4 (S.D. Cal. Apr. 26, 2012), Moro
21 argues that “[a]ssessing the existence, impact, and legality of Costco’s nationwide
22 policies will result in precisely the sort of ‘common answer’ that was lacking in Wal-
23 Mart.”

24 In this regard, Moro asserts he and Stiller are not, as Costco asserts, challenging
25 unpaid delays arising only from the till and jewelry pulls, but are instead challenging
26 unpaid delays experienced even after the till and jewelry pulls were completed due to
27 Costco’s requirement that warehouses be locked down once the last customer left, with
28 employees only being allowed to exit through a designated door on a fixed schedule.

1 Moro asserts the existence and unlawful effect of Costco’s policies can be
2 proved on a classwide basis using, among other things, Costco’s Manuals, EAs, audit
3 memoranda and checklists, internal communications, class member testimony, and
4 other documentation demonstrating that these policies was implemented and enforced
5 on a companywide basis. Moro argues the combined effect of these policies “bridges
6 the gap between an individual grievance and class-wide injury.”

7 Here, Moro’s theory of commonality rests on the assertion that Costco had a
8 uniformly enforced, companywide policy of locking employees, who had already
9 clocked-out, in warehouses for a compensable amount of time without pay while
10 closing procedures were completed. Plaintiffs have, of course, offered no evidence that
11 Costco had an express policy of this nature. Rather, Plaintiffs contend Costco had an
12 implied or de facto policy of this nature. The Court refers to this de facto policy as the
13 “Alleged Policy.”

14 California law requires that employees be compensated for all time “during
15 which an employee is subject to the control of an employer,” which includes “all the
16 time the employee is suffered or permitted to work, whether or not required to do so.”
17 Morillion v. Royal Packing Co., 22 Cal. 4th 575, 585-87 (2000). Thus, in addition to
18 the common questions of whether the Alleged Policy existed and operated on a
19 companywide basis, an additional common question is whether the Alleged Policy
20 resulted in employees being subject to Costco’s control. See Otsuka, 2010 WL
21 366653, at *6 (“[A]pplication of the ‘control’ rule presents a common question of law
22 that can be resolved on a class basis, outweighing any individualized inquiries that will
23 be required.”); Cervantez v. Celestica Corp., 253 F.R.D. 562, 572 (C.D. Cal. 2008)
24 (“Plaintiffs have established at least one common question of law common to all
25 members of the security line class: whether time spent in the security line at the end of
26 a shift is compensable under the California Labor Code.”); Brinker Rest. Corp. v.
27 Super. Ct., 53 Cal. 4th 1004, 1051 (2012) (“Claims alleging that a uniform policy
28 consistently applied to a group of employees is in violation of the wage and hour laws

1 are of the sort routinely, and properly, found suitable for class treatment.”); Schulz v.
2 QualxServ, LLC, 2012 WL 1439066, at *4 (S.D. Cal. 2012) (“[W]hether the
3 Defendants’ policies and practices comply with California’s specific requirements is
4 the type of question that can be answered on a classwide basis.”) (citing Dukes, 131 S.
5 Ct. at 2551; Dilts v. Penske Logistics, LLC, 267 F.R.D. 625, 632-33 (S.D. Cal. 2010)
6 (finding “common factual questions, such as whether Defendants’ policies deprived the
7 putative class members of meal periods, rest periods, overtime pay, and reimbursement
8 for installation tool expenses, and common legal questions, such as Defendants’
9 obligations under California [law.]”).⁶

10 The Court concludes Costco has failed to satisfy its “heavy burden” of
11 demonstrating that Rule 23(a)’s commonality requirement is no longer satisfied. In
12 addition to the evidence Judge Huff relied on in finding the commonality requirement
13 satisfied, Plaintiffs have offered substantial, albeit partially rebutted, evidence
14 demonstrating that Costco had a de facto policy of detaining employees in warehouses
15 during closing procedures without pay.

16 That said, the Court finds that determining whether the Alleged Policy existed,
17 was enforced on a companywide basis, and operated in a way that resulted in
18 employees being under Costco’s control, will only answer the question of whether
19 employees were sometimes detained without pay as a result of the Alleged Policy.

20 Costco has offered convincing evidence that not all employees experienced
21 unpaid delays as a result of the Alleged Policy. And, if it can only be determined on
22 a classwide basis whether the Alleged Policy sometimes resulted in unpaid OTC time,
23 individualized determinations will be required to determine the question of liability.
24 This is because liability hinges on whether employees actually performed OTC work.
25 See York v. Starbucks Corp., 2011 WL 8199987, at *17 (C.D. Cal. Nov. 23, 2011)

26
27 ⁶ The Court’s finding that Plaintiffs have offered substantial proof of the existence of the
28 Alleged Policy distinguishes this case from those relied on by Costco: Corwin v. Lawyers Title
Insurance Co., 276 F.R.D. 484 (E.D. Mich. 2011), Scott v. First American Title Insurance Company,
276 F.R.D. 471 (E.D. Ky. 2011), and Gonzalez v. Millard Mall Services, Inc., 281 F.R.D. 455 (S.D.
Cal. 2012).

