IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMIE HOLAK, Plaintiff, **v.** **KMART CORPORATION, et al.,** Defendants.	1:12-cv-00304 AWI MJS **FINDINGS AND RECOMMENDATION REGARDING MOTION FOR CLASS CERTIFICATION AND RELATED DISCOVERY AND EVIDENTIARY MOTIONS** [Docs. 82, 95, 104, 113]

On January 10, 2014, plaintiff Amie Holak ("Plainitff") filed the instant motion seeking class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure against defendant Kmart Corporation ("Defendant"). (ECF No. 85.) Both parties have filed cross-motions to strike declarations provided in support and defense of the certification motion. (ECF Nos. 95, 104.) Additionally, on March 3, 2014, Plaintiff filed a motion to modify the scheduling order and reopen discovery to allow further briefing in support of the certification motion. (ECF Nos. 113.)

The matters have been fully briefed, and on March 17, 2014, the Court deemed the matters submitted on the pleadings. (ECF No. 124.)

I. PROCEDURAL HISTORY

Plaintiff filed the instant action on January 23, 2012 in Fresno County Superior Court alleging California wage and hour violations against Defendant. Plaintiff presents

these claims on behalf of herself and "[a]ll non-exempt or hourly paid employees who worked for Defendants in a California Kmart store within four years prior to the filing of this complaint until the date of certification." (2nd Am. Compl. ¶ 16.)

On February 29, 2012, Defendant removed the matter to federal court based on the Class Action Fairness Act. Plaintiff sought remand for lack of subject matter jurisdiction on March 30, 2012. (ECF No. 12.) The Court denied the remand motion on May 4, 2012. (ECF No. 20.)

Defendant filed a motion to dismiss and a motion to strike on March 7, 2012. (ECF Nos. 8, 10.) In the motion to dismiss, Defendant moved to dismiss claims alleged against an employee of Defendant and a subsidiary company of Defendant. In the motion to strike, Defendant moved to strike the class allegations as overbroad, by including employees that were not subject to the alleged wage violations. Prior to adjudication of the motions, Plaintiff dismissed the defendant employee from the matter. (ECF No. 31.)

On December 12, 2012, the Court granted Defendant's motion to dismiss with leave to amend, and granted in part and denied in part Defendant's motion to strike. (ECF No. 41.) The Court granted the motion to dismiss regarding naming a subsidiary company as a defendant without sufficient factual basis to support the contention, but provided Plaintiff leave to amend. (Id. at 6.) The Court also dismissed, with leave to amend, Plaintiff's fifth and sixth causes of action based on alleged violations and fees required to withdraw wages when using Defendant's payroll debit card. (Id. at 11.) Finally, the Court denied Defendant's motion to strike the class allegations as premature, but granted the motion to strike with regard to Plaintiff's injunctive relief claims. (Id. at 12-14.)

On January 22, 2013, Plaintiff filed a second amended complaint. (ECF No. 52.) In the complaint, Plaintiff only named defendant Kmart Corporation, and did not include wage claims regarding penalties arising from the use of the payroll debit card system. (Id.) On February 19, 2013, Defendant filed an answer to the complaint. (ECF No. 61.)

With regard to discovery, while the motions to dismiss and strike were still pending, the parties filed a joint scheduling report on July 26, 2012. (ECF No. 33.) The parties also exchanged initial disclosures under Fed. R. Civ. P. 26(a)(1) on the same date.

In the joint scheduling report, Plaintiff proposed the date of June 7, 2013 for the deadline for filing a motion for class certification, whereas Defendant proposed a deadline roughly six months earlier on January 21, 2013. In light of the pending motions, the scheduling conference was continued several times, and ultimately held on March 28, 2013. (ECF No. 70.) In the parties' second joint scheduling report filed on March 27, 2013, Plaintiff proposed that the motion for class certification be filed in roughly nine months, on January 10, 2014. (ECF No. 69.) Defendant again proposed a much shorter period, and requested that the certification motion be ordered due in three months, on June 26, 2013. (Id.)

On March 29, 2013, the Court issued its scheduling order, and adopted the later dates proposed by Plaintiff. (ECF No. 70.) Accordingly, the class certification motion was due on January 10, 2014. (Id.) However, the Court instituted a discovery deadline of October 10, 2013. The Court ordered that "[a]bsent contrary agreement between the parties or further order of this Court, information and documents discovered or produced after that date shall not be included in or considered by the Court in ruling on the [class certification motion]." (Id. at 2.) Based on the scheduling order, the parties had six months to continue to pursue further discovery with regard to certification issues.

