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

GINA BALASANYAN; NUNE  
NALBANDIAN, on behalf of themselves  
all others similarly situated,

Plaintiffs,

v.

NORDSTROM, INC., a Washington  
corporation; and DOES 1-100, inclusive,

Defendants.

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GINO MARAVENTANO; and NEESHA  
KURJI,

Plaintiffs,

v.

NORDSTROM, INC., a Washington  
corporation; and DOES 1-100, inclusive,

Defendants.

Case Nos. 3:11-cv-2609-JM (WMC)  
3:10-cv-2671-JM (WMC)

**ORDER GRANTING  
PLAINTIFFS’ MOTIONS FOR  
CLASS CERTIFICATION OF  
THE PROPOSED  
CALIFORNIA CLASSES,  
DENYING PLAINTIFFS’  
MOTION FOR  
CERTIFICATION OF THE  
NATIONWIDE CLASS, AND  
STRIKING BOEDEKER’S  
REPORT**

On March 6, 2013, plaintiffs Gino Maraventano, Neesha Kurji, Gina Balasanyan, and Nune Nalbandian (together, “Plaintiffs”) filed a motion to certify classes in two proposed class action lawsuits, Case No. 3:11-cv-2609 (“Balasanyan”) and Case No. 3:10-cv-2671 (“Maraventano”) against Nordstrom,

1 Inc. (“Nordstrom”). The Balasanyan complaint was originally filed in Los  
2 Angeles Superior Court on April 5, 2011, then removed to federal court, and later  
3 transferred to this district on November 9, 2011. The Maraventano complaint  
4 was originally filed in San Diego Superior Court, North County, in October 2010  
5 and was removed to this court in December 2010. For the reasons stated below,  
6 the motions for certification are granted for the proposed California classes and  
7 subclass and denied for Balasanyan’s proposed nationwide class. In addition, the  
8 Boedeker Declarations (Maraventano, Dkt. 99, Attachment 5; Balasanyan, Dkt.  
9 91, Attachment 8), which were submitted by Nordstrom, are stricken for failure  
10 to comply with Magistrate Judge William McCurine, Jr.’s orders requiring that  
11 expert reports be disclosed by January 18, 2013 (Balasanyan, Dkt. 71as modified  
12 by Maraventano, Dkt. 78).

## 13 **I. BACKGROUND**

### 14 ***A. Nordstrom’s Compensation Structure***

#### 15 **1. Commission Compensation with Minimum Draw Guarantee**

16 Nordstrom’s salespeople are paid on commission rather than at an hourly  
17 rate. Maraventano First Amended Complaint (“MFAC”) ¶ 11. However,  
18 Nordstrom’s salespeople are guaranteed a “minimum draw,” or an average  
19 pre-determined hourly rate, whether or not they sell merchandise. Maraventano  
20 Motion for Class Certification (“MMCC”) at 2. Nordstrom calculates each  
21 salesperson’s commissions at the end of each period and compares their  
22 commissions with the guaranteed minimum draw that they would have received  
23 had they been working at an hourly rate. MFAC ¶ 21; Balasanyan Second  
24 Amended Complaint (“BSAC”) ¶¶ 12-15. If a given employee’s commissions  
25 per selling hour equals or exceeds their guaranteed minimum, Nordstrom pays

1 commissions. MFAC ¶ 21; BSAC ¶ 51. If that employee's commissions per  
2 selling hour do not equal or exceed the guaranteed minimum draw rate,  
3 Nordstrom pays the employee with his or her commission plus the amount  
4 necessary to bring them to the guaranteed minimum draw rate for all sell time.  
5 MFAC ¶ 21; BSAC ¶ 51. For example, if the minimum draw rate was \$10.85 per  
6 hour and the employee was working 10 hours, an employee would need to make  
7 over \$108.50 in commissions to be paid solely on commissions and earn above  
8 the minimum draw. Otherwise, the employee would be paid \$10.85 per hour for  
9 his or her time.

## 10 **2. Pre-Opening and Post-Closing Hours**

11 Sell time can include up to 40 minutes of pre-opening and post-closing  
12 time. MFAC ¶¶ 14-18; BSAC ¶¶ 12-15. Pre-opening and post-closing activities  
13 include writing thank you notes to customers, addressing invitations to customers  
14 regarding upcoming sales events, calling customers to thank them for their  
15 business, attending store rallies and certain meetings, walking the sales floor to  
16 familiarize him or herself with merchandise, putting away shoes that customers  
17 did not purchase, putting shoes on display, organizing mismatched shoes, taking  
18 tissue paper out of shoes, and cleaning and dusting tables on the sales floor.

19 Plaintiffs claim that they were unable to make sales during the pre-opening  
20 and post-closing hours included in sell time because the stores were not open and  
21 that this time should have therefore been considered non-sell time.<sup>1</sup> However,  
22

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23 <sup>1</sup> By including additional time as sell time, Plaintiffs also needed to sell slightly more  
24 merchandise to meet the minimum draw rate. Though the difference needed to surpass the  
25 minimum draw rate was likely small, this difference would have been provided to Plaintiffs in  
addition to an hourly rate for the pre-opening or post-closing time. For example, if a salesperson  
worked 8.67 hours, .67 hours of which was pre-opening time, at a minimum draw rate of

1 Nordstrom claims that its doors are generally open 10 minutes before the posted  
2 opening time and closed 10 minutes after the posted closing time. MMCC at 4;  
3 Balasanyan Motion for Class Certification (“BMCC”) at 4. Plaintiffs dispute this  
4 claim. MMCC at 4; BMCC at 4. But even if Nordstrom stores opened 10  
5 minutes before posted opening and closed 10 minutes after posted closing,  
6 Plaintiffs explain that they were purportedly still unable to earn commissions  
7 during the additional 30 minutes that they were required to work before opening  
8 or after closing. MMCC at 4.

### 9 **3. Stock Assignments**

10 In addition to pre-opening and post-closing hours, sell time can include up  
11 to 30 minutes of daily stock assignments. MFAC ¶ 21; BSAC ¶ 12. Managers  
12 give stock assignments during pre-opening and post-closing time as well as  
13 during store operating hours. BMCC, Nalbandian Decl. ¶ 11; Answer to BSAC  
14 ¶ 13 (conceding that stock assignments “sometimes occur before the store doors  
15 open to the public or after the store is closed to the public”). Plaintiffs further  
16 allege that stock assignments occurred each shift and lasted, on average, between  
17 fifteen (15) and forty-five (45) minutes. BMCC, Boenzi Decl. ¶ 6; BMCC,  
18 Nalbandian Decl. ¶ 11; BMCC, Balasanyan Decl. ¶ 13.

19 Stock assignments may include “checking merchandise, preparing the sales  
20 floor, opening and closing registers, putting away and taking out merchandise  
21

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22  
23 \$10.85, she would need to sell enough to make more than \$94.07 in commissions before being  
24 paid on commission and in excess of the minimum draw rate. If the .67 hours of pre-opening  
25 time was excluded, then she would need to make more than \$86.80 in commissions and would  
have also earned an additional \$7.27 of non-sell time pay. So if she had earned anything above  
\$86.80 in commissions, that salesperson was owed additional wages, up to \$7.27, under  
Plaintiffs’ theory.

1 onto the sales floor and picking up or dropping off alterations, along with a  
2 variety of other sales-related activities.” Answer to BSAC ¶ 13. By Nordstrom’s  
3 own definition, salespeople are not available to service customers during these  
4 assignments.<sup>2</sup> MMSJ, Ex. 9 at 21. Accordingly, Plaintiffs claim that they were  
5 precluded from making any sales during stock assignments. BSAC ¶ 35.  
6 However, Plaintiffs’ numerous declarations vary widely in this regard.<sup>3</sup>

7 While Nordstrom’s official policy provides that salespeople may be asked  
8 to perform up to 30 minutes of stocking per shift, compensated only with  
9 commission, Nordstrom insists that stock assignments do not preclude employees  
10 from making sales and are not uniformly assigned once per shift.<sup>4</sup> Opp. BMCC  
11 at 6:3-17; Opp. BMCC at 13:2-8. In fact, Nordstrom insists stock assignments  
12 come second to assisting customers and occur only infrequently if at all. Id.  
13 Nordstrom claims that many draw commission employees do not receive stock

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16 <sup>2</sup> Nordstrom defines stock assignments as follows: “Stock assignments are considered part of the  
17 selling process and are included in the calculation of your sales per hour. You may be asked to  
18 spend up to thirty (30) minutes of selling time for a stock assignment during your scheduled  
19 shift, which is inclusive of any time before or after store hours. Normal department maintenance  
20 during which you are still available to service the customer, does not count towards these thirty  
21 (30) minutes.” MMSJ, Blumenthal Decl., Ex. F (Excerpt from Nordstrom’s “Fruit of Your  
22 Labor” packet).

23 <sup>3</sup> BMCC, Nalbandian Decl. ¶ 11 (“I estimate that on average I spend between fifteen (15) and  
24 forty-five (45) minutes on stock assignments per shift.”); BMCC, Balasanyan Decl. ¶ 13 (“I  
25 regularly spend between fifteen (15) and forty-five (45) minutes performing stock assignments.  
If I am assigned an opening or closing shift, I spend another forty (40) minutes engaging in  
stock assignments.”); BMCC, Boenzi Decl. ¶ 9 (“During each shift, I would perform more than  
thirty (30) minutes of stock assignments, and at times I would spend up to one (1) hour per shift  
on stock assignments.”); BMCC, Mahdi Decl. ¶ 6 (“I would routinely spend between forty-five  
(45) minutes and one (1) hour each shift performing these stock[] assignments.”).

<sup>4</sup> Nordstrom generally refers to stock assignments as “daily duties” but does not admit that  
assignments are uniformly assigned. Answer to SAC ¶ 12.

1 assignments and that the assignments vary greatly from department to department  
2 in terms of frequency, duration, and tasks performed.<sup>5</sup>

#### 3 **4. Non-Sell Time**

4 Nordstrom’s policy provides that employees should be compensated at an  
5 hourly rate for all non-sell time, which includes pre-opening and post-closing  
6 activities in excess of 40 minutes, stock assignments in excess of 30 minutes, and  
7 meetings.<sup>6</sup> MFAC ¶ 21; BSAC ¶ 16. Specifically, Nordstrom policy states that  
8 “[m]eetings are considered non-sell hours. This means meetings are paid at [an  
9 employee’s] non-sell hourly rate and are not included in the calculation of [that  
10 employee’s] commission.” BMCC, Ex. 5 at 82.