1 (“[A] plaintiff may establish liability for an off-the-clock claim by proving that (1) he
2 performed work for which he did not receive compensation; (2) that defendants knew
3 or should have known that plaintiff did so; but that (3) the defendants stood ‘idly by.’”)
4 (quoting Adoma v. Univ. of Phoenix, Inc., 270 F.R.D. 543, 548 (E.D. Cal. 2010));
5 Ortiz v. CVS Caremark Corp., 2013 WL 6236743, at *9 (N.D. Cal. Dec. 2, 2013) (“To
6 prove an off-the-clock claim, a plaintiff must demonstrate that she actually worked off
7 the clock, that she was not compensated for it, and the employer was aware or should
8 have been aware that she was performing off the clock work.”).

9 Of course, the existence of individualized questions does not per se defeat
10 commonality. Rather, the commonality requirement is met so long as there is a single
11 common question that goes to the core of Plaintiffs’ claims and that can be answered
12 on a classwide basis. The Court finds the questions of whether the Alleged Policy
13 existed, was enforced on a companywide basis, and resulted in Costco’s control over
14 employees satisfy the commonality requirement. Accordingly, the Court will not
15 decertify the California Class for lack of commonality.

16 **2. Predominance**

17 **i. Legal Standard**

18 The predominance inquiry focuses on “the relationship between the common and
19 individual issues” and “tests whether proposed classes are sufficiently cohesive to
20 warrant adjudication by representation.” Vinole, 571 F.3d at 945 (quoting Hanlon, 150
21 F.3d at 1022). The predominance inquiry also includes consideration of whether
22 “adjudication of common issues will help achieve judicial economy.” Vinole, 517 F.3d
23 at 945 (quoting Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir.
24 2001)).

25 Recently, the Supreme Court explained that the same “rigorous analysis”
26 required of Rule 23(a)’s commonality requirement also applies to Rule 23(b)(3)’s
27 predominance requirement. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013)
28 (“If anything, Rule 23(b)(3)’s predominance criterion is even more demanding than

1 Rule 23(a).”) Thus, courts should “take a close look at whether common questions
2 predominate over individual ones.” Id. (internal quotation marks omitted).

3 In Lou v. Ma Laboratories, Inc., the Northern District of California found Rule
4 23(b)(3)’s predominance requirement unmet in an OTC overtime case where the
5 plaintiff employees “ha[d] not identified a common method of proof on a classwide
6 basis for their off-the-clock claims” where “employee time-keeping and overtime
7 practices varied greatly.” 2014 WL 68605, at *3 (N.D. Cal. Jan. 8, 2014). Reviewing
8 more than 64 declarations submitted by the parties, the court noted there were
9 variations in when employees would work overtime, request overtime, and claim
10 overtime. Id. The court found “[t]hese collective variations cause plaintiffs’ off-the-
11 clock claims to necessarily dissolve into a series of mini-trials.” Id. at *4.

12 The Lou court rejected the opinion offered by plaintiffs’ proposed expert, Dr.
13 Richard Drogin (the same expert retained by plaintiffs in this case), that individualized
14 damages could be calculated using time-clock data and OTC time estimates based on
15 the phone calls employees made and the emails employees sent while at work. Id. In
16 rejecting Dr. Drogin’s opinion, the court noted there were “individualized variances”
17 with regard to time-clock data. Id. The court further noted the phone calls and emails
18 were “not evidence that the employee was doing compensable work,” given that they
19 could have been making personal calls and sending personal emails. Id. The court
20 further noted Dr. Drogin only reviewed email data for 15 employees and phone data
21 for 42 employees—“a small subset of the proposed class.” Id. The Court concluded
22 that, “[w]ithout a method of classwide damages proof tethered to plaintiffs’ theory of
23 liability, it becomes difficult to imagine how plaintiff’s class action could proceed.”
24 Id.

25 ii. Analysis

26 Costco argues individualized questions predominate over common questions
27 because, as the Court concluded above, the Alleged Policy does not trigger automatic
28 liability. Costco asserts individualized determinations are required to determine

1 whether each class member:

2 (1) clocked out while intending to immediately exit, (2) was unable to exit
3 because the manager was conducting a till pull, (3) did not radio or
4 otherwise ask anyone to open the warehouse doors (and explain why), (4)
5 did not clock back into the ATS system (and explain why), (5) waited for
6 a compensable amount of time, and (6) did not log the waiting time in the
7 exception log (and explain why).