On July 15, 2013, the parties requested a telephonic discovery dispute conference which was held before the Magistrate Judge on July 17, 2013. (ECF No. 76, 81.) The issues raised were not resolved during the telephonic conference. (ECF No. 77.) The parties disputed the scope of discovery – Defendant asserted that Plaintiff was not entitled to class-wide discovery without making a prima facie showing that discovery was likely to produce substantiation of the class allegations. (ECF No. 78.) Defendant provided Plaintiff information regarding the employees that worked at Plaintiff's store, but

refused to provide further discovery of possible class members from other stores in California. (Id.)

In support of her showing of the need for discovery of all employees of Defendant in California, Plaintiff provided her deposition testimony and a store closing bulletin. (ECF No. 78, Exs. C-D.) During a second telephonic discovery dispute conference on July 30, 2013, the Magistrate Judge told the parties that based on the evidence presented by Plaintiff at that time, it was not appropriate to require Defendant to provide discovery regarding employees from other California stores. Plaintiff explained to the Court that she had further evidence in support of certification. In light of such representations, the Court instructed Plaintiff to provide the additional information to Defendant and for the parties to discuss and attempt to reach a resolution regarding the scope of discovery without Court intervention. However, if that was not possible, Plaintiff was authorized to file a motion to compel the discovery of the additional employee information. The Court issued a minute order summarizing the telephonic conference:

> The discovery dispute was not resolved. Court authorized Plaintiff to file a Motion to Compel Discovery [regarding] Identification of Potential Class Members. Before filing a Motion to Compel, Plaintiff is to share her supporting evidence with Defendants, and parties are to meet and confer further to see if that evidence obviates the need for the Motion. Parties are here advised that the Court's preliminary review of the Points and Authorities and evidence contained in the Telephonic Discovery Dispute Conference briefs, does not identify criteria which would justify such discovery.

(ECF No. 81.) Plaintiff did not thereafter file a motion to compel or seek further Court intervention before the end of the period for certification discovery. Accordingly, the discovery period ended as scheduled on October 10, 2013. Three months later, on January 10, 2014, Plaintiff filed the present class certification motion. (ECF No. 82.)

On February 10, 2014, Defendant filed an opposition to the class certification motion. (ECF No. 88.) In response to the opposition to the class certification motion, Plaintiff requested the Court conduct a telephonic discovery dispute conference. The Court held a dispute conference on February 21, 2014. (ECF No. 105.) Plaintiff argued that in light of the evidence provided by Defendant in its opposition to the class

certification motion, that discovery should be re-opened to allow Plaintiff to depose various witnesses, and that Plaintiff be provided further time to file a reply to the opposition to class certification. (Id.) The dispute was not resolved and so the Court authorized Plaintiff to file a motion seeking relief to modify the scheduling order, permit further discovery, and extend the deadline for filing the reply to the certification motion. The Court did not provide Plaintiff additional time to file a reply brief.

On March 3, 2014, Plaintiff filed a reply with regard to the class certification motion. On the same date, Plaintiff filed a motion to modify the scheduling order, permit Plaintiff to conduct discovery, and to grant Plaintiff the opportunity to file a sur-reply to the class certification motion. (ECF No. 113.) On March 6, 2014, Defendant filed an opposition to the discovery motion, and on March 13, 2014, Plaintiff filed a reply. (ECF Nos. 118, 123.) On March 17, 2014, the Court took both Plaintiff's motion for certification and motion to reopen discovery under submission. (ECF No. 124.) Accordingly, the matter stands ready for adjudication.

II. RELEVANT EVIDENCE

Prior to determining whether certification is proper the Court must determine what, if any, evidence should be excluded, and if discovery should be reopened to permit further discovery. As described above, the parties have both filed motions to strike portions of the opposing parties' evidence, and Plaintiff has filed a motion to modify the scheduling order to reopen discovery. The Court shall address the motions below.

A. Plaintiff's Evidence

In support of her motion for class certification, Plaintiff presents several documents. Plaintiff provides documents from Kmart including Kmart's opening and closing procedure checklists and portions of Kmart's overtime policy. (Decl. of Raul Perez, Exs. A, D, ECF No. 82-1.) Plaintiff provides copies of her deposition transcript and written declaration, the deposition transcript of Aimee Grabau, corporate designee for Kmart, and Kmart's Supplemental Responses to Plaintiff's Interrogatories, Set One. (Id., Exs. B-C, E; decl. of Amie Holak, ECF No. 82-2.) Finally, Plaintiff provides six

declarations from class members who were employed at different Kmart stores in California. (ECF No. 82-3.)