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13  
14 <sup>5</sup> Opp. BMCC, Rezkalla Decl. ¶ 22 (“I do not give ‘stock assignments.’ The St. John  
15 department does not have a large back stock room where we store merchandise, like some  
16 departments. Most of our merchandise is on the sales floor. The tasks St. John salespeople  
17 perform when customers are not present generally takes place on the sales floor or are for just a  
18 short period of time in the back area.”); *Id.* ¶ 23 (“I tell my sales team to prioritize customers  
19 who need help over other tasks that can be done at another time. No one on my sales team  
20 should fail to greet a customer who is on the floor or assist a customer who calls because they  
21 are working on some other task.”); Opp. BMCC, Bodaken Decl. ¶ 21 (“I do not give out ‘stock  
22 assignments.’ We do not sell merchandise that we keep in a back stock room in the same way  
23 that a shoe or handbag department might.”); *Id.* ¶ 24 (“I tell my team regularly that customers  
24 who are present in the department (or on the phone) are the top priority over other tasks. None  
25 of their work tasks on selling time should ever interfere with or prevent a salesperson from  
immediately greeting and assisting a customer.”); Opp. BMCC, King Decl. ¶ 5 (“When I was  
the Department Manager, I did not give . . . stock assignments every day and never gave stock  
assignments that lasted 30 or more minutes. I only gave out stock assignments periodically  
when needed.”); *Id.* ¶ 7 (“I put a 15-minute cap on stock assignments.”).

<sup>6</sup> The parties refer to meetings by a variety of terms (including “department meetings,” “the  
United Way meeting,” “the State of the Company meeting,” “Annual Performance Reviews,”  
“pay period chats,” business reviews,” “opportunity checks,” and “coaching conversations”) but  
do not clarify the distinctions. Opp. BMCC, Gonzalez Decl. ¶¶ 11-15; BMCC, Ex. 5 at 13,  
52-53. It is unclear whether the term “staff meetings,” which the Balasanyan Plaintiffs used in  
their second amended complaint, encompasses all or only some of the aforementioned meetings.

1           However, the Balasanyan Plaintiffs claim that Nordstrom violated its own  
2 policy by regularly requiring employees to attend “staff meetings” and to perform  
3 stock assignments and pre-opening and post-closing assignments without  
4 allowing them to clock-in at their hourly rates. Specifically, the Balasanyan  
5 Plaintiffs allege that they are regularly required to be away from the sales floor to  
6 attend fifteen (15) to twenty (20) minute evening staff meetings. BSAC ¶ 15.  
7 Although Nordstrom encourages meetings, it does not appear to have a specific  
8 policy specifying the frequency or duration of these meetings. Some meetings, at  
9 least, appear to be at the discretion of store managers. Opp. BMCC, Arias Decl.  
10 ¶ 13 (“The company recently shifted to encouraging managers to have more  
11 detailed, but less frequent, business reviews in place of pay period chats.”).  
12 Moreover, the parties failed to provide information about the frequency or  
13 duration of any other meetings and to clarify which meetings qualify for non-sell  
14 time and why.

15           Plaintiffs also do not specify how often stock assignments exceeded 30  
16 minutes, whether these extended assignments were properly recorded as non-sell  
17 time, or whether managers across all stores regularly prohibited employees from  
18 recording the assignments as non-sell time. Plaintiffs have also failed to provide  
19 any evidence indicating that managers regularly prohibited employees from  
20 recording meetings as non-sell time.

21           ***B. Maraventano Named Plaintiffs***

22           Maraventano worked as a draw commission salesperson in the women’s  
23 shoes department of Nordstrom’s store in Escondido, California from October  
24 2006 until June 2009. MMCC at 2. Kurji worked as a draw commission  
25 salesperson in the lingerie department of Nordstrom’s store in Irvine, California

1 from October 2010 until December 2010. Id. at 2. Pursuant to Nordstrom’s  
2 aforementioned compensation structure, Nordstrom paid Maraventano and Kurji  
3 for all designated sell time with commissions and for all designated non-sell time  
4 at an hourly rate. Id. at 3.

5 ***C. Balasanayan Named Plaintiffs***

6 Balasanayan has worked as a draw commission salesperson in the St. John’s  
7 department of Nordstrom’s stores in Santa Anita and Glendale, California since  
8 2004. BMCC at 13. Similarly, Nalbandian has worked as a draw commission  
9 salesperson in the men’s department of Nordstrom’s store in Glendale, California  
10 since 2004. Id. Both are current employees. Id. Nordstrom also paid  
11 Balasanayan and Nalbandian according to the previously discussed  
12 commission-based compensation structure. Id.

13 ***D. Proposed Classes***

14 The Maraventano Plaintiffs wish to certify a class that includes “all  
15 persons employed by Nordstrom within the state of California from October 20,  
16 2006 through the date of the trial who were or are paid on a draw commission  
17 basis” (the “Maraventano Class”). MMCC at 6.

18 The Balasanayan Plaintiffs wish to certify at least two classes and one  
19 subclass:

- 20 1. A class of all draw commission salespersons employed by Nordstrom  
21 within the state of California from October 20, 2006 through the date of  
22 trial (“California Class Period”) who were or are paid on a draw  
23 commission basis (the “Balasanayan California Class”).
- 24 2. As it is possible that some employees never worked a closing or opening  
25 shift and thus never participated in pre-opening or post-closing duties, a  
subclass of the first class of all draw commission salespersons employed  
by Nordstrom within the state of California during the California Class



1 Period who were or are paid on a draw commission basis for activities  
2 performed *during* store operating hours class (the “the Balasanyan  
3 California Subclass,” and together with the Maraventano Class and the  
4 Balasanyan California Class, the “California Classes”); and

- 5 3. A class of all draw commission salespersons employed by Nordstrom  
6 nationwide from April 5, 2007 through the date of trial (“Nationwide Class  
7 Period”) who were or are paid on a draw commission basis (the  
8 “Nationwide Class Members”).<sup>7</sup>

9 BMCC at 3-4.

### 10 *E. Maraventano and Balasanyan Claims*

11 The proposed Maraventano Class is composed only of California  
12 employees. The MFAC alleges that Nordstrom did not pay employees for  
13 “stocking time . . . unless they failed to meet their minimum commission draw.”

14 <sup>7</sup> The Balasanyan Plaintiffs alternatively propose that the Nationwide Class can be divided into  
15 and certified as subclasses based on the seven applicable statute of limitations, as follows:

16 (1) from April 5, 2010 to the present date (if within the state of  
17 Arizona);

18 (2) from April 5, 2008 to the present date (if within the states  
19 Alaska, Colorado, Delaware, Maryland, or North Carolina);

20 (3) from April 5, 2007 to the present date (if within the states of  
21 California, Pennsylvania or Texas);

22 (4) from April 5, 2006 to the present date (if within the states of  
23 Florida, Kansas, Missouri, or Virginia);

24 (5) from April 5, 2005 to the present date (if within the states of  
25 Connecticut, Georgia, Hawaii, Massachusetts, Michigan,  
Minnesota, Nevada, New Jersey, New York, Oregon, Tennessee,  
Utah or Washington);

(6) from April 5, 2003 to the present date (if within the state of  
Ohio); and

(7) from April 5, 2001 to the present date (if within the states of  
Illinois, Indiana or Rhode Island).

BMCC at 2.

1 MFAC ¶ 21. The Maraventano Plaintiffs define “stocking time” to include stock  
2 assignments “performed prior to the store opening, during certain shifts, and/or  
3 after a sales shift.” It states four causes of action: (1) violation of California  
4 Labor Code § 1197; (2) violation of California Labor Code §§ 201-203; (3)  
5 willful violation of California Labor Code § 226; and (4) unfair business  
6 practices under California Business & Professions Code § 17200 *et seq.*

7 The Balasanyan complaint alleges that Nordstrom has underpaid its  
8 salespeople across the country by only compensating them for time spent on  
9 stock assignments, pre-opening, and post-closing periods through commissions  
10 earned, which they believe can only be used to compensate for commission  
11 producing activities. BSAC ¶¶ 13, 14. The noncommission-producing activities  
12 include performing marketing activities such as contacting customers to inform  
13 them of new product lines. *Id.* According to the BSAC, “[t]he combined time  
14 [Balasanyan] Plaintiffs and Class Members are required to engage in  
15 noncommission-producing activities totals at least one (1) hour and thirty (30)  
16 minutes per work shift” for which there is no compensation. *Id.* ¶ 16. The BSAC  
17 states six causes of action: (1) nonpayment of wages under California Labor  
18 Code § 1194; (2) nonpayment of wages under 29 U.S.C. § 206 (the Fair Labor  
19 Standards Act, or “FLSA”); (3) breach of contract; (4) declaratory relief under  
20 California Code of Civil Procedure § 1060; (5) ) unfair business practices under  
21 California Business & Professions Code § 17200 *et seq.*; and (6) a PAGA claim  
22 under California Labor Code § 2699. The Balasanyan FLSA claim was later  
23 dismissed by this court. *See* Dkt. 76.

24 The Balasanyan Plaintiffs assert only the breach of contract claim on  
25 behalf of the proposed Nationwide Class, though the Balasanyan Plaintiffs had

1 previously sought to assert the now dismissed FLSA on behalf of the Nationwide  
2 Class. The Balasanyan Plaintiffs allege that Nordstrom breached its contracts  
3 with their salespeople by failing to compensate them for stock assignments  
4 lasting more than 30 minutes and meetings by compensating that work only  
5 through commissions and not the non-sell time hourly rate. The Balasanyan  
6 Plaintiffs' proposed California classes assert all other claims as well as the breach  
7 of contract claim.

## 8 **II. LEGAL STANDARD**

9 "The class action is 'an exception to the usual rule that litigation is  
10 conducted by and on behalf of the individual named parties only.'" Wal-Mart  
11 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (citing Califano v. Yamasaki,  
12 442 U.S. 682, 700-01 (1979)). To qualify for the exception to individual  
13 litigation, the party seeking class certification must provide facts sufficient to  
14 satisfy the requirements of Federal Rules of Civil Procedure 23(a) and (b). See  
15 Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001);  
16 Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977). Rule  
17 23(a) requires Plaintiffs to demonstrate that: (1) the class is so numerous that  
18 joinder of all members is impracticable; (2) there are questions of law or fact  
19 common to the class; (3) the claims or defenses of the representative parties are  
20 typical of the claims or defenses of the class; and (4) the representative parties will  
21 fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a).

22 Rule 23(b)(3) requires the court to find that the questions of law or fact  
23 common to class members predominate over any questions affecting only  
24 individual members, and that a class action is superior to other available methods  
25 for fairly and efficiently adjudicating the controversy. See Fed. R. Civ. P.

1 23(b)(3). The court considers “the capacity of a classwide proceeding to generate  
2 common answers apt to drive the resolution of the litigation. Dissimilarities  
3 within the proposed class are what have the potential to impede the generation of  
4 common answers.” Wal-Mart Stores, Inc., 131 S. Ct. at 2551 (quoting Richard A.  
5 Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev.  
6 97, 131 (2009)). The district court must conduct a rigorous analysis to determine  
7 whether the prerequisites of Rule 23 have been met. See Gen. Tel. Co. v. Falcon,  
8 457 U.S. 147, 161 (1982). It is a well-recognized precept that “the class  
9 determination generally involves considerations that are enmeshed in the factual  
10 and legal issues comprising the plaintiff’s cause of action.” Wal-Mart Stores, Inc.,  
11 131 S. Ct. at 2551-52 (quoting Falcon, 457 U.S. at 160). “The district court is  
12 required to examine the merits of the underlying claim in this context [class  
13 certification], only inasmuch as it must determine whether common questions  
14 exist; not to determine whether class members could actually prevail on the merits  
15 of their claims.” Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983 n.8 (9th Cir.  
16 2011) (citations omitted). Rather, the court’s review of the merits should be  
17 limited to those aspects relevant to making the certification decision on an  
18 informed basis. See Fed. R. Civ. P. 23 advisory committee notes. The court must  
19 consider the merits if they overlap with the Rule 23 requirements. See Ellis, 657  
20 F.3d at 981 (citing Wal-Mart Stores, Inc., 131 S. Ct. at 2551-52; Hanon v.  
21 Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992)). If a court is not fully  
22 satisfied that the requirements of Rules 23(a) and (b) have been met, certification  
23 should be refused. See Falcon, 457 U.S. at 161.