8 Costco goes on to argue that its defenses also require individualized
9 determinations. Costco emphasizes that determining whether employees were delayed
10 for longer than a de minimis amount of time would require individualized inquiries
11 because each employee's individual circumstances would have to be evaluated to
12 determine the length of any OTC time. Costco asserts this is not merely a matter of
13 damages because the de minimis rule is a defense to liability.⁷

14 In response, Moro asserts that Costco's purported individual questions regarding
15 when an employee clocked out and was or was not allowed to clock back in are
16 determinable on a classwide basis by resort to Costco's timecard and compensation
17 policies. Moro argues that Costco's purported individualized questions regarding
18 whether employees were unable to exit a warehouse and/or whether they waited a
19 compensable amount of time are determinable on a classwide basis by resort to
20 Costco's lockdown policy. The exact time of any delays, Moro argues, can be
21 estimated by a just and reasonable inference, as set forth more fully below.

22 In support of his position, Moro cites Lopez v. G.A.T. Airline Ground Support,
23 Inc., 2010 WL 3633177 (S.D. Cal. 2010). In Lopez, the court found the predominance
24 requirement satisfied despite the need for some individualized inquiries "in light of the

25 ⁷ It is not clear that the de-minimis rule applies under California law. See Bustamante v.
26 Teamone Emp't Specialists, LLC, 2011 WL 1844628, at *10 (Cal. Ct. App. May 17, 2011) (noting
27 plaintiff's argument that de minimis rule is inconsistent with California wage and hour law, but
28 declining to determine whether the de minimis rule applies to California wage and hour cases.)

29 The California cases that apply the rule do not address the preliminary question of whether it
30 should be applied under California law. See Gomez v. Lincare, Inc., 173 Cal. App. 4th 508, 526
31 (2009) (applying de minimis rule without question); LoJack Corp., Inc. v. Super. Ct., 2010 WL
32 1137044, at *8 (Cal. Ct. App. Mar. 26, 2010) (citing Gomez as authority that de minimis rule applies).

1 size of the class.”⁸ The court further reasoned: “Where, as here, the claim asserted by
2 a proposed class is based upon a consistent employer practice, class certification is
3 usually appropriate.” Id. at *8 (citing Kamar v. Radio Shack Corp., 254 F.R.D. 387,
4 398 (C.D. Cal. 2008)). Among other claims, the plaintiffs in Lopez argued their
5 employer’s policy of requiring employees to ride a shuttle bus to work resulted in
6 unpaid OTC time. The employer asserted that individualized inquiries regarding
7 whether employees could have used other transportation or were even required to use
8 the shuttle defeated predominance. The court rejected this argument, finding these
9 individualized inquiries “go directly to the common legal question of whether [the
10 employer] should have compensated employees for their travel time.” Id. at *10.⁹

11 Moro also relies on Jimenez v. Allstate Insurance Co., 2012 WL 1366052 (C.D.
12 Cal. Apr. 18, 2012). In Jimenez, the plaintiff brought a putative class action on behalf
13 of himself and about 1,300 other insurance claims adjusters, claiming Allstate failed
14 to pay required overtime compensation and provide required meal and rest breaks. The
15 plaintiff sought to certify a class that was defined to include all claims adjusters with
16 similar titles and/or job duties that worked for Allstate during the class period.

17 When it came to predominance, the court agreed that “a number of
18 individualized questions [existed], including whether individual employees worked off-
19 the-clock.” Id. at *19. The court nonetheless found the predominance requirement
20 satisfied, noting that “courts have certified classes and allowed collective actions to
21 proceed notwithstanding such circumstances.” Id. The court observed: “Generally, the
22 more narrowly defined the class, and the more evidence of a controlling company-wide
23 policy, the more likely it is that the class will be permitted to proceed.”

24
25 ⁸ The class size was comprised of less than 1,400 individuals.

26 ⁹ This Court finds the Lopez analysis unpersuasive because the employer’s proffered
27 individualized inquiries did not go to the common legal question of whether the employer should have
28 compensated employees for their travel time; rather, they went to demonstrating that the employer did
not in fact have a policy that required all employees to ride the shuttle to work. Post Dukes, the Lopez
court likely would have determined whether the employer did in fact have a companywide policy that
would allow a fact finder to resolve the issue of OTC liability on a classwide basis.