B. Defendant's' Evidence

In opposition of the motion for class certification, Defendant presents several documents. Defendant provides portions of the deposition transcripts of both Plaintiff and Aimee Grabau. (Decl. of Jeffrey Wohl, Exs E-F, ECF No. 89.) Defendant includes the declaration of Aimee Grabau, to which she attaches copies of relevant sections of Kmart's employees handbook and other policy documents. (Decl. of Aimee Grabau, ECF No. 90.) Finally, Defendant provides the declarations of forty-nine (49) Kmart assistant managers, and ninety-two (92) Kmart hourly associates. (ECF Nos. 91-92.)

C. Challenges to the Evidence

Both parties dispute the right of the opposing party to present the declarations prepared in support and opposition of the class certification motion. Concurrent with its opposition to the class certification motion, Defendant moved to strike the declarations of the six hourly Kmart associates Plaintiff provided in support of the motion for certification. (ECF No. 95.) Defendant alleges that the declarants were not disclosed before the October 10, 2013 discovery deadline and that Plaintiff did not move to modify the scheduling order to allow for discovery after the deadline. In response to Defendant's motion to strike, Plaintiff filed a motion to modify the scheduling order to re-open certification discovery and allow for further discovery to use support Plaintiff's reply to the certification motion. (ECF No. 113.)

Plaintiff also moves to strike Defendant's evidence. Specifically, Plaintiff moves to strike the declarations of Kmart assistant managers and hourly associates provided by Defendant in opposition to the motion for certification because Defendant did not disclose the declarants in a timely fashion as to provide Plaintiff a meaningful opportunity to depose them. (ECF No. 104.)

1. Challenges to Plaintiff's Declarations

Plaintiff provides the declarations of six hourly associates in support of her

certification motion. (See ECF No. 82-3.) The parties do not dispute that Plaintiff did not disclose the declarants prior to the October 10, 2013 deadline. The declarants were not disclosed until the filing of the certification motion three months later. Indeed, all the declarations were signed between December 19 and 25, 2013, i.e., after the October 10, 2013 discovery deadline.

a. Relevant Factual History

As described above, the instant case was filed on January 23, 2012. On July 12, 2012, the parties conferred as required under Fed. R. Civ. P. 26(f)(1) in preparation for filing the joint scheduling report, which was filed two weeks later on July 26, 2012. (ECF No. 33.) Accordingly, the parties were able to commence discovery on July 12, 2012, and proceeded to exchange initial disclosures shortly thereafter on July 26, 2012. (Fed. R. Civ. P. 26(d)(1).

While the parties were entitled to engage in discovery, the scheduling conference was continued for nearly six months because of pending motions before the Court. The conference was held on March 28, 2013, at which time the Court provided another six months for certification discovery, in addition to the nine months during which the parties had already been free to conduct discovery. (ECF No. 70.) In sum, the parties had nearly fifteen months to conduct certification discovery. The parties engaged in a discovery dispute conference in July, 2013, but took no further action until after the filing of the class certification motion.

b. The Parties' Contentions

Defendant contends that the Court, in the March 29, 2013 scheduling order, specifically set a discovery deadline for class certification issues on October 10, 2013, and that no "information or documents discovered or produced" after that date would be considered by the court. (ECF No. 70 at 2.) Further, the Court informed the parties that the duty to provide supplemental disclosures under Fed. R. Civ. P. 26(e) would be "strictly enforced." (Id.)

Despite the duty to provide disclosure of potential witnesses, Defendant argues

that Plaintiff did not disclose the names of the six declarants. In her initial disclosures, Plaintiff only discloses witnesses besides herself as "putative class members" and "supervisory and managerial" employees of Kmart. (Wohl Decl., Ex. G.) Despite having the duty to provide relevant discovery and supplement discovery, Plaintiff did not disclose the witness. Further, Defendant asserts that the discovery was conducted after the discovery deadline imposed by the Court on October 10, 2013.

In response, Plaintiff asserts that Defendant was not prejudiced by the delay in disclosing the witnesses because Plaintiff was willing to make the declarants available for deposition and that, in any event, Defendant had access to contact information for all of its employees. Finally, Plaintiff asserts that the Court's scheduling order does not require Plaintiff to disclose declarants that were used in support of the class certification motion.

c. Analysis

First, the Court must determine if the declarations were other than authorized by the Court's scheduling order. Plaintiff asserts that the March 29, 2013 scheduling order referred to information and documents, but not witnesses. Therefore Plaintiff believes that it was permissible to use the declarations signed after the October 10, 2013 discovery deadline.

The Court's Scheduling Order states that "all information and documents" used for purposes of certification must have been discovered or produced by October 10, 2013. "Information" and "documents" are very expansive terms. One would expect the term "information" reasonably to include the name and identity of any witnesses whose testimony is offered in support or opposition of certification.