1           **III. DISCUSSION**

2           ***A. Rule 23(a) Class Certification Requirements***

3           **1. Numerosity**

4           Rule 23(a)(1) requires the proposed class to be “so numerous that joinder of  
5 all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “Impracticability does  
6 not mean impossibility,” rather the inquiry focuses on the difficulty or  
7 inconvenience of joining all members of the class. Harris v. Palm Springs Alpine  
8 Estates, Inc., 329 F.2d 909, 913-14 (9th Cir. 1964). In determining whether  
9 numerosity is satisfied, the court may consider reasonable inferences drawn from  
10 the facts before it. See Gay v. Waiters’ & Dairy Lunchmen’s Union, 549 F.2d  
11 1330, 1332 n.5 (9th Cir. 1977) (citing Senter v. General Motors Corp., 532 F.2d  
12 511, 523 (6th Cir. 1976)). A proposed class is ascertainable for class certification  
13 if it “identifies a group of unnamed plaintiffs by describing a set of common  
14 characteristics sufficient to allow a member of that group to identify himself as  
15 having a right to recover based on the description.” Estrada v. FedEx Ground  
16 Package System, Inc., 154 Cal. App. 4th 1, 14-15 (2007) (citing Bartold v.  
17 Glendale Fed. Bank, 81 Cal. App. 4th 816, 828 (2000)).

18           Plaintiffs indicate that the proposed Maraventano Class, the Balasanyan  
19 California Class and Subclass Members, and the Nationwide Class Members  
20 appear to include over 20,000 individuals employed by Nordstrom during the  
21 California Class Period who were or are paid on a draw commission basis.  
22 MMCC at 11; BMCC at 10. The proposed Nationwide Class allegedly includes  
23 an additional 60,000 employees. BMCC at 10. These numbers far exceed the  
24 level of practicable joinder.

1 Nordstrom counters that these classes are overbroad and thus not  
2 ascertainable because there is no reliable way to identify which salespeople  
3 engaged in tasks that precluded them from making sales while on sell time.  
4 MMCC, Blumenthal Decl. ¶ 16; BMCC, Blumenthal Decl. ¶ 16. Yet,  
5 Nordstrom’s own policy on stocking time compensated employees separately for  
6 stock assignments lasting more than 30 minutes, thereby recognizing that stock  
7 assignments might preclude employees from making sales. This argument also  
8 does not address Plaintiffs’ pre-opening and post-closing time claims.

9 Here, the class description sufficiently identifies common characteristics so  
10 that members may easily identify themselves. And, as Nordstrom’s internal  
11 system categorizes all employees by specific position title, Nordstrom may check  
12 the supposed class members against its own records. BMCC at 10-11 (citing  
13 Shamtoub Decl., Ex. 3 Blumenthal Deposition 2.28 at 50:21-51:5; 53:1-2; 54:1-8;  
14 56:3-6). The large size of the proposed classes renders individual joinder  
15 impracticable. Plaintiffs have therefore satisfied this requirement.

## 16 **2. Commonality**

17 “Commonality requires the plaintiff to demonstrate that the class members  
18 ‘have suffered the same injury.’” Wal-Mart Stores, Inc., 131 S. Ct. at 2551  
19 (quoting Falcon, 457 U.S. at 157). This “does not mean merely that they have all  
20 suffered a violation of the same provision of law.” Wal-Mart Stores, Inc., 131 S.  
21 Ct. at 2551. The “claims must depend on a common contention” and “[t]hat  
22 common contention . . . must be of such a nature that it is capable of classwide  
23 resolution - - which means that determination of its truth or falsity will resolve an  
24 issue that is central to the validity of each one of the claims in one stroke.” Id.  
25 “The existence of shared legal issues with divergent factual predicates is sufficient

1 [to satisfy commonality], as is a common core of salient facts coupled with  
2 disparate legal remedies within the class.” Hanlon v. Chrysler Corp., 150 F.3d  
3 1011, 1019 (9th Cir. 1998). “All questions of fact and law need not be common to  
4 satisfy the rule.” See id. Rather, commonality is satisfied “if the named plaintiffs  
5 share at least one question of fact or law with the grievances of the prospective  
6 class.” See Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010) (citing Baby  
7 Neal for & by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)).

#### 8 **a. California Classes**

9 Plaintiffs explain that the shared legal issue is whether Nordstrom may  
10 compensate draw commission employees with commissions for pre-opening and  
11 post-closing work and stock assignments performed during store hours because  
12 they cannot earn commissions during these times. MFAC ¶¶ 14-18; BSAC  
13 ¶¶ 12-15. As a result, Plaintiffs explain that they have suffered the same injury,  
14 underpayment, due to Nordstrom’s allegedly improper commission compensation  
15 structure. Plaintiffs assert that the common questions of fact and law include but  
16 are not limited to whether Nordstrom: (1) maintains a uniform written commission  
17 plan applicable to all draw commission employees; (2) directly compensates draw  
18 commission employees for each hour worked; (3) fails to directly compensate  
19 draw commission employees for each hour worked by way of its commission  
20 compensation structure; and (4) violates California minimum wage law by failing  
21 to directly compensate employees for pre-opening hours, post-closing hours,  
22 and/or stock assignments. BMCC at 12.

23 Nordstrom argues that Plaintiffs have failed to show commonality for the  
24 California Classes because the claims falsely presume that salespeople are  
25 precluded from selling during pre-opening and post-closing hours and stock

1 assignments during store hours. Opp. BMCC at 1. Nordstrom further argues that  
2 Plaintiffs have failed to show commonality because liability turns on  
3 individualized facts, such as possible variations in whether an employee actually  
4 sold products during pre-opening, post-closing, or stocking time. Opp. BMCC at  
5 8-9. Clarification, Nordstrom asserts, would require individual determinations for  
6 each salesperson, resulting in tens of thousands of mini-trials. Opp. BMCC at  
7 9-10.

8         The court finds that the dispute turns on matters that apply to the class as a  
9 whole, not on individualized facts. Nordstrom’s policy is undisputed. The  
10 common question is whether salespeople were able to sell to customers during  
11 pre-opening, post-closing, and stocking time, and consequently whether they  
12 should be compensated for that time with commissions as opposed to a separate  
13 hourly rate. Before stores open and after stores close, salespeople appear to have  
14 a significantly impaired ability to sell to customers. Similarly, salespeople may  
15 have a difficult time selling to customers when they are not available to  
16 customers. Minor variations on a theme, such as the precise activities that  
17 salespeople were engaging in when they were unavailable to customers either  
18 because the store was closed or they were completing a stock assignment, should  
19 not contain the seeds of destruction for a putative class. See Hanlon, 150 F.3d at  
20 1019 (“The existence of shared legal issues with divergent factual predicates is  
21 sufficient [to satisfy commonality] . . .”). In fact, “class determination generally  
22 involves considerations that are enmeshed in the factual and legal issues  
23 comprising the plaintiff’s cause of action.” Wal-Mart Stores, Inc., 131 S. Ct. at  
24 2551-52 (quoting Falcon, 457 U.S. at 160).



1 As the claims arise from Nordstrom’s official policies and requirements,  
2 uniformly applied to all draw commission employees, both the named Plaintiffs  
3 and the prospective class share common complaints and allege common injuries.  
4 Accordingly, Plaintiffs share a common contention and have thus satisfied this  
5 requirement for the proposed California Classes.

6 **b. Nationwide Class**

7 The Balasanyan Plaintiffs explain that the common contention at issue for  
8 the Nationwide Class is whether Nordstrom breached its employment contracts  
9 with its draw commission employees by failing to compensate them for certain  
10 work during which they could not sell, including meetings and stock assignments  
11 that exceeded 30 minutes per shift, at the hourly non-sell rate because Nordstrom  
12 managers prevented employees from properly recording it as non-sell time.  
13 BSAC ¶ 24, 59. The Balasanyan Plaintiffs also claim that it is unreasonable to  
14 require employees to “watch the clock” to determine when a stock assignment  
15 should be changed to non-sell time. Reply BMCC at 8-9. The Balasanyan  
16 Plaintiffs insist that any variations are “simply a matter of damages, which are  
17 readily calculable through, among other things, Nordstrom’s employee records  
18 and trusted survey methodology.” BMCC at 3.

19 The Nationwide Class appears to assert a violation of the same provision of  
20 law. If members of the Nationwide Class were in fact unable to record time spent  
21 on meetings and stock assignments over 30 minutes, then they would have  
22 common facts on which to base their breach of contract claim. Accordingly, the  
23 Balasanyan Plaintiffs have satisfied the commonality requirement for the  
24 proposed Nationwide Class.

### 3. Typicality

1 Rule 23(a)(3) requires the representative party to have claims or defenses  
2 that are “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).  
3 Typicality is satisfied “when each class member’s claim arises from the same  
4 course of events, and each class member makes similar legal arguments to prove  
5 the defendant’s liability.” Rodriguez, 591 F.3d at 1124 (citations omitted). The  
6 typicality requirement is permissive and requires only that the representative’s  
7 claims are “reasonably co-extensive with those of the absent class members; they  
8 need not be substantially identical.” Hanlon, 150 F.3d at 1020. “[C]lass  
9 certification is inappropriate where a putative class representative is subject to  
10 unique defenses which threaten to become the focus of the litigation.” Hanon v.  
11 Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citations omitted).

#### a. California Classes

13 Here, Plaintiffs seek to represent Nordstrom employees whose claims are  
14 nearly identical to their own. Balasanyan, Kurji, Maraventano, and Nalbandian  
15 each work or worked as a draw commission salesperson in four of Nordstrom’s  
16 California stores. MMCC at 14; BMCC at 13. Nordstrom compensated all  
17 proposed members of the California Classes, including Plaintiffs, pursuant to a  
18 plan that paid commission for designated sell time and an hourly wage for  
19 designated non-sell time. MMCC at 14-15; BMCC at 13-14. Critically,  
20 Nordstrom defined sell time to include pre-opening, post-closing, and stocking  
21 time, during which Plaintiffs and the proposed members of the California Classes  
22 were allegedly precluded from earning a commission either because Nordstrom’s  
23 stores were closed to the public or because stock assignments kept them from  
24 customer contact and thus from sales. MMCC at 15; BMCC at 14. This  
25

1 compensation structure has been, and continues to be, applied by Nordstrom to all  
2 draw commission employees, including Plaintiffs and the proposed members of  
3 the California Classes. Id. Plaintiffs seek damages on behalf of themselves and  
4 the class and subclass for work performed during pre-opening, post-closing, and  
5 stocking time. MMCC at 15; BMCC at 14.