1 The Jimenez court found that, while Allstate had a policy of paying all overtime
2 compensation owed, the plaintiff had “presented sufficient evidence to support the
3 inference that Allstate ha[d] a common practice of not following its overtime policy.”
4 Id. at *8. The court thus found the predominance requirement met despite the need for
5 individualized determinations, emphasizing the relatively small class size and the fact
6 that any managerial discretion in causing unpaid OTC time was limited to “the details
7 of enacting a company-wide policy or directive.” Id. at *19.

8 Moro further asserts that, in the Ninth Circuit, “individual damages questions do
9 not defeat the propriety of class certification.” Moro relies on Stearns v. Ticketmaster
10 Corp., in which the Ninth Circuit reiterated that “the mere fact that there might be
11 differences in damage calculations is not sufficient to defeat class certification.” 655
12 F.3d 1013, 1026 (9th Cir. 2011) (citing Yokoyama v. Midland Nat’l Life Ins. Co., 594
13 F.3d 1087, 1094 (9th Cir. 2010)).¹⁰

14 Regarding Costco’s defenses, Moro claims they can be decided using common
15 proof. Moro first asserts that the de minimis defense is largely a damages issue that can
16 be decided on a classwide basis by determining the regularity and aggregate amount
17 of unpaid time. Moro asserts that, even if Costco’s de minimis defense requires
18 individualized inquiries, common questions still predominate.

19 At the outset, the Court rejects Moro’s assertion that individualized damages
20 issues cannot defeat predominance. The Supreme Court’s decision in Comcast makes

21
22 ¹⁰ Moro similarly relies on Williams v. Superior Court of Los Angeles, 221 Cal. App. 4th 1353
23 (2013), to support its argument that variations in OTC time do not defeat predominance. In Williams,
24 the California Court of Appeal found a class action appropriately certified where a group of auto
25 insurance adjusters claimed they had incurred uncompensated OTC time in performing their duties
26 (e.g., “setting voicemail messages and checking for schedule and travel changes”) before and/or after
27 completing their scheduled onsite auto inspections. In applying California’s class-certification rules,
28 the court concluded predominance was not defeated by any variations in the amount of OTC each
adjuster incurred because that was ultimately a question of damages and because “differences in the
amount of individual damages do not by themselves defeat class certification.” Id. at 1365-66. The
court recognized, however, that “under federal class action rules, differences in method of calculating
damages arising from individualized damages may defeat certification of class.” Id. (citing Comcast,
133 S. Ct. at 1432-33); see also Jones v. Farmers Ins. Exchange, 221 Cal. App. 4th 986, 996-96 (2013)
(applying California class action rules to find OTC claims suitable for certification even though
amount of OTC time each class member incurred varied).

1 clear that individualized damages determinations can defeat Rule 23(b)(3)'s
2 predominance requirement. 133 S. Ct. at 1433, 1435. It thus appears that Comcast
3 abrogates Stearns and Yokoyama in this regard.

4 “It is clear that considering whether questions of law or fact common to class
5 members predominate begins, of course, with the elements of the underlying cause of
6 action.” Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1020 (9th Cir.2011). To prove
7 an OTC claim, a plaintiff must demonstrate (1) he or she performed work, for which
8 (2) he or she did not receive compensation, and of which (3) the employer was aware
9 or should have been aware. Adoma, 270 F.R.D. at 548; Ortiz v. CVS Caremark Corp.,
10 2013 WL 6236743, at *9 (N.D. Cal. Dec. 2, 2013).

11 As discussed above, common questions exist with regard to whether the Alleged
12 Policy existed, was enforced on a companywide basis, and resulted in Costco's control
13 over employees. These common questions, however, go to whether OTC work
14 resulting from the Alleged Policy constituted “work” (i.e., whether class members
15 subject to the Alleged Policy were under Costco's control and whether Costco was
16 aware that employees experienced unpaid detention times) and whether Costco took
17 action to remedy any unpaid detention times. In other words, these common questions
18 go to the second and third elements of an OTC claim. As to the first element, however,
19 there is no common answer as to whether each class member actually performed
20 uncompensated OTC work.

21 Assuming Plaintiffs prove the existence of the Alleged Policy and that the
22 Alleged Policy sometimes resulted in unpaid detention time, there is no classwide
23 method, of determining whether, how often, and for how long class members actually
24 experienced unpaid OTC time as a result of the Alleged Policy. As such, liability
25 cannot be proved on a classwide basis without thwarting Costco's ability to
26 demonstrate that some class members, due to a variety of circumstances, did not
27 actually experience unpaid OTC time despite being subject to the Alleged Policy. See
28 Dukes, 131 S. Ct. at 2561 (rejecting trial-by-formula approach were defendant would

1 be deprived of litigating individualized defenses); Mendoza v. Home Depot, USA, Inc.,
2 2010 WL 424679, at *10 (C.D. Cal. Jan. 21, 2010) (denying class certification where
3 variations in employee experiences made it appropriate to provide defendant
4 opportunity to raise individualized defenses).