Any doubt should have been put to rest by the language of the scheduling order. The court directed the parties to "complete Discovery related to [class certification issues] on or before October 10, 2013." and explained that "[a]bsent contrary agreement between the parties or further order of this Court, **information and documents discovered or produced after that date shall not be included or considered by the**

Court." (ECF No. 70 at 2. Emphasis added.) Clearly, this meant that everything that a party wanted to rely on in connection with the certification motion had to be “on the table,” so to speak, by October 10, 2013. To the extent a party was to rely upon a witness's testimony, the party was required to produce the name and contact information of the witness prior to the discovery deadline.

District courts enter scheduling orders in actions to "limit the time to join other parties, amend the pleadings, complete discovery, and file motions." Fed. R. Civ. P. 16(b)(3). In addition, scheduling orders may "modify the timing of disclosures" and "modify the extent of discovery." Id. Once entered by the court, a scheduling order "controls the course of the action unless the court modifies it." Fed. R. Civ. P. 16(d). "A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th Cir. 1992) (internal citation and quotations omitted). Disregard of the terms of the scheduling order "undermine[s] the court's ability to control its docket, disrupt[s] the agreed-upon course of the litigation, and reward[s] the indolent and the cavalier." Id. The district court "is given broad discretion in supervising the pretrial phase of litigation, and its decisions regarding the preclusive effect of a pretrial order . . . will not be disturbed unless they evidence a clear abuse of discretion." C.F. v. Capistrano Unified Sch. Dist., 654 F.3d 975, 984 (9th Cir. 2011) (citing Johnson, 975 F.2d at 607).

Defendant correctly asserts that Plaintiff failed to timely disclose the declarants. "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37 (c)(1). Plaintiff has provided no evidence that the declarants were disclosed to Defendant prior to the filing of Plaintiff's certification motion. As such, the witnesses were not disclosed to Defendant prior to the close of class certification discovery on October 10, 2013.

Plaintiff argues that her failure to disclose the declarants was substantially

justified or harmless because: (1) Defendant was aware that putative class members may present evidence even though no putative class members were named in Plaintiff's disclosures; (2) Defendant had information and access to putative class members, and (3) Defendant had been given the opportunity to depose the declarants.

First, Plaintiff argues that she provided in her initial disclosures that putative class members may have discoverable information and that "Defendant was clearly on notice that putative class members may submit evidence in support of Plaintiff's claims." (ECF No. 118 at 5.) Further, Plaintiff argues that Defendant, as the putative class members' employer, had the names and addresses of the putative class members from its employment records. (Id.)

Plaintiff did not however provide the name of any putative class members. Rule 26 requires parties to provide "the name and, if known, the address and telephone number" of relevant witnesses in the initial disclosures and supplements to the disclosures. Fed. R. Civ. P. 26(a)(1)(A)(i), 26(e)(1). Plaintiff's reference to "putative class members, as alleged in the operative complaint" is insufficient disclosure under Rule 26 and clearly so in the factual context of this case. Regardless whether Defendant possessed contact information for all of them, there are a staggering number of employees from the relevant time period. In her certification motion, Plaintiff asserts that there are more than 38,396 putative class members. (Mot. for Cert., p. 13; Perez Decl. ¶, Ex. E at 5.) Without providing the names of the six declarants to Defendant, it would have been practically impossible for Defendant to determine which, among the 38,396 putative class members, Plaintiff intended to use to support her allegations for class certification. Just because Defendant may have had payroll records that indicated putative class members, it does not mean it was not surprised or harmed by the failure to disclose the declarants from the thousands of other putative class members. Plaintiff's first two arguments are without merit.

Finally, Plaintiff argues that Defendant was not prejudiced because it had the opportunity to depose the declarants. This argument fails for multiple reasons as well.

First, the class certification discovery deadline had passed over three months before these declarants were disclosed. Defendants were not entitled to conduct discovery at that time without court approval. Secondly, Plaintiff made the offer to depose the declarants on January 31, 2014, only ten days before Defendant's opposition was due. It is unrealistic to suggest that Defendant would have had the ability to depose the declarants and prepare arguments in opposition based on the evidence elicited from the declarations in ten days.