6 Nordstrom argues that Plaintiffs fail to show that their experiences are  
7 typical of the experiences of more than 27,000 California draw commission  
8 salespeople at 32 different stores. Opp. MMCC at 21; Opp. BMCC at 24. That  
9 Plaintiffs constitute a relatively small sample of the large proposed California  
10 Classes is not a valid reason to deny class certification. Nordstrom further claims  
11 that the fact that Plaintiffs were subject to the same commission pay plan is  
12 insufficient because liability turns not on the pay plan itself, but on whether  
13 salespeople were precluded from selling. Id. at 22. However, Nordstrom has not  
14 explained why that inquiry is inappropriate for class resolution.

15 Nordstrom claims that no Plaintiff is typical of the proposed class.  
16 Nordstrom maintains that Balasanyan and Nalbandian are not typical because they  
17 work in only two departments in two separate stores, but it does not explain why  
18 this is not typical of the proposed class. Opp. BMCC at 25. If Nordstrom is  
19 implying that most of its salespeople work in multiple departments, then it has not  
20 offered any evidence demonstrating that to be the case. Otherwise, no named  
21 proposed named plaintiff would be typical for this action.

22 Nordstrom further maintains that Kurji is not typical because she worked at  
23 a single store for only two months. Opp. MMCC at 22. While Nordstrom  
24 employed Kurji for the shortest period of time of all Plaintiffs, Nordstrom fails to  
25 further elaborate on why she is not typical of the proposed class. See Kamar v.

1 Radio Shack Corp., 254 F.R.D. 387, 396 (C.D. Cal. 2008) (“Given the common  
2 policy, the fact that there have been variations in meetings attended, scheduled  
3 shifts, and actual hours of work does not defeat typicality.”). Presumably, the  
4 length of each salesperson’s employment varied. In fact, the duration of Kurji’s  
5 employment seemingly affects only the calculation of damages, which is  
6 insufficient to defeat typicality. See id.

7 Nordstrom also maintains that Maraventano is not typical because he only  
8 worked in a single department at one store and was terminated for failing to meet  
9 sales goals. Opp. MMCC at 22. Nordstrom claims that Maraventano’s  
10 experience is “not typical of experienced, successful salespeople who comprise a  
11 key part of the class.” Opp. MMCC at 22. Nordstrom fails to explain how  
12 Maraventano’s sales record changes his experience with the commission  
13 compensation structure, or why that might affect his claims and defenses in this  
14 case. Surely, not every Nordstrom salesperson has been successful. Nordstrom  
15 also employed Maraventano for over two years, thereby reducing the potency of  
16 Nordstrom’s argument.

17 Finally, Nordstrom argues that Plaintiffs are not typical because of their  
18 shared opinion “that the tasks at issue were not directly tied to sales is contrary to  
19 other employees’ affirmations that the tasks are part of sales work.” Opp. MMCC  
20 at 22; Opp. BMCC at 25. This misconstrues Plaintiffs’ complaint, which focuses  
21 not on personal beliefs, but on whether Nordstrom may legally categorize  
22 activities that preclude sales as sell time. In addition, Nordstrom does not explain  
23 why these opinions prevent Plaintiffs from bringing claims typical to the proposed  
24 class, especially as class members are free to opt out of the class action. More  
25 importantly, Nordstrom has provided no case law supporting this theory that

1 personal belief somehow affects California labor law and unfair business practices  
2 claims.

3 While not addressed by the parties in their submissions, the court is  
4 concerned about whether the Maraventano Plaintiffs lack standing to seek  
5 injunctive relief under the fourth claim alleging Unfair Business Practices under  
6 Cal. Bus. & Prof. Code § 17200. “In a class action, the plaintiff class bears the  
7 burden of showing that Article III standing exists.” (citing Bates v. UPS, 511 F.3d  
8 974, 985 (9th Cir. 2007). “Plaintiffs must show standing with respect to each  
9 form of relief sought. Standing exists if at least one named plaintiff meets the  
10 requirement.” Ellis, 657 F.3d at 978 (citing Bates, 511 F.3d at 985). To satisfy  
11 standing for a claim seeking injunctive relief, “[t]he plaintiff must demonstrate  
12 that he has suffered or is threatened with a concrete and particularized legal harm,  
13 coupled with a sufficient likelihood that he will again be wronged in a similar  
14 way.” Bates, 511 F.3d at 985 (internal citations and quotation marks omitted).  
15 The plaintiff must establish a “real and immediate threat of repeated injury.” Id.  
16 (quoting O’Shea v. Littleton, 414 U.S. 488, 496 (1974)). “Past wrongs do not in  
17 themselves amount to a real and immediate threat of injury necessary to make out  
18 a case or controversy . . . [but] are evidence bearing on whether there is a real and  
19 immediate threat of repeated injury.” Ellis, 657 F.3d at 979 (citing Bates, 511  
20 F.3d at 985).

21 The Maraventano Plaintiffs, who are both former employees, cannot  
22 establish a sufficient likelihood that they will again be wronged by Nordstrom’s  
23 allegedly improper conduct. MMCC at 14. As a result, the Maraventano  
24 Plaintiffs have no standing to pursue injunctive relief and, therefore, their claims  
25 are not typical of the proposed class. The only claim for which the Maraventano

1 Plaintiffs seek injunctive relief and therefore lack standing is their Unfair Business  
2 Practices under Cal. Bus. & Prof. Code § 17200.

3 Except for the standing issue outlined above, Plaintiffs are typical of the  
4 proposed California Classes and have therefore satisfied the typicality  
5 requirement. The claims and damages Plaintiffs allege on behalf of themselves  
6 and the California Classes all result from Nordstrom's policies and agreements  
7 with all draw commission employees and are therefore typical. Nordstrom's  
8 arguments against Plaintiffs are irrelevant to the claims and defenses typical of the  
9 proposed class.

10 **b. Nationwide Class**

11 The Balasanyan Plaintiffs and the proposed Nationwide Class Members are  
12 subject to the same binding agreement found in Nordstrom's Commission  
13 Calculation Agreement, employee handbook, and new hire materials. BMCC at  
14 14. These materials provide that Nordstrom will pay draw commission  
15 salespeople on an hourly basis for meetings and for stock assignments exceeding  
16 30 minutes per shift. Id. The Balasanyan Plaintiffs were employed by Nordstrom  
17 as draw commission employees and worked under the same commission  
18 compensation structure and employment agreements as the proposed Nationwide  
19 Class Members. Id. at 14-15. Accordingly, the Balasanyan Plaintiffs assert that  
20 their claims arise from the same course of events and are similar to legal  
21 arguments available to the proposed class.

22 Nordstrom argues that Plaintiffs have failed to show that their experiences  
23 are typical of the experiences of more than 60,000 draw commission salespeople  
24 in 30 different states at 117 stores. Opp. MMCC at 24. Nordstrom offers no  
25 additional information as to why Plaintiffs fall short of typicality. Accordingly,

1 Plaintiffs are deemed typical of the proposed Nationwide Class and have therefore  
2 satisfied this requirement.

#### 3 **4. Adequacy of Representation**

4 Rule 23(a) also requires the representative parties to “fairly and adequately  
5 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Ninth Circuit set  
6 a two-prong test for this requirement: “(1) [d]o the representative plaintiffs and  
7 their counsel have any conflicts of interest with other class members, and (2) will  
8 the representative plaintiffs and their counsel prosecute the action vigorously on  
9 behalf of the class?” Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003)  
10 (citing Hanlon, 150 F.3d at 1020).

11 Nordstrom does not object to the adequacy of class counsel but contends  
12 that Plaintiffs are not adequate representatives because “they were able to sell  
13 during the periods at issue and so cannot represent a class of salespeople who  
14 were precluded from selling.” Opp. MMCC at 22; Opp. BMCC at 25. However,  
15 Nordstrom’s only evidence to support this is a flawed expert report that this court  
16 has stricken as untimely. See infra Section III.B.2.a. Additionally, the court has  
17 already noted that the occasional sale appears to be the exception to the rule.  
18 Nordstrom’s numerous declarations attesting otherwise were selected for the  
19 purposes of litigation and may not reflect the realities of most Nordstrom  
20 employees. While Nordstrom may ultimately be able to demonstrate that  
21 Plaintiffs were able to make sales regularly, Nordstrom has not yet done that  
22 conclusively.

23 Nordstrom contends that Balasanyan and Nalbandian are not adequate  
24 representatives because they expressed concern about time and financial  
25 commitment necessary to serve as class representatives if the litigation took place

1 in San Diego. Opp. BMCC at 25 (citing Balasanyan Dkt. 12-2, Balasanyan Decl.,  
2 and Dkt. 12-3, Nalbandian Decl.). Yet, the court notes that those declarations  
3 were made in August 2011. Almost two years have transpired since those  
4 statements were made, and both have continued to pursue this case vigorously.  
5 Balasanyan and Nalbandian’s commitment to this case do not appear to be in  
6 doubt.

7 Nordstrom further argues that Maraventano “also cannot serve as the class  
8 representative on the wage statement penalties claim because his claims are barred  
9 by the one-year statute of limitations.” Opp. MMCC (Cal. Civ. Proc. Code  
10 § 340(a)). However, this argument fails because Maraventano is also seeking  
11 actual damages under California Labor Code § 226. See Ricaldai v. US  
12 Investigations Servs., LLC, 878 F. Supp. 2d 1038, 1046 (citing Singer v. Becton,  
13 Dickinson and Co., 2008 U.S. Dist. LEXIS 56326, at \*11-14 (S.D. Cal. 2008)).

14 Finally, Nordstrom contends that it fired Kurji based on alleged falsification  
15 of commission information. Opp. MMCC at 23 (citing Strauss Decl., Exh. A,  
16 Kurji Dep.182:4-184:8). Nordstrom relies on Savino v. Computer Credit, 164  
17 F.3d 81, 87 (2d Cir. 1998), in which the court held that a proposed named plaintiff  
18 had frequently changed his position on an issue central to the lawsuit. See id. at  
19 87. Plaintiffs reply that Kurji vehemently denies having committed any fraud and  
20 that she was never convicted of any fraud. Reply MMCC at 10. Plaintiffs instead  
21 direct the court to Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996, 1015 (N.D.  
22 Cal. 2010) (citing Ross v. RBS Citizens, N.A., 2010 U.S. Dist. LEXIS 107779, at  
23 \*14-15 (N.D. Ill. 2010) (“Where credibility has been considered, courts have  
24 generally found inadequacy only where the representative’s credibility is  
25 questioned on issues directly relevant to the litigation or there are confirmed



1 examples of dishonesty, such as a criminal conviction for fraud.”)). In Harris, the  
2 court permitted Harris to act as a class representative because, although she had  
3 lied about certain matters related to the case, those matters were not directly  
4 related to the claims asserted. See id. at 1015. The Harris court concluded that no  
5 conflicts existed between Harris and the putative class and that Harris could be a  
6 fair and adequate representative. See id. at 1015-16. Although the accusations  
7 levied against Kurji are concerning, Plaintiffs are correct that Kurji was never  
8 convicted. The court does not find that Kurji has any conflicts of interest with the  
9 putative class.