5 Plaintiffs provide in their proposed trial plan that, once common questions
6 related to liability are answered in a “Stage One” proceeding, the Court can choose
7 from among four methods to ascertain the actual amount of unpaid detention time
8 experienced by individual class members as a question of damages in a “Stage Two”
9 proceeding.

10 To establish liability, Plaintiffs contend the following issue would need to be
11 resolved in the “Stage One” proceeding:

12 Whether, during the respective liability periods, Costco’s lockdown,
13 timecard, and compensation policies caused members of the Plaintiff
14 classes to perform work for which they were improperly compensated and
15 the amount and extent of that work “as a matter of just and reasonable
inference,” determined as the “reasonable time” taken for the activities
performed during the lockdown periods while employees were detained.

16 (ECF No. 210 at 6 (emphasis added) (citing, e.g., Anderson v. Mt. Clemens Pottery
17 Co., 328 U.S. 680, 687 (1946).) To establish this predicate to liability, Plaintiffs intend
18 to rely on “Costco’s Payroll and ATS databases containing the scheduled shifts, hours
19 worked, and wages paid to all class members”; “The study and report of time-and-
20 motion expert Jeffrey Fernandez measuring the time required to perform the activities
21 that had to take place while employees were being detained without pay”; and “A
22 database Costco represents to include records of cash register logouts.” The Court
23 rejects this approach.

24 Using Costco’s payroll and scheduling records, along with Costco’s cash register
25 data, one could infer that a number of employees who clocked out during a till pull
26 were detained without pay because of language in Costco’s Manuals requiring
27 warehouses to be secured during such pulls. However, such an inference is rebutted
28 by evidence of the discretion Costco managers had with regard to how often clocked-

1 out employees were permitted to leave once warehouses were locked down. Even if
2 managers were not vested with such discretion, Plaintiffs do not limit their claims to
3 unpaid detentions caused by Costco’s till-pull procedures. Plaintiffs include unpaid
4 detentions caused by, among other activities, Costco’s jewelry-pull procedures. And
5 there are no records—like the cash register logouts—that would permit an inference that
6 clocked-out employees were being detained during closing procedures.

7 As for the time-and-motion expert opinion, the Court disagrees that this is an
8 acceptable form of common proof of liability. Among other cases, Plaintiffs cite
9 McDonald v. Kellogg Co., 2011 WL 6372870, at *3 (D. Kan. Dec. 20, 2011), for the
10 proposition that reasonable estimates of the time required for all closing activities may
11 be used to determine whether the Alleged Policy caused employees to “perform work”
12 and also the “amount and extent of that work.” While such estimates might be able to
13 measure the amount and extent of any “work,” they may not be used to establish
14 liability. The McDonald court explained that such estimates were only available to use
15 as common proof “upon a liability determination.” Id. (emphasis added). There, all
16 employees were affected by a uniform policy in the same way; thus, none of the
17 liability issues in that case hinged on whether every employee experienced
18 uncompensated time. Here, by contrast, Plaintiffs have only established that the
19 Alleged Policy resulted in unpaid OTC time for some employees. Thus, liability issues
20 in this case will indeed turn on individualized inquiries.

21 The Court rejects Plaintiffs’ assertion that the approach used in Mt. Clemens can
22 be used here to establish, “as a matter of just and reasonable inference,” the average
23 frequency and length of detention time that the Alleged Policy caused. Again,
24 Plaintiffs put the damages cart before the liability horse. Mt. Clemens first requires
25 that an employee “prove[] that he has in fact performed work for which he was
26 improperly compensated.” Id. at 687. Accordingly, while the Mt. Clemens approach
27 may offer a classwide basis of proving damages, proving liability in this case first
28 requires individuals to show they performed uncompensated “work” as a result of the

1 Alleged Policy. See Gomez v. Tyson Foods, Inc., 2013 WL 5516189, at * (D. Neb.
2 Oct. 1, 2013) (“The relaxed burden [described in Mt. Clemens] applies only to
3 damages, not liability—it does not help plaintiffs show that there was a violation under
4 the FLSA; it only allows them to prove damages by way of estimate, if they had already
5 established liability.” (citing O’Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d 567,
6 602 (6th Cir.2009)).