Plaintiff cites cases for the proposition that failure to disclose declarants may be excused if the opportunity to depose them is made available. See Wilson v. Kiewit Pac. Co., 17 Wage & Hour Cas. 2d (BNA) 197, 2010 U.S. Dist. LEXIS 133304, 30-31 (N.D. Cal. Dec. 6, 2010); Ortiz v. CVS Caremark Corp., 2013 U.S. Dist. LEXIS 169854, 28n.1 (N.D. Cal. Dec. 2, 2013); In re TFT-LCD Antitrust Litig., 267 F.R.D. 583, 608 (N.D. Cal. 2010); McCrary v. Elations Co., LLC, 2014 U.S. Dist. LEXIS 8443, 45-48n.11 (C.D. Cal. Jan. 13, 2014). Each of these cases is inapposite.

In Wilson, the plaintiff filed a third amended complaint two weeks before moving for certification on significantly altered classes that ignored six of the causes of action in the third amended complaint. Id. The defendant immediately obtained new declarations to challenge the new claims raised by plaintiff. Id. When plaintiff asserted that the declarants were not disclosed, the court held that defendant did not violate its duty to provide timely supplemental disclosures, but that if it had, it was substantially justified. Id.

Here, Plaintiff's claims did not substantially change during the discovery period. Plaintiff did not provide Defendant with witness names initially or at any time during the fifteen month class certification discovery period ending on October 10, 2013. Plaintiff's failure to timely disclose the declarants created undue surprise and prejudice to Defendant. Plaintiff's offer to allow Defendant to depose the declarants shortly before its opposition brief was due and well after the discovery deadline was not a practical means to avoid prejudice in this matter.

In each of the other cases relied upon, prejudice arose because the disclosure of

the discovery was untimely and prevented the opposing party from the opportunity to depose the witnesses. In one matter, Ortiz v. CVS Caremark Corp., 2013 U.S. Dist. LEXIS 169854 at 28 n.1, the court found the late disclosure harmless because the opposing party had already deposed several of the witnesses and the rest of the undisclosed declarations were to the same effect. However, in each of the other cases, the disclosure was untimely and prejudicial. Defendant had no meaningful opportunity to depose the witnesses during the discovery period.

Plaintiff failed to timely disclose the names and contact of information of the other witnesses before the discovery deadline. Accordingly, declarations of the others are untimely and hereby stricken.

2. Defendant's Declarations

Plaintiff contends that the Defendant's 141 witnesses were untimely disclosed. As noted above, Defendant provided supplemental disclosures providing the names and contact information of the 141 witnesses on the last day of the class discovery period. Defendant explains that declarations of forty-nine (49) Kmart assistant managers were obtained in late September and early October, 2013, and disclosed to Plaintiff less than a couple weeks later.

All parties have a duty to provide supplemental disclosures "in a timely manner." Fed. R. Civ. P. 26(e)(1)(A). In this case, Defendant disclosed the assistant store manager witnesses within a short period of time after obtaining the declarations. Accordingly, the supplemental disclosures with regard to the assistant managers were timely made. The Court is cognizant that even though the disclosure met the deadline, disclosure on the last day of discovery certainly had the potential to prejudice Plaintiff. If Plaintiff had sought to depose the witnesses, she would have had to solicit a stipulation from Defendant or seek Court approval to modify the discovery deadline. Setting the discovery deadline three months before briefing left time for further limited discovery. However, Plaintiff took no action for **over four months** after receiving the disclosures, and only after the motion briefing period was underway. Plaintiff's inaction in this regard

made the last-minute disclosure of the assistant manager witnesses harmless. See e.g., Fed. Ins. Co. v. Handwerk Site Contractors, 2013 U.S. Dist. LEXIS 54332, *28-29 (M.D. Pa. Apr. 15, 2013) (party "cannot now complain of prejudice in light of its own inaction."); Ellison v. Windt, 2001 U.S. Dist. LEXIS 1347, *7-8 (M.D. Fla. Jan. 24, 2001) ("When, as here, a party fails to promptly seek enforcement of his rights, any prejudice suffered arises largely from the party's own inaction.").

While the assistant manager witnesses were timely disclosed, the hourly associate witnesses were not. Defendant obtained the majority of the hourly associate declarations in May and June, 2013, but waited until the last day of the discovery period, October 10, 2013, to provide Plaintiff supplemental disclosures. By waiting over four months and until the last day of the discovery, Defendant did not provide Plaintiff an opportunity to depose the witnesses. Defendant argues that disclosure of the witnesses was not required because Plaintiff did not place her state wide claims at issue. (ECF No. 114 at 11-12.) Admittedly, Plaintiff presented Defendant with little discovery supporting her state wide class claims. But Plaintiff never withdrew or said she intended to withdraw her state wide claims. While Defendant may have been reticent to provide Plaintiff names of Kmart associates at other stores in light of her apparent failure to pursue discovery, its actions were evasive and inappropriate. See Fed. R. Civ. P. 26, Notes of Advisory Committee on 1983 amendments ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses.").