10 In sum, the court finds that Plaintiffs Maraventano, Kurji, Balasanyan, and  
11 Nalbandian are adequate class representatives.

### 12 ***B. Rule 23(b)(3) Class Certification Requirements***

13 In addition to meeting the conditions imposed by Rule 23(a), the parties  
14 seeking class certification must also show that the action is appropriate under Rule  
15 23(b)(1), (2), or (3). See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614  
16 (1997). Certification under Rule 23(b)(3) is proper “whenever the actual interests  
17 of the parties can be served best by settling their differences in a single action.”  
18 Hanlon, 150 F.3d at 1022 (internal quotations omitted). Rule 23(b)(3) calls for  
19 two separate inquiries: (1) do issues common to the class “predominate” over  
20 issues unique to individual class members, and (2) is the proposed class action  
21 “superior” to other methods available for adjudicating the controversy. Fed. R.  
22 Civ. P. 23(b)(3); Hanlon, 150 F.3d at 1022. In evaluating predominance and  
23 superiority, the court must consider: (1) the extent and nature of any pending  
24 litigation commenced by or against the class involving the same issues; (2) the  
25 interest of individuals within the class in controlling their own litigation; (3) the

1 convenience and desirability of concentrating the litigation in a particular forum;  
2 and (4) the manageability of the class action. See Fed. R. Civ. P. 23(b)(3)(A)-(D);  
3 Amchem, 521 U.S. at 615-16.

#### 4 **1. Predominance**

5 Rule 23(b)(3)'s predominance requirement is more stringent than Rule  
6 23(a)(2)'s commonality requirement. The analysis under Rule 23(b)(3) "presumes  
7 that the existence of common issues of fact or law have been established pursuant  
8 to Rule 23(a)(2)." Hanlon, 150 F.3d at 1022. In contrast to Rule 23(a)(2), "Rule  
9 23(b)(3) focuses on the relationship between the common and individual issues."

10 Id. Class certification under Rule 23(b)(3) is proper when common questions  
11 present a significant portion of the case and can be resolved for all members of the  
12 class in a single adjudication. Id. In other words, it is not enough to establish that  
13 common questions of law or fact exist, as it is under Rule 23(a)(2)'s commonality  
14 requirement. The predominance inquiry under Rule 23(b) is more rigorous,  
15 Amchem, 521 U.S. at 624, as it "tests whether proposed classes are sufficiently  
16 cohesive to warrant adjudication by representation." Id. at 623.

#### 17 **a. California Classes**

18 Plaintiffs argue that the proposed California class members will succeed or  
19 fail together because (1) they were all paid on a draw commission basis; (2) they  
20 were all paid for the time they worked prior to opening and after closing with  
21 commissions earned during time when the store was open; and (3) all of the  
22 unpaid hours worked were recorded by Nordstrom. MMCC at 20. Plaintiffs note  
23 that "[c]lass certification is usually appropriate where liability turns on an  
24 employer's uniform policy that is uniformly implemented, since in that situation  
25 predominance is easily established." Kamar, 254 F.R.D. at 399; see also Wren v.

1 RGIS Inventory Specialists, 256 F.R.D. 180, 204 (N.D. Cal. 2009) (citing Kamar,  
2 254 F.R.D. at 399); Kurihara v. Best Buy Co., 2007 U.S. Dist. LEXIS 64224, at  
3 \*28 (N.D.Cal. 2007) (“[C]ourts’ discomfort with individualized liability issues is  
4 assuaged in large part where the plaintiff points to a specific company-wide policy  
5 or practice that allegedly gives rise to consistent liability.”).

6 Plaintiffs concede that the issue of damages is an individualized issue  
7 inherent in this case but argue that it does not defeat class treatment. MMCC at  
8 20. “In cases where there are both individualized inquiries and common  
9 questions, courts are more willing to certify classes where the individualized  
10 inquiries relate to damages than where they relate to liability.” Wren, 256 F.R.D.  
11 at 204 (citing Kurihara, 2007 U.S. Dist. LEXIS 64224, at\* 9); see also Blackie v.  
12 Barrack, 524 F.2d 891, 905 (9th Cir. 1975) (“The amount of damages is invariably  
13 an individual question and does not defeat class action treatment.”). Plaintiffs rely  
14 heavily on Kurihara v. Best Buy Co., a case in which employees were not paid for  
15 the additional time that they remained at the defendants’ stores for inspections  
16 meant to reduce shrinkage. See Kurihara, 2007 U.S. Dist. LEXIS 64224, at \*9-10.  
17 In that case, the court held that plaintiffs met the predominance requirement by  
18 providing “substantial evidence of the existence of a company-wide policy  
19 whereby employees are subject to inspections, and not compensated for the time  
20 spent on those inspections.” Id. at 29. Small variances in the amount of damages  
21 due or in the amount of time that Kurihara plaintiffs were prevented from making  
22 commissions did not defeat class certification. Id. at 29. Plaintiffs therefore  
23 contend that the Maraventano Class and the Balasanyan California Class and  
24 California Subclass should be certified because the variances among prospective  
25 members of the California Classes are small. MMCC at 20; BMCC at 19.

1 Nordstrom counters that courts routinely deny class certification where  
2 liability and damages assessments turn on individual issues. First, Nordstrom  
3 relies on Marlo v. UPS, Inc., 639 F.3d 942 (9th Cir. 2011), in which the Ninth  
4 Circuit declined to certify a class whose members had allegedly been improperly  
5 characterized as exempt employees and should have received meal breaks and  
6 overtime. The Ninth Circuit found that common issues did not predominate in the  
7 class because deposition testimony submitted by the parties suggested that  
8 variations in job duties were attributable to employees working at different  
9 facilities, under different managers, and with different customer bases. See id. at  
10 949. Yet, Nordstrom fails to note that the Ninth Circuit also declined to certify  
11 the class in Marlo because the policies and procedures presented did not establish  
12 whether the proposed class of employees was actually primarily engaged in  
13 exempt activities during the work week. See id. at 948. That part of the Ninth  
14 Circuit's opinion has more bearing here.

15 Another case upon which Nordstrom relies is Wang v. Chinese Daily News,  
16 709 F.3d 829 (9th Cir. 2013). In Wang, the Ninth Circuit remanded a case that  
17 had been certified in light of Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541  
18 (2011), highlighting four areas for reconsideration: (1) Rule 23(a)'s commonality  
19 requirement, (2) Rule 23(b)(2)'s requirement that monetary relief not predominate  
20 over claims for injunctive relief, (3) Rule 23(b)(3)'s predominance requirement,  
21 and (4) damages. See Wang, 709 F.3d at 832-36. The Ninth Circuit did not,  
22 however, hold that a Rule 23(b)(3) class could not be certified in that case.

23 With respect to Rule 23(b)(3)'s predominance requirement, the Ninth  
24 Circuit instructed the district court in Wang to review its conclusion that common  
25 questions predominated by analyzing the balance between individual and common

1 issues. See Wang, 709 F.3d at 835. The Ninth Circuit’s Wang opinion  
2 emphasized Dukes’ holding disapproving of “trial by formula,” “wherein damages  
3 are determined for a sample set of class members and then applied by  
4 extrapolation to the rest of the class ‘without further individualized proceedings.’”  
5 See Wang, 709 F.3d at 836 (citing Dukes, 131 S. Ct. at 2561). Specifically, the  
6 Supreme Court’s holding in Dukes disapproved of the proposal in which a  
7 “sample set of the class members would be selected, as to whom liability for sex  
8 discrimination and the backpay owing as a result would be determined in  
9 depositions supervised by a master. The percentage of claims determined to be  
10 valid would then be applied to the entire remaining class, and the number of  
11 (presumptively) valid claims thus derived would be multiplied by the average  
12 backpay award in the sample set to arrive at the entire class recovery--without  
13 further individualized proceedings.” Dukes, 131 S. Ct. at 2561.

14 Citing Pryor v. Aerotek Scientific, LLC, 278 F.R.D. 516, 536 (C.D. Cal.  
15 2011), Nordstrom notes that “the court denied certification of an off-the-clock,  
16 unpaid wages claim because of significant variations in how early employees  
17 arrived, when they logged onto their computers and how long it took them to log  
18 in, among other facts.” Opp. MMCC at 12. Specifically, the Pryor class was not  
19 certified because it was composed of employees who were encouraged but often  
20 did not arrive at least five minutes prior to their shift (when they could start  
21 working) and whose time may have already been compensated through that  
22 company’s rounding policy. See Pryor v. Aerotek Scientific, LLC, 278 F.R.D. at  
23 534-37 (“There appears to be significant variation in how early employees arrived,  
24 how early they logged onto their computers, how long it took them to log into  
25 other programs before logging into VCC, whether they performed non-work

1 activities after their computer logons, and how they rounded their time.”). Unlike  
2 the present matter, the early arrivals in Pryor were unrecorded and therefore  
3 difficult, if not impossible, to reconstruct. The amount of time that employees  
4 were expected to arrive early in Pryor varied significantly more than the time that  
5 Nordstrom employees are expected to stay before or after Nordstrom’s posted  
6 hours.

7 Next, Nordstrom contends that courts have previously denied class  
8 certification in piece-rate cases, which Nordstrom asserts are similar to the case at  
9 hand. For example, Nordstrom cites Espenscheid v. DirectSat USA, LLC, 705  
10 F.3d 770 (7th Cir. 2013), a case in which the Seventh Circuit declined to certify a  
11 class of technicians who installed and repaired satellite dishes. The technicians,  
12 who were paid per job, complained that they had to perform duties unrelated to  
13 repair orders and that their piece-rate compensation did not compensate them for  
14 these duties. See id. at 773-74. The court declined to certify a class, in part,  
15 because the technicians had no records of the time they had worked. See id. at  
16 774-75. However, this matter is distinguishable as the Espenscheid plaintiffs had  
17 asserted FLSA violations, not California labor law violations. This court has  
18 already dismissed the Balasanyan Plaintiffs’ FLSA claim, and California labor  
19 laws materially differ from FLSA. The matter at hand is also distinguishable  
20 because the disputed time has been recorded and can be easily examined, which  
21 was not the case for the disputed unpaid time in Espenscheid.