7 Still, at least one court has certified a OTC class despite the existence of
8 individualized questions where the class was narrowly defined, consisted of about
9 1,300 members, and where there was evidence of a controlling company-wide policy.
10 See Jimenez, 2012 WL 1366052 at *19 (compiling cases). Here, while there is
11 evidence of a controlling company-wide policy, the California Class is, in the first
12 place, not narrowly defined and, in the second place, is comprised of approximately
13 30,000 individuals. As currently defined, the California Class includes anyone subject
14 to the Alleged Policy. Thus, at a minimum, the class would need to be redefined to
15 include employees who were not only subject to the Alleged Policy, but who also
16 experienced unpaid detention times as a result of the Alleged Policy. Defining the
17 California Class in this way, however, would—in essence—require a liability finding as
18 to each employee to determine whether he or she were even a member of the California
19 Class. And undertaking individualized inquiries as to approximately 30,000
20 individuals—even in a bifurcated proceeding as Plaintiffs propose—would result in the
21 common questions here being overcome by individualized inquiries. See O’Donnell
22 v. Robert Half Int’l, Inc., 250 F.R.D. 77, 81 (D. Mass. 2008) (concluding predominance
23 requirement unsatisfied where plaintiffs had presented no evidence to suggest that
24 determining whether every employee was subject to improper payroll deductions on
25 a class-wide basis).

26 This case is unlike Otsuka v. Polo Ralph Lauren Corp., 2010 WL 366653, where
27 every class member experienced the same type of unpaid detention as a result of Polo’s
28 companywide policy requiring its employees’ bags to be searched before leaving work.

1 It is also unlike Cervantez v. Celestica Corp., 253 F.R.D. 562, where every class
2 member experienced the same type of unpaid detention as a result of a companywide
3 policy requiring employees to pass through security before entering and leaving work.

4 This case is more like Koike v. Starbucks Corp., 378 Fed. App'x 659, where the
5 Ninth Circuit affirmed a district court's denial of class certification based on a finding
6 that "individualized factual determinations were required to determine whether class
7 members did in fact engage in OTC work and whether Starbucks had actual or
8 constructive knowledge of the OTC work performed." Id. at 661. This case is also
9 more like Cornn v. United Parcel Service, Inc., 2005 WL 2072091, where the district
10 court concluded Rule 23(b)(3) was not satisfied because individualized inquiries as to
11 whether each class member actually performed compensable work before his or her
12 recorded start time predominated over any common questions.

13 Based on the foregoing, the Court finds Costco has satisfied its burden of
14 demonstrating that Rule 23(b)(3)'s predominance requirement is no longer satisfied.
15 See Babineau v. Fed. Express Corp., 576 F.3d 1183, 1187 (11th Cir. 2009) (affirming
16 district court's finding that predominance requirement unmet in OTC case where
17 individualized inquiries were required to determine whether and why employees
18 arrived early or stayed late); Basco v. Wal-Mart Stores, Inc., 216 F. Supp. 2d 592, 601-
19 03 (E.D. La. 2002) (finding predominance requirement unmet in OTC case where
20 individualized issues would "arise from the myriad of possibilities that could be offered
21 to explain why any one of the plaintiffs worked off-the-clock."); Purnell v. Sunrise
22 Senior Living Mgmt., Inc., 2012 WL 1951487 (C.D. Cal. Feb. 27, 2012) (finding
23 predominance requirement unmet where (1) plaintiff offered no evidence of a
24 companywide policy of requiring employees to miss meal and rest breaks, and (2)
25 individualized inquiries required as to whether and why employees missed breaks);
26 Espenschild v. DirectSat USA, LLC, 2011 WL 2009967, at *5 (W.D. Wis. May 23,
27 2011) (decertifying class despite existence of uniform policies and practices because
28 evidence suggested success of plaintiffs' claims depended on how individual class

1 members responded to the numerous policies and practices at issue).

2 Because the Court finds Rule 23(b)(3)'s predominance requirement is no longer
3 satisfied, the Court does not address Costco's argument that Rule 23(b)(3)'s superiority
4 requirement is no longer satisfied. The Court thus goes on to determine whether the
5 FLSA Class should also be decertified.

6 **II. FLSA Collective Action**

7 **A. Legal Standard**

8 The FLSA provides that "no employer shall employ any of his employees . . . for
9 a workweek longer than forty hours unless such employee receives compensation for
10 his employment in excess of the hours above specified at a rate not less than one and
11 one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).
12 Section 16(b) of the FLSA provides that an employee may bring a collective action on
13 behalf of himself and other "similarly situated" employees. 29 U.S.C. § 216(b). In a
14 § 216(b) collective action, employees wishing to join the suit must "opt-in" in order to
15 be bound by the outcome of the collective action. Id.; Leuthold v. Destination Am.,
16 Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004).