For the foregoing reasons, the court finds that the declarations of hourly associates that were not timely disclosed (i.e. all hourly associates except those from the

Coalinga store[1]) shall be, and hereby are, stricken.

3. Modification of the Scheduling Order

Plaintiff also moves to modify the scheduling order to permit discovery regarding the 141 witness declarations provided by Defendant. As the ninety-two (92) Kmart hourly associates declarations have been stricken, the request is only pertinent to the remaining assistant manager declarations.

Plaintiff brought this motion upon receipt of Defendant's opposition to the motion for certification with the supporting declarations. Plaintiff contends that she could not have known of the declarations or their contents until that time. (ECF No. 113 at 1-2.) In her motion, Plaintiff asserts that the witnesses' declarations were not disclosed. She does not assert that Defendants failed to disclose the names and contact information of the witnesses.

a. Standard for Modification of the Scheduling Order

The Court has broad discretion in supervising the pretrial phase of litigation. C.F. v. Capistrano Unified Sch. Dist., 654 F.3d 975, 984 (9th Cir. 2011); Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002). Generally, the Court is required to enter a pretrial scheduling order within 120 days of the filing of the complaint. Fed. R. Civ. P. 16(b). The scheduling order "controls the subsequent course of the action" unless modified by the Court. Fed. R. Civ. P. 16(e). Orders entered before the final pretrial conference may be modified upon a showing of "good cause." Fed. R. Civ. P. 16(b); see also Johnson v. Mammoth Recreations, 975 F.2d 604, 608 (9th Cir. 1992).

Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294-95 (9th Cir. 2000); Johnson, 975 F.2d at 609. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment); Johnson, 975 F.2d at 609.

[1] Defendant asserted that it disclosed the names of all the employees of the Coalinga Kmart to Plaintiff prior to the end of the discovery period.

Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Johnson, 975 F.2d at 609. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. Id. (citing Gestetner Corp. v. Case Equip. Co., 108 F.R.D. 138, 141 (D. Me. 1985)). If the moving party was not diligent, the Court's inquiry should end. Id.

b. Analysis

Plaintiff asserts that there is good cause to reopen discovery because she did not have an opportunity to conduct adequate discovery regarding certification. The Court fails to find merit in this argument. The Court provided the parties over a year to conduct discovery relating to class certification. Nothing before the Courts suggests that one year was less than ample time for Plaintiff to conduct discovery related to class certification. Plaintiff asserts that she is prejudiced as she has not been able to depose the witnesses and provide rebuttal evidence. Plaintiff's position is facially reasonable. In this case, Defendant did not disclose the witnesses until the last day of the discovery period, leaving Plaintiff no time within the discovery period to depose them or otherwise conduct discovery regarding them. However, Plaintiff then delayed over four months after receiving the disclosures to request relief and modification of the scheduling order. In fact, Plaintiff only sought relief upon realizing that Defendant used the evidence obtained from the disclosed witnesses to support its opposition to the class certification motion.

The Court finds that Plaintiff's said four month delay is wholly inconsistent with diligence in requesting relief. See, e.g., Pedroza v. PetSmart, Inc., 2012 U.S. Dist. LEXIS 189538, 2 (C.D. Cal. Aug. 15, 2012) ("A reasonably diligent party who was non-dilatory in seeking discovery would have sought an extension [at the time of disclosure]"); Wartluft v. Feather River Cmty. College, 2010 U.S. Dist. LEXIS 23431, 5 (E.D. Cal. Feb. 23, 2010) (plaintiff was not diligent in waiting until three months after the close of discovery to seek relief.).

Plaintiff argues the delay was justified because she could not have deposed the

witnesses regarding the contents of their declarations until she had received the declarations. (ECF No. 113 at 6-9.)

Plaintiff's argument is without merit. The assistant manager witnesses were timely disclosed, albeit at the end of the discovery period. Furthermore, Defendant did not have a duty to provide Plaintiff the witness declarations. "The Federal Rules of Civil Procedure do not require a party who has disclosed potential witnesses to reveal the declarations signed by said witnesses for use in an impending summary judgment motion." Joseph v. Las Vegas Metro. Police Dep't, 2011 U.S. Dist. LEXIS 63954 (D. Nev. June 10, 2011) "Such declarations are considered work product up until the moment they are filed." Id. (citing Intel Corp v. Via Technologies, 204 F.R.D. 450, 451-2 (N.D. Cal. 2001). As the court in Intel Corp. explained:

> when a fact witness is disclosed, all parties are on notice that the disclosing side contends the witness has relevant knowledge. All are thus on notice that the disclosing side may well have interviewed the witness and may have even obtained a statement. That would be normal practice. Disclosing that fact would only disclose what should be presumed by prudent counsel. All parties are free to contact the fact witness and obtain their own statements.