22 Nordstrom also relies on another piece-rate case, Hughes v. WinCo Foods,  
23 2012 U.S. Dist. LEXIS 2469, at \*17, \*26 (C.D. Cal. Jan. 4, 2012), in which the  
24 court declined to certify a meal period claim because evidence confirmed that  
25 meal periods were taken at varying times depending on the store, department,

1 manager, shift, and day. However, the plaintiffs in Hughes could only point to a  
2 policy that required them to obtain management approval to take a break, and that  
3 policy did not, on its face, violate California law as it did not explicitly prevent  
4 employees from taking a break. The court found that plaintiffs had not explained  
5 how this policy had affected putative class members. See Hughes, 2012 U.S. Dist.  
6 LEXIS 2469, at \*26. See also Gonzalez, 281 F.R.D. at 462 (denying certification  
7 for a certain subclass because “[p]laintiffs ha[d] not shown that there was a  
8 common policy that pervaded the entire company where Project Managers  
9 prevented employees from taking meal breaks and did not authorize and permit  
10 employees to take rest breaks”).

11 Like Hughes, Nordstrom argues that the ability to make sales during  
12 pre-opening and post-closing times and stock assignments turns on individual  
13 issues. Nordstrom argues that its practices related to hours and tasks performed  
14 during pre-opening and post-closing hours vary from store to store. For example,  
15 Nordstrom cites several declarations regarding varying pre-opening and  
16 post-closing hours. See, e.g., Nguyen Decl., ¶ 4 (“Our store opens 15 minutes  
17 before the posted opening time each day, so customers are free to come in and  
18 make purchases during that time.”); Galindo Decl., ¶ 6 (“Another example is a  
19 customer who recently did not even start a fitting room until 9:05 p.m., and  
20 ultimately did not make her purchase until 9:30 p.m. The posted store closing  
21 time on that day was 9:00 p.m.”). In addition, Nordstrom explains that  
22 salespeople “can ring up sales when the stores are not open for a wide variety of  
23 reasons, including personal appointments, sales over the phone, ringing up  
24 pre-sales on the first day of an event or sale, ringing up merchandise placed on  
25 reserve and arranging for direct-to-customer shipments, for example.” Opp.

1 MMCC at 14. The court remains unclear about the actual frequency of such  
2 opportunities, whether they are available to all employees or only employees in  
3 certain departments, whether the actual work for the sales had taken place during  
4 Nordstrom’s posted hours, or whether employees could readily generate such  
5 sales opportunities for themselves during those times.<sup>8</sup>

6 In addition, Nordstrom cites several California state cases in which state  
7 courts have declined to certify allegedly similar class actions. Nordstrom  
8 principally relies on a later order in Armenta denying class certification because  
9 the employees were not required to use a company truck to head to job sites and  
10 an analysis of productive and non-productive time required individualized  
11 considerations. See Armenta v. Osmose, unpublished opinion, Opp. MMCC,  
12 Ex. 3. However, in Armenta, the unproductive time was unrecorded and followed  
13 no consistent pattern, which therefore required individual inquiries about the  
14 amount of time each employee spent doing non-productive work. Again, that is  
15 not the case here. The other California state cases cited by Nordstrom are  
16 similarly flawed. See Ortega v. Sears, Roebuck and Co., 2011 Cal. App. Unpub.  
17 3923 (May 24, 2011) (denying class certification because individualized  
18 hour-by-hour analysis of each employee’s work was required to determine  
19 whether or not they had received at least minimum wage); RJN, Ex. 5, Order  
20 Granting Motion to De-Certify Class in Carson v. Knight Trans., Inc., Tulare  
21 Superior Court Case No. 234186 (decertifying class due to need for individual  
22

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23 <sup>8</sup> For example, a salesperson ringing up a sale to a customer who found an item they wanted to  
24 purchase on Thursday, but knew that the item would be on sale the following day. Although the  
25 sale might be “rung up” during pre or post-closing time, the actual work would have been done  
during sell time. In addition, such opportunities might be limited and might only arise if a  
customer for some reason delayed buying an item.



1 inquiries into the verbal agreement to which each employee agreed and unclear  
2 payment calculations).

3 Plaintiffs counter by citing a recently published California Court of Appeal  
4 case, Bluford v. Safeway Stores, Inc., 216 Cal. App. 4th 864 (2013), which  
5 affirmed Armenta and agreed that “averaging pay to comply with the minimum  
6 wage law instead of separately compensating employees for their rest periods at  
7 the minimum or contractual hourly rate . . . is not allowed under California labor  
8 law.” Id. at 872. In Bluford, Safeway drivers were required to take a 30 minute  
9 meal period no later than five hours after their regular shift began. See id. at 867.  
10 Although their wage statements were itemized, the wage statements did not  
11 include pay for rest periods or specifically account for them and omitted essential  
12 information that would have allowed a driver to determine if he had been paid the  
13 proper wages due to him under the compensation system. See id. at 868. Given  
14 that the court found that California labor law requires employers to provide  
15 employees with paid rest breaks, the California Court of Appeals certified the  
16 plaintiffs’ class. See id. at 874. Unlike the cases cited by Defendants, Bluford  
17 discussed and applied Armenta and relied upon wage statements.

18 In addition, Plaintiffs note that the Ninth Circuit recently rejected the notion  
19 that individualized damages could serve as a basis for denying certification. See  
20 Leyva v. Medline Indus., 716 F.3d 510, 2013 U.S. App. LEXIS 10649, at \*4-5  
21 (9th Cir. 2013). Leyva involved several wage-related violations, including  
22 rounding violations, bonus violations, waiting time penalties, and wage statement  
23 penalties. See id. at \*3-4. There, the Ninth Circuit held that the need for  
24 individualized damages determinations, which is necessary in nearly all  
25 wage-and-hour class actions, cannot be used, by itself, to defeat class certification

1 under Rule 23(b)(3). See id. at \*10. Finally, Plaintiffs seek injunctive relief, a  
2 prospective remedy which, if liability is established and Nordstrom's policies are  
3 invalidated, will inure to the entire putative class. Such a result would not require  
4 individualized damage assessments.

5 To bolster its argument that predominance has not been met, Nordstrom  
6 also submitted a declaration by an expert, Steven Boedeker. Opp. MMCC, Decl.  
7 Boedeker. His declaration contains a new study that was not included in the  
8 previously submitted Boedeker expert report<sup>9</sup> and that was allegedly provided to  
9 Plaintiffs after the January 18, 2013 deadline for expert disclosure related to class  
10 certification. Indeed, Boedeker's declaration was signed on April 18, 2013 and  
11 was not filed with Defendants' opposition to Plaintiffs' motion for class  
12 certification until the following day. Boedeker's new study was therefore not  
13 provided to Plaintiffs until at least 3 months after the discovery deadline for filing  
14 expert reports for class certification. See Maraventano, Dkt. 78 (order indicating  
15 deadline to provide opposing counsel with expert reports for class certification).  
16 Plaintiffs rightfully complain that Boedeker's declaration goes well beyond the  
17 scope of his expert report, which only analyzed sales transaction data for  
18 Maraventano, Kurji, Balasanyan, and Nalbandian. See Maraventano, Dkt. 81,  
19 Decl. Boedeker; Balasanyan, Dkt.78, Decl. Boedeker. The court therefore strikes  
20 Boedeker's declaration.<sup>10</sup>

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21  
22 <sup>9</sup> Boedeker's original expert report was submitted to the court with Nordstrom's motions for  
23 reconsideration.

24 <sup>10</sup> Ironically, Nordstrom objects to the declarations submitted by Plaintiff's attorney Matthew  
25 Archbold because it purportedly constitutes new evidence, analyzes (allegedly inaccurately) the  
new evidence offered up by Nordstrom's expert Boedeker, and contains unauthenticated  
hearsay. See Dkt. 114. The court did not rely on Archbold's declaration in this order as it was  
unnecessary to do so because the court is striking Boedeker's report from the record.

1 Yet, looking beyond the declaration’s untimeliness, the methodology  
2 behind Boedeker’s declaration and the new study contained therein appear to be  
3 deeply flawed and would not likely be admissible under Daubert v. Merrell Dow  
4 Pharms., Inc., 509 U.S. 579, 597 (1993) (requiring court to act as a “gatekeeper”  
5 to exclude junk science that does not meet Federal Rule of Evidence 702’s  
6 reliability standards by making a preliminary determination that the expert’s  
7 testimony is reliable). The new study surveys the percentage of time 525  
8 employees were able to sell to customers up to 40 minutes before opening and 40  
9 minutes after closing as well as that percentage for the first 30 minutes of a shift  
10 prior to opening and the last 30 minutes of a shift after closing. It is unclear  
11 whether the employees were randomly selected or even whether the population of  
12 employees was statistically significant (assuming that the selection was random,  
13 which, again, is unclear).<sup>11</sup> The court cannot tell how many of Nordstrom’s stores  
14 would have been covered by this survey or why the survey only covered six  
15 months of the year.

16 Other problems abound, such as the possibility that the posted hours used  
17 by Boedeker were more likely inaccurate due to the back-to-school and holiday  
18 shopping seasons and other unaccounted-for sales and/or events. For example, the  
19 increase of an hour to stores’ hours after Thanksgiving is arbitrary and does not  
20 appear to have any basis in fact. For that matter, it is unclear whether employee  
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22 Nevertheless, the court notes that Plaintiffs were not timely provided with Boedeker’s new  
23 study and that Archbold’s analysis was, at least in part, offered so late as a direct result of  
24 Nordstrom’s failure to timely disclose Boedeker’s study.

25 <sup>11</sup> The Declaration of Kin Lau, submitted by Nordstrom with its opposition to Plaintiffs’  
motions for class certification, does not explain how these 525 employees were selected,  
although it appears that Lau was responsible for providing the data for Boedeker’s analysis.

1 purchases are included in these figures or whether they should be included. Such  
2 concerns are appropriate, especially when considering the Ninth Circuit's holding  
3 in Marlo, 639 F.3d at 948-49 (declining to rely on a survey where the expert was  
4 unable to testify whether the sample was representative and where the reliability  
5 of the survey was questionable). Such "'litigation-driven' selective sampling of  
6 employees and other data are insufficient to inject fatal uncertainty into the  
7 question of liability." Kurihara, 2007 U.S. Dist. LEXIS 64224, at\*28 (citing  
8 Tierno v. Rite Aid Corp., 2006 U.S. Dist. LEXIS 71794, at \*8 (N.D. Cal. Aug. 31,  
9 2006)).

10 The court also has concerns about Boedeker's findings. Even when the  
11 analysis is restricted to the first 30 minutes of pre-opening time and the last 30  
12 minutes of post-closing time, Nordstrom contends that employees made sales  
13 approximately 20 percent and 47 percent of the time respectively. Opp. MMCC,  
14 Boedeker Decl. ¶¶ 16, 17. Nordstrom provided a graph showing the distribution  
15 for its analysis of sales completed within the full 40 minutes of pre-opening and  
16 post-closing time, but no such graph for the 30-minute sets. As such, the court  
17 cannot tell whether Nordstrom's analysis is skewed by outliers. Given the  
18 previous concerns about how hours were determined, the court also has concerns  
19 about relying on these statistics. While Nordstrom may ultimately be able to show  
20 that Plaintiffs were able to sell during pre-opening, post-closing, and stocking  
21 time, Boedeker's highly deficient studies do not conclusively show that variation  
22 existed amongst salespeople. If Nordstrom is later permitted to add this study into  
23 the record, the court strongly encourages Nordstrom to address the court's  
24 concerns.