17 The FLSA does not define the term "similarly situated," and there is no Ninth
18 Circuit precedent specifically interpreting the term. Adams v. Inter-Con Sec. Sys., Inc.,
19 242 F.R.D. 530, 536 (N.D. Cal. 2007). Rather, district courts employ a two-tiered
20 approach to decide whether collective treatment is appropriate. At the first-tier stage,
21 the court determines, "based primarily on the pleadings and any affidavits submitted
22 by the parties, whether the potential class should be given notice of the action." Smith
23 v. T-Mobile USA, Inc., 2007 WL 2385131, at *3 (C.D. Cal. Aug. 15, 2007). After
24 discovery is complete, the "more rigorous" second-tier analysis is designed to
25 determine whether the plaintiffs are "similarly situated" to justify proceeding as a
26 collective action. Leuthold, 224 F.R.D. at 467; T-Mobile, 2007 WL 2385131, at *7.
27 "The second-stage analysis, however, is still 'considerably less stringent than the
28 requirement of Rule 23(b)(3) that common questions predominate.'" Troy v. Kehe

1 Food Distributions, Inc., 276 F.R.D. 642, 649 (W.D. Wash. 2011) (quoting Grayson v. K
2 Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996)).¹¹ Whether certification of a § 216(b)
3 collective action is appropriate is within a district court's discretion. Leuthold, 224
4 F.R.D. at 466.

5 In her Certification Order, Judge Huff conditionally certified an FLSA collective
6 action and determined "Plaintiffs ha[d] presented sufficient allegations of Costco's
7 official centralized policy affecting its hourly employees." (See ECF No. 104 at 6.)
8 Judge Huff further determined that, because discovery was ongoing, the second-stage
9 analysis should be reserved for a later date. (Id.) Judge Huff therefore directed that
10 notice be sent to Costco employees to determine whether they wanted to opt into the
11 collective action. (Id.) Following dissemination of the FLSA notice, slightly over
12 1,500 Costco employees submitted forms to opt into the collective action. (See ECF
13 Nos. 116, 117, 118, 121, 122.)

14 Discovery has concluded, and this case is now at the second stage of the
15 "similarly situated" analysis. See Beauperthuy v. 24 Hour Fitness USA, Inc., 772 F.
16 Supp. 2d 1111, 1118 (N.D. Cal. 2011) (citing Reed v. Cnty. of Orange, 266 F.R.D. 446,
17 449 (C.D. Cal. 2010)). At this stage, "it is plaintiffs' burden to provide substantial
18 evidence to demonstrate that they are similarly situated." Reed 266 F.R.D. at 449. In
19 deciding whether plaintiffs have met their burden, courts consider: "(1) the disparate
20 factual and employment settings of the individual plaintiffs; (2) the various defenses
21 available to defendants with respect to the individual plaintiffs; and (3) fairness and
22 procedural considerations." Beauperthuy, 772 F. Supp. 2d at 1118 (citing Reed, 266
23

24 ¹¹ Contrary to Costco's position, this Court finds no controlling authority stating that the Rule
25 23 commonality analysis that the Supreme Court articulated in Dukes must inform a district court's
26 application of the FLSA's "similarly situated" standard. Indeed, the cases Costco cites for this
27 proposition were each decided before the Supreme Court decided Dukes. While there may be
28 similarities between Rule 23's commonality standard and the FLSA's "similarly situated" standard,
the standards are separate and distinct. See, e.g., Troy, 276 F.R.D. at 651 ("[C]ourts have made clear
that the FLSA's 'similarly situated' requirement is less demanding than the Rule 23 commonality
requirement that was at issue in Dukes."); Houston, 591 F. Supp. 2d at 832 (E.D. Va. 2008) ("[C]ourts
have observed that the requirements for class certification of a collective action under FLSA are
similar, but not identical, to those that pertain to certification of a class under [Rule] 23.").

1 F.R.D. at 449).

2 **B. Analysis**

3 **1. Factual & Employment Settings**

4 Costco asserts the opt-in claimants worked different shifts, performed different
5 job duties, worked at different warehouses, and reported to different managers. Costco
6 thus reiterates that liability would hinge on factors related to when the last customer
7 left each day, when employees clocked out, whether employees were permitted to exit
8 after clocking out, and whether employees were detained for a compensable time.

9 In response, Stiller argues that Costco’s companywide, uniformly enforced
10 policy of detaining employees during closing procedures without pay renders
11 immaterial any marginal differences in the opt-in claimants’ factual and employment
12 settings.