1 As it has previously done, Nordstrom again explains that its sales process  
2 involves “countless tasks, including, for example, calling customers to let them  
3 know about merchandise or special events, pulling items for customers,  
4 exchanging emails with customers about items that they want to buy, searching  
5 for merchandise online or in other stores that is not available, writing thank you  
6 notes, [and] checking on alterations and merchandise being shipped directly to the  
7 customer.” Id. at 14-15. Nordstrom also argues that it does not track what work  
8 is being performed during non-sell time and argues that the court must assess “if  
9 salespeople clocked into non-sell [time] for any time when they were allegedly  
10 precluded from selling.” Id. at 16. The argument is that pre-opening and  
11 post-closing tasks can be attributed to the sales process and that salespeople are  
12 therefore not precluded from selling. However, the court already rejected this  
13 argument when it denied Nordstrom’s motion for summary judgment. See Dkt.  
14 76 at 8-10 (explaining that Armenta v. Osmose, 135 Cal. App. 4th 314 (2005), and  
15 its progeny have rejected this argument).

16 Nordstrom further contends that violations of California Labor Code §§ 203  
17 and 226 require fact-intensive inquiries about its state of mind and are therefore  
18 inappropriate for class action adjudication. Under California Labor Code § 203,  
19 employers owe waiting time only if they “willfully” failed to pay all wages due.  
20 MMCC at 17. “An employer’s good faith mistaken belief that wages are not  
21 owed may negate a finding of willfulness.” Road Sprinkler Fitters Local Union  
22 No. 669 v. G & G Fire Sprinklers, Inc., 102 Cal. App. 4th 765, 782 (2002).  
23 Nordstrom notes that at least one other district court has found that California  
24 Labor Code § 203’s required finding of willfulness “raises an inherently fact  
25 intensive inquiry focusing on state of mind and surrounding circumstances.” In re

1 Taco Bell Wage & Hour Actions, 2011 U.S. Dist. LEXIS 109169, at \*15 (E.D.  
2 Cal. 2011). Nordstrom explains that this is because evaluating penalties “will  
3 require assessment[s] of whether salespeople reported alleged unpaid non-sell  
4 wages and were or were not timely paid for them.” MMCC at 18.

5 California Labor Code § 226(a) requires employers to provide employees  
6 with “an accurate itemized statement in writing” showing, among other things,  
7 total hours worked” and “all applicable hourly rates in effect during the pay period  
8 and the corresponding number of hours worked at each hourly rate.” Nordstrom  
9 noted that another district court decertified a class alleging violations of California  
10 Labor Code § 226(a) because it also required individualized inquiries as to  
11 damages. See Cole v. CRST, Inc., 2013 U.S. Dist. LEXIS 32793, at \*13 (C.D.  
12 Cal Mar. 5 2013). But the court notes that the district court in Cole also  
13 decertified a California Labor Code § 226(a) claim because it had previously  
14 decertified the plaintiffs’ minimum wage claims earlier in the same order. See id.

15 As discussed above, the Ninth Circuit permitted similar claims to be  
16 brought by a class in Leyva. See Leyva, 2013 U.S. App. LEXIS 10649, at \*4 and  
17 10. Plaintiffs’ minimum wage claims also remain intact. The only other reason to  
18 not certify these classes is the need to engage in individualized inquiries to  
19 determine damages, which is an insufficient reason to deny class certification.  
20 See Leyva, 716 F.3d 510, 2013 U.S. App. LEXIS 10649, at \*3-4, \*14-15.

21 Nordstrom’s request that the court decline to certify this motion is therefore  
22 denied.

23 Here, the court finds that Plaintiffs have identified a Nordstrom’s policy  
24 which provides that salespeople be compensated with commissions during  
25 pre-opening and post-closing when they may not be able to sell to customers. The

1 common factual issue is whether employees were in fact precluded from earning a  
2 commission during those pre-opening and post-closing periods.<sup>12</sup> Plaintiffs have  
3 provided some expert analysis indicating that Plaintiffs were unable to make sales  
4 during the contested periods.<sup>13</sup> Nordstrom has not provided sufficient and  
5 uncontroverted evidence to demonstrate that its salespeople were able to engage in  
6 sales during pre-opening or post-closing hours. See Kurihara, 2007 U.S. Dist.  
7 LEXIS 64224, at\*28 (holding that a selective sample was insufficient to inject  
8 fatal uncertainty on question of liability). That individualized determinations of  
9 damages may be necessary is insufficient reason for the court to decline class  
10 certification per Leyva. Analyzing Nordstrom's wage policies is also inherently  
11 more objective than the inherently subjective analysis called for in cases like  
12 Dukes, where no official company policy applied. Assuming that employees are  
13 unable to earn a commission during those times, the common legal issue  
14 previously addressed by this court in its order denying summary judgment is

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16 <sup>12</sup> Plaintiffs have wrongly concluded that the court's order denying Nordstrom's motions for  
17 summary judgment included a factual determination that Nordstrom's employees were not  
18 being compensated for that time. See, e.g., MMCC; BMCC at 2. That is not the case. The  
19 court found that Nordstrom had failed to show that its salespeople could readily earn a  
20 commission during those periods. Plaintiffs should not assume that they have met their factual  
21 burden. Rather, sufficient factual support exists for Plaintiffs to be granted class certification  
22 and proceed with their cases, barring additional evidence indicating that Plaintiffs were in fact  
23 able to earn a commission during pre-opening, post-closing, and stocking time.

24 <sup>13</sup> Specifically, Plaintiffs rely on the expert report of Kirk Marangi, which analyzes Plaintiffs'  
25 sales transactions to determine whether they were made during the contested periods. See Dkt.  
91, Marangi Decl. Marangi's report indicates that sales were made infrequently during the  
contested times. See id. (finding that, during the 40 to 11 minutes prior to opening and the 11 to  
40 minutes after closing, the following sales were made by Plaintiffs: Maraventano 4 out of 28  
days; Kurji 0 out of 3 days; Balasanyan 0 out of 81 days; and Nalbandian 1 out of 69 days).  
The court has concerns about this report as well, including Marangi's failure to specify what is  
meant by the numbers 808, 9988, 9989, and 9900 to 9999. Clarifications for the court should be  
submitted if and when Plaintiffs rely on Marangi's report again.

1 whether Plaintiffs could be compensated with commissions when they were  
2 allegedly unable to make commissions during the pre-opening, post-closing, and  
3 stocking times. The court therefore grants class certification for the Maraventano  
4 Class and the Balasanyan California Class as their claims relate to time worked  
5 prior to opening and after closing.

6 This analysis, however, does not apply to Plaintiffs' allegations regarding  
7 stock assignments performed during store hours. Although Plaintiffs' claims  
8 related to stock assignments are based on Nordstrom's company-wide policy,  
9 several factors differentiate Plaintiffs' claims related to stocking time performed  
10 during store hours. First, managers had discretion over whether to assign an  
11 employee a stock assignment. The frequency of such assignments appears to have  
12 varied from store to store, department to department, and manager to manager.  
13 Second, the amount of time that each salesperson spent on such assignments  
14 varied, depending on the task at hand. Third, stock assignments were performed  
15 before, during, and/or after Nordstrom's posted store hours, making it difficult to  
16 determine the amount owed to each prospective plaintiff as Plaintiffs' claims  
17 overlap. Finally, time spent on stock assignments was not recorded, making it  
18 difficult to establish the extent of liability. As a result, the court declines to certify  
19 the California classes' claims related to stock assignments completed during store  
20 hours.

#### 21 **b. Nationwide Class**

22 The Balasanyan Plaintiffs contend that its Nationwide Class meets the  
23 predominance requirement because Nordstrom violated the terms and conditions  
24 of its own contracts, which provided that employees would receive non-sell time  
25 compensation for meetings. The Balasanyan Plaintiffs allege that they were not



1 paid hourly wages for stock assignments exceeding 30 minutes per shift and for  
2 meetings attended. They further submit that this is a company-wide policy and  
3 provide several declarations indicating that employees were unable to clock in  
4 meeting and stock assignments lasting over 30 minutes.<sup>14</sup> Nordstrom counters  
5 that “[e]valuating those questions is complicated by the fact that how often  
6 salespeople have stock assignments and attend meetings varies.” Opp. BMCC at  
7 18. Moreover, Nordstrom cites its policy that employees should record such time  
8 as non-sell time.

9 Balasanyan Plaintiffs’ proposed Nationwide Class does not meet the  
10 predominance requirements as no potentially violative company-wide policy  
11 exists. See Dukes, 131 S. Ct. at 2556-57 (“Because respondents provide no  
12 convincing proof of a companywide discriminatory pay and promotion policy, we  
13 have concluded that they have not established the existence of any common  
14 question.”). The Balasanyan Plaintiffs have offered no evidence indicating a  
15 uniform, nationwide unofficial policy preventing employees from recording  
16 meeting time and stock assignments in excess of 30 minutes as non-sell time.

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18  
19 <sup>14</sup> Balasanyan Decl. ¶ 7 (“The only time I recall being required to insert a code is when I was  
20 asked to attend certain meetings, such as Nordstrom’s yearly anniversary sale meetings.”);  
21 Beonzi Decl. ¶ 9 (“During each shift, I would perform more than thirty (30) minutes of stock  
22 assignments, and at times I would spend up to one (1) hour per shift on stock assignments. I do  
23 not recall ever being told to clock in on my hourly rate when I performed more than thirty (30)  
24 minutes of stock assignments during a shift.”); Mahdi Decl. ¶ 7 (“I was not instructed by my  
25 manager to clock in under my hourly rate when I performed more than thirty (30) minutes of  
stock assignments during a shift. I could not clock in under my hourly rate unless I had my  
manger’s permission first.”); Rago Decl. ¶ 6 (“In fact, on one occasion I attempted to clock in  
on an hourly basis in connection with performing such duties, but was told by my manager that  
this was not permitted.”); Hertel Decl. ¶9 (“My manager never authorized me to clock in on an  
hourly or “non-sell” rate when I performed more than thirty (30) minutes of stock assignments  
during a shift.”).

1 Without more information, possible variations in policy and practice amongst  
2 stores, departments, and even managers are essentially immeasurable.

3 The court would need to examine the practices at each store or even each  
4 store's department, which may not be uniform. The Balasanyan Plaintiffs have  
5 failed to demonstrate that meetings are held at regular, predetermined intervals,  
6 thereby creating much greater variance within the proposed Balasanyan California  
7 Subclass. Similarly, determining the frequency of stock assignments lasting more  
8 than 30 minutes and management's consent (or lack thereof) to record such excess  
9 time as non-sell time would require an individualized inquiry to establish liability.  
10 Together, these two problems indicate that Balasanyan's proposed Nationwide  
11 Class has not met Rule 23(b)(3)'s predominance requirement and therefore cannot  
12 be certified.

## 13 **2. Superiority**

14 Rule 23(b)(3) requires the Court to find that "a class action is superior to  
15 other available methods for fairly and efficiently adjudicating the controversy."  
16 Fed. R. Civ. P. 23(b)(3). Considerations pertinent to this finding include:

- 17 (A) the class members' interests in individually controlling  
18 the prosecution or defense of separate actions;
  - 19 (B) the extent and nature of any litigation concerning the  
20 controversy already begun by or against class  
21 members;
  - 22 (C) the desirability or undesirability of concentrating the  
23 litigation of the claims in the particular forum; and
  - 24 (D) the likely difficulties in managing a class action.
- 25

1 Fed. R. Civ. P. 23(b)(3)(A)-(D). The superiority requirement tests whether  
2 “classwide litigation of common issues will reduce litigation costs and promote  
3 greater efficiency.” Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th  
4 Cir. 1996). “If each class member has to litigate numerous and substantial  
5 separate issues to establish his or her right to recover individually, a class action is  
6 not ‘superior.’” Zinser, 253 F.3d at 1192.

7 Plaintiffs claim that all of the aforementioned superiority considerations are  
8 met. Plaintiffs first argue that class members have a less-than-normal interest in  
9 individually asserting individual claims because the financial gain is not  
10 sufficiently significant. See In re N. Dist. Cal., Dalkon Shield IUD Products Liab.  
11 Litig., 693 F.2d 847, 856 (9th Cir. 1982). Plaintiffs argue that each individual  
12 class member only stands to gain about \$5.00 per day of the violation (or  
13 \$1,250.00 per year assuming that employee worked 5 days per week). MMCC at  
14 21; BMCC at 23. Even if the employee had worked for years, the damages would  
15 not be sufficiently sizeable to defeat class treatment.

16 Second, Plaintiffs argue that, other than these two pending actions, they are  
17 unaware of any other pending matter filed on behalf of any former or current class  
18 member involving the same claims. MMCC at 22; BMCC at 23. Noting that the  
19 purpose of the second factor is to assure judicial economy and reduce the  
20 possibility of multiple lawsuits, Plaintiffs contend that this argument weighs in  
21 their favor. MMCC at 22; BMCC at 23.

22 Third, Plaintiffs note that Nordstrom has 32 stores in California, thereby  
23 increasing the desirability of litigation in this court. MMCC at 22; BMCC at  
24 23-24.

1 Fourth, Plaintiffs contend that the case is “manageable” because Plaintiffs’  
2 claims are sufficiently legally similar to justify certification, individualized  
3 inquiries regarding liability are not required, and the class is sufficiently  
4 well-defined. MMCC at 23-24; BMCC at 23. Plaintiffs note that Nordstrom has  
5 contact information for its former and current employees, thereby facilitating  
6 meaningful notice to the prospective class members. MMCC at 24; BMCC at 23.  
7 Finally, Plaintiffs note that “[m]any courts have found that wage claims are  
8 ‘especially suited to class litigation.’” Ramos v. SimplexGrinnell LP, 796  
9 F. Supp. 2d 346, 359 (E.D.N.Y. 2011); Alonzo v. Maximus, Inc., 275 F.R.D. 513,  
10 527 (C.D. Cal. 2011); McKenzie v. Federal Express Corp., 275 F.R.D. 290, 302  
11 (C.D. Cal. 2011).

12 Nordstrom contends that a class action is not superior because: (1) a class  
13 proceeding would violate their due process rights; (2) putative class members are  
14 potentially biased because they have a financial interest in the outcome; (3)  
15 Plaintiffs have failed to present trial plans; and (4) Plaintiffs have an adequate  
16 alternative means to recover unpaid wages (i.e., arbitration). MMCC at 23-25;  
17 BMCC at 20-23. These arguments do not directly address any of Rule 23’s  
18 superiority requirements, but the court nevertheless discusses each argument in  
19 turn below.

20 Nordstrom contends that its due process rights would be violated by a “trial  
21 by formula.” Dukes, 131 S. Ct. at 2561 (rejecting “trial by formula,” which would  
22 have entailed sampling class members to assess the percentage of valid claims);  
23 Espenscheid, 705 F.3d at 776 (declining to use the testimony of 42  
24 “unrepresentative” representatives’ testimony and other evidence to assess  
25 damages). Nordstrom also argues that “[t]here is also a risk of bias in a survey of

1 putative class members because they have a financial interest in the outcome,  
2 which courts recognize as bias.” Opp. BMCC at 22. Nordstrom notes that “a  
3 defendant is deprived of due process when judged by a person who ‘has a direct,  
4 personal, substantial pecuniary interest in reaching a conclusion against him in his  
5 case.’” Brown v. Vance, 637 F.2d 272, 278 (5th Cir. 1981) (quoting Tumey v.  
6 Ohio, 273 U.S. 510, 523 (1927)). But the court has already distinguished both  
7 cases from the matter at hand as both Dukes and Espenscheid involved more  
8 subjective assessments. The purpose of Rule 23’s class certification requirements  
9 is to only certify class actions where the defendant will not be disadvantaged by  
10 the inability to address claims or assert defenses applicable against particular  
11 prospective class members. Legal and factual issues sufficiently predominate,  
12 thereby mooting this concern. Thus, the court flatly rejects this argument,  
13 especially as Nordstrom’s argument suggests that class actions should never be  
14 certified because they would necessarily violate due process. That result is  
15 unmerited and undesirable.

16 Nordstrom next argues that Plaintiffs have failed to provide the court with a  
17 trial plan as required by Gartin v. S&M NuTec LLC, 245 F.R.D. 429, 441 (C.D.  
18 Cal. 2007) (requiring Plaintiffs to provide a trial plan when seeking class  
19 certification to manage the varied cases within the class). See also Zinser, 253  
20 F.3d at 1189 (finding that “[b]ecause [plaintiff] seeks certification of a nationwide  
21 class for which the law of forty-eight states potentially applies, [plaintiff bore] the  
22 burden of demonstrating ‘a suitable and realistic plan for trial of the class  
23 claims.’”). Here, the court has already declined to certify the Balasanayan  
24 Plaintiffs’ Nationwide Class. The remaining classes involve only California  
25

1 plaintiffs and claims. Accordingly, no class plan is required to demonstrate that  
2 this case is manageable because the litigation will center on only one state’s laws.

3 Nordstrom’s argument that Plaintiffs may recover unpaid wages through  
4 individual arbitration has no bearing if the court concludes that class certification  
5 is proper. Opp. MMCC at 25. Although Nordstrom is correct that alternate  
6 forums may offer a faster, less formal resolution of wage claims, Nordstrom has  
7 cited no authority that would compel this court to not certify a class based on the  
8 mere availability of that alternate forum.

9 The court agrees that Plaintiffs have met the requirements for superiority  
10 and declines to adopt any of the arguments Nordstrom has made. The court  
11 recognizes that each prospective class member’s possible recovery may be  
12 relatively small. The court further agrees that the Southern District of California  
13 is an appropriate forum because the proposed classes are located exclusively in  
14 California.<sup>15</sup>

#### 15 **IV. EFFECT OF BINDING DISPUTE RESOLUTION AGREEMENT**

16 Nordstrom contends that a “significant portion of putative class members  
17 are subject to Nordstrom’s June or August 2011 binding Dispute Resolution  
18 Agreements (“DRA”), which require individual arbitration of the claims at  
19 issue.” Opp. MMCC at 19; Opp. BMCC at 19. Nordstrom further argues that at  
20 least one court has declined to certify a class where “the evidence currently  
21 before the [c]ourt supports an inference that a significant number [of plaintiffs  
22 signed arbitration agreements], and that a significant portion of this litigation  
23

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24  
25 <sup>15</sup> The court is not addressing concerns regarding the superiority of the Nationwide Class, which, for the reasons already stated, the court will not certify.

1 would be devoted to discovering which class members signed such agreements  
2 and enforcing those agreements, rather than to the resolution of plaintiffs' legal  
3 claims." Pablo v. Servicemaster Global Holdings, Inc., 2011 U.S. Dist. LEXIS  
4 87918, at \*6 (N.D. Cal. 2011). Alternatively, Nordstrom argues that the court  
5 may elect to exclude salespeople who were hired after the DRA and who  
6 therefore have no existing rights to participate in these class actions.<sup>16</sup>

7 The Maraventano Plaintiffs claim that Nordstrom's argument "ignores the  
8 [c]ourt's March 8, 2012 holding that the DRA itself is invalid because it  
9 constituted an improper class communication, and that imposition of the  
10 agreement was confusing in and of itself." Reply MMCC at 3 n. 7 (citing  
11 Balasanayan v. Nordstrom, Inc., 2012 WL 760566, at \*2, n. 3 (S.D. Cal. March 8,  
12 2012)). They further contend that Nordstrom has failed "to present any evidence  
13 showing that the foregoing confusing circumstances were not applicable to  
14 employees hired after June 2011. Regardless, [they argue that] the DRA does not  
15 create individual issues for anyone hired before June 2011, rendering  
16 Nordstrom's argument untenable."

17 Pablo, the only authority provided by Nordstrom, is a case where the court  
18 later discovered that "numerous arbitration agreements were signed by  
19 defendants and their employees, as well as affidavits stating that defendants have  
20 utilized these agreements for at least the past eight years." Pablo, 2011 U.S. Dist.  
21 LEXIS 87918, at \*5. That is not the situation here for new employees who have  
22 signed the DRA well after this case was filed. Nordstrom cites no authority that

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23  
24 <sup>16</sup> Nordstrom recognizes that the court has previously refused to enforce the DRA as to putative  
25 class members hired before July 2011 under Rule 23 because it deprived them of an existing  
right to participate in the suit by not informing them about the impact of the DRA on the  
lawsuit. See Balasanayan, Dkt. 64.

1 would permit a defendant to reduce their liability by having new potential Class  
2 Members sign arbitration agreements. Nevertheless, the court concedes that  
3 Nordstrom was engaging in a standard practice that many companies engage in  
4 when hiring new employees. Accordingly, the court holds that new employees  
5 who signed the DRA upon becoming employed by Nordstrom may be properly  
6 excluded from the class. Prospective California Class Members who were  
7 employed prior to Nordstrom's use of the DRA may not be excluded from the  
8 class nor may the California Class Period be modified to reflect the signing of the  
9 DRA, which was an improper communication.

10 **V. PROPOSED CLASS NOTICES**

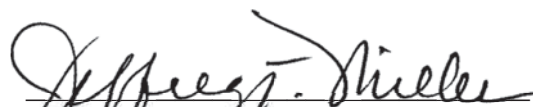
11 Finding this motion to approve proposed class notices as premature, the  
12 court declines to approve the proposed class notices without prejudice. Plaintiffs  
13 may renew their motions at a later date.

14 **VI. CONCLUSION**

15 For the aforementioned reasons, the motions for certification are granted  
16 for the proposed Maraventano and Balasanyan California Classes and denied for  
17 Balasanyan's proposed California Subclass and Nationwide Class. The court also  
18 strikes the Boedeker Declarations (Maraventano, Dkt. 99, Attachment 5;  
19 Balasanyan, Dkt. 91, Attachment 8) from the record.

20 **IT IS SO ORDERED.**

21 DATED: August 12, 2013

22  
23   
24 Jeffrey T. Miller  
25 United States District Judge