13 The Court has found that Plaintiffs have offered substantial evidence of a
14 companywide, uniformly enforced policy of detaining employees during closing
15 procedures without pay (i.e., the Alleged Policy). The Court has also found, however,
16 that the Alleged Policy did not always result in employees being detained without pay.
17 Rather, the Alleged Policy only resulted in some employees being detained without
18 pay. Thus, while examining the existence and effect of the Alleged Policy may provide
19 answers to questions that are central to this case (e.g., whether the Alleged Policy
20 resulted in Costco’s control over employees and whether Costco knew the Alleged
21 Policy caused employees to be detained without pay), the Court agrees with Costco that
22 differences in the way managers implemented the Alleged Policy require individualized
23 inquiries to establish liability. The Court finds these differences weigh against a
24 finding that the opt-in claimants are “similarly situated.”

25 **2. Individualized Defenses**

26 Costco contends that each of its defenses—that any unpaid detention time was
27 de minimis, that the statute of limitations has run as to some instances of unpaid
28 detention time, and the possible lack of credibility of each opt-in plaintiff—requires

1 individualized determinations.

2 Stiller argues in response that Costco’s defenses are susceptible to common
3 proof under the Mt. Clemens model of representative proof.

4 The Court has already determined that the Mt. Clemens model may only be used
5 to calculate damages. (See n.14, above.) And, under the FLSA, the de-minimis rule
6 is a defense to liability. See Lindlow v. United States, 738 F.2d 1057, 1061-62 (9th
7 Cir. 1984) (“As a general rule, employees cannot recover for otherwise compensable
8 time if it is de minimis.”). Still, where employees report a common experience—such
9 as donning/doffing without pay—the issue of whether the time employees spent
10 engaged in that experience was de-minimis may be determined by common proof. See
11 Reed, 266 F.R.D. at 464 (finding de-minimis defense in donning/doffing case subject
12 to common proof); Wren v. RGIS Inventory Specialists, 256 F.R.D. 180, 213 (N.D.
13 Cal. 2009) (same). In contrast, operation of the Alleged Policy in this case only
14 sometimes resulted in employees being detained during closing procedures without
15 pay. Thus, whether the opt-in claimants performed uncompensated work as a result of
16 the Alleged Policy depends on several individualized facts, including whether any
17 uncompensated work was de minimis. In the same vein, the Court finds Costco should
18 have the opportunity to determine whether individual opt-in claimants are being
19 truthful about experiencing unpaid detention time as a result of the Alleged Policy.

20 Conversely, the Court finds Costco’s statute-of-limitations defense may be
21 determined on a collective basis. The statute of limitations for an FLSA claim is
22 extended from two to three years where the FLSA violation was willful. 29 U.S.C. §
23 255(a). Because Plaintiffs have offered substantial evidence that the Alleged Policy
24 existed and sometimes resulted in unpaid detention time, the Court finds the issue of
25 whether Costco willfully implemented the Alleged Policy, knowing it resulted in
26 unpaid detention time, may be resolved on a collective basis.

27 3. Fairness & Procedural Considerations

28 Costco argues a collective trial would be unfair because only individualized

1 proof can establish liability and common proof of damages is entirely absent. Costco
2 asserts that relying on experts to establish liability and damages would result in a “trial
3 by formula” that would strip Costco of its right to mount individualized defenses.
4 Costco claims that, even if one could find representative proof, Costco would still be
5 unable to put on a defense through representative proof because each claim of unpaid
6 waiting time would require individualized scrutiny.

7 In response, Stiller argues that fairness and procedural considerations favor
8 continued certification because determining whether Costco’s policies violate wage and
9 hour laws will lower the burden on individual claimants, whose recovery would be
10 relatively low compared to the cost of individual litigation. Stiller also argues that
11 separate trials would be the worst possible outcome in terms of judicial efficiency.

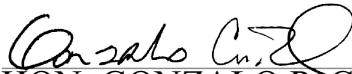
12 While continued FLSA certification would conserve judicial resources and
13 significantly lower the burden on individual opt-in claimants, the Court cannot escape
14 the fact that Plaintiffs have failed to offer a viable method of establishing liability on
15 a classwide basis. See Disc. § I(B)(2)(ii), above (finding individualized inquiries
16 predominate over common questions under the more exacting Rule 23(b)(3)). The
17 Court thus finds that procedural concerns weigh against continued certification.

18 Having considered the foregoing factors, the Court finds they weigh in favor of
19 concluding that Stiller and each of the opt-in claimants are not “similarly situated.”
20 The Court will therefore decertify the FLSA Class.

21 **CONCLUSION & ORDER**

22 Based on the foregoing, **IT IS HEREBY ORDERED** that Costco’s Motion to
23 Decertify, (ECF No. 146), is **GRANTED**. Both the California Class and the FLSA
24 Class are hereby **DECERTIFIED**.

25 DATED: April 15, 2014

26 
27 HON. GONZALO P. CURIEL
28 United States District Judge