Intel Corp., 204 F.R.D. at 452. Defendant provided Plaintiff with the names and contact information of the witnesses, yet Plaintiff did nothing until Defendant presented declarations during briefing. Had Plaintiff desired to determine what evidence each witness possessed, Plaintiff could have begun her inquiry in October. Plaintiff's counsel explains that she recently initiated a campaign to contact the hourly associate witnesses, but provides no information why she did not attempt to do so earlier. (Whitte Decl., ¶ 9., ECF No. 113-1.) As described, the Court has stricken those declarations. With regard to the assistant manager witnesses, Plaintiff has provided no evidence that she has attempted to contact them at any time.

Plaintiff was not diligent in seeking a modification of the scheduling order, and therefore has not provided good cause as required under Rule 16. Accordingly, the motion to modify the scheduling order is denied.

To summarize the evidentiary rulings:

Plaintiff's six witness declarations were not timely obtained or disclosed, and are therefore stricken. Defendant's store manager declarations were timely disclosed, but the hourly employee declarations were not. Accordingly, the hourly store employee declarations, notwithstanding the hourly employees from the Coalinga store that were disclosed earlier, are stricken. Finally, since Plaintiff has not presented good cause to modify the scheduling order, the modification motion is denied.

III. LEGAL STANDARD FOR CLASS CERTIFICATION

A. Law Governing Class Certification

To obtain class certification, Plaintiff bears the burden of showing she meets each of the four requirements of Federal Rule of Civil Procedure 23(a), together with at least one of the requirements of Rule 23(b). Ellis v. Costco Wholesale Corp., 657 F.3d 970, 979-80 (9th Cir. 2011).

The four Rule 23(a) requirements are numerosity, commonality, typicality, and adequacy, i.e., (1) the class is so large that joinder of all members is impracticable; (2) there are one or more questions of law or fact common to the class; (3) the named parties' claims are typical of the class; and (4) the class representatives will fairly and adequately protect the interests of other members of the class. Fed. R. Civ. P. 23(a); Ellis, 657 F.3d at 980. Defendant does not dispute numerosity or adequacy, and the resolution of this motion therefore hinges on the interrelated questions of commonality and typicality. See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge.").

The Court must perform "a rigorous analysis [to ensure] that the prerequisites of Rule 23(a) have been satisfied." Wal–Mart Stores v. Dukes, 131 S. Ct. 2541, 2551 (2011) (citation and internal quotation marks omitted). The plaintiff must prove that the proposed class presents common questions of law or fact. Id. at 2550-51. This means that the class members' claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution — which means that determination of its

truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 2551.

As for Rule 23(b), Plaintiff contends the proposed class satisfies the third prong because "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b). "While Rule 23(a)(2) asks whether there are issues common to the class, Rule 23(b)(3) asks whether these common questions predominate. Though there is substantial overlap between the two tests, the 23(b)(3) test is 'far more demanding,' and asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" Wolin v. Jaguar Land Rover North America, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). To answer this question, the Court must "probe behind the pleadings." Wal–Mart, 131 S. Ct. at 2551 (citation and internal quotation marks omitted). The plaintiff must "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).

1. Rule 23(a) Prerequisites

a. Numerosity

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This requires the Court to consider "specific facts of each case and imposes no absolute limitations." General Tel. Co. v. EEOC, 446 U.S. 318, 330 (U.S. 1980). Courts interpreting the numerosity requirement have identified a variety of factors relevant to whether joinder of all class members would be impracticable.

> Though different courts label and group the considerations differently, they include: (1) the number of individual class members; (2) the ease of identifying and contacting class members; (3) the geographical spread of class members; and (4) the ability and willingness of individual members to bring claims, as affected by their financial resources, the size of the claims, and their fear of retaliation in light of an ongoing relationship with the defendant.

Twegbe v. Pharmaca Integrative Pharm., Inc., 2013 U.S. Dist. LEXIS 100067 (N.D. Cal. July 17, 2013); see also 7A Wright et al., Federal Practice & Procedure § 1762 (3d ed.); McLaughlin, McLaughlin on Class Actions § 4:6; Rubinstein et al., Newberg on Class Actions § 3:11.

b. Commonality

Rule 23(a) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement has been construed permissively; not all questions of law and fact need to be common. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). "However, it is insufficient to merely allege any common question." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011).

In Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (2011), the Supreme Court "recently emphasized that commonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." Abdullah v. U.S. Sec. Assocs., 731 F.3d 952, 957 (9th Cir. 2013); (quoting Wal-Mart, 131 S. Ct. at 2551) (internal alteration omitted); Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012).

"[T]he key inquiry is not whether the plaintiffs have raised common questions, 'even in droves,' but rather, whether class treatment will 'generate common answers apt to drive the resolution of the litigation.'" Abdullah, 731 F.3d at 957 (citing Wal-Mart, 131 S. Ct. at 2551.). "This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is "a single *significant* question of law or fact." Abdullah, 731 F.3d at 957 (citing Mazza, 666 F.3d at 589) (emphasis in original).

c. Typicality

The typicality requirement demands that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Under Rule 23(a)(3)'s permissive standard, "representative claims are typical if

they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. Typicality is generally satisfied when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Rodriguez v. Hayes, 591 F.3d 1105, 1124 (9th Cir. 2010).

Furthermore "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." Wal-Mart Stores, Inc., 131 S. Ct. at 2551 n.5. The Supreme Court explained how the elements overlap:

> Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

Id. (citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-158, n.13 (1982)).

d. Fair and Adequate Representation

Absentee class members must be adequately represented for judgment to be binding upon them. Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). Accordingly, this requirement is satisfied if the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Here, Defendant does not challenge whether the class representative adequately represents the interests of the class members.

2. Rule 23(b)(3) Certification

If an action meets the prerequisites of Rule 23(a), the party seeking class certification must show the action is appropriate under Rule 23(b). Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Here, Plaintiffs propose certification under Rule 23(b)(3).

Class certification under Rule 23(b)(3) is an "adventuresome innovation," and

allows for class certification in cases "in which class-action treatment is not clearly called for as it is in Rule 23(b)(1) and (b)(2) situations." Amchem Prods., 521 U.S. at 615. Thus, a class is maintainable under Rule 23(b)(3) where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and where "a class action is superior to other available methods for fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem, 117 S. Ct. at 2249; Hanlon, 150 F.3d at 1022. Where the issues of a case "require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001).

3. Burden of Proof and Evidentiary Submissions

Parties seeking class certification bear the burden of demonstrating that each element of Rule 23 is satisfied, and "must affirmatively demonstrate . . . compliance with the Rule." Wal-Mart Stores, 131 S. Ct. at 2551; Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). The Court must conduct a "rigorous analysis," which may require the Court "to probe behind the pleadings before coming to rest on the certification question." Wal-Mart Stores, 131 S. Ct. at 2551 (quoting Falcon, 457 U.S. at 160-61). The Court has an affirmative duty to consider the merits of an action "to the extent that they overlap with class certification issues." Ellis, 657 F.3d at 981 ("a district court must consider the merits if they overlap with the Rule 23(a) requirements") (citing Wal-Mart Stores, 131 S. Ct. at 2551-52; Hanon, 976 F.2d at 509). As a result, the Court may consider material evidence submitted by the parties to determine Rule 23 requirements are satisfied. Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975).

IV. EVIDENTIARY OBJECTIONS

While the Court may need to delve into the merits, the inquiry is solely for the purpose of determining if certification is proper under Rule 23. Wal-Mart Stores, 131 S. Ct. at 2552 n.6. Below, the Court shall note in detail how the parties have presented

conflicting evidence. However, the analysis of the evidence is merely to determine issues related to certification. The Court, in reviewing declarations submitted by the parties, is not a position to determine the credibility of the given declarant, and therefore it is not possible to make ultimate conclusions regarding liability that would be decided at trial. Instead the Court is focused on the determination whether Plaintiffs have met the burden established under Rule 23.

In this vein, each party has attacked the credibility of the declarants provided by the other party. Defendant asserts that statements in Plaintiff Amie Holak's declaration contradict her sworn deposition testimony, are speculative and lack foundation, are vague and ambiguous, and are irrelevant. (ECF No. 98.) Most of the objections relate to contents of the declaration that contradict her deposition testimony or provide insufficient detail regarding how she allegedly performed unpaid work during closing shifts. Defendant objects to the declarations of Plaintiff's other witnesses for the same reasons. (See ECF No. 95.) On the other hand, Plaintiff objects to the form declarations prepared by Defendant's hourly associate witnesses. (ECF No. 112.) The Court is not in a position to ultimately determine the credibility of each of these witnesses' statements based solely on examination of the anecdotal evidence presented and will not do so.

Since a motion to certify a class is a preliminary procedure, courts do not require strict adherence to the Federal Rules of Civil Procedure or the Federal Rules of Evidence. See Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178 (1974) (The class certification procedure "is not accompanied by the traditional rules and procedures applicable to civil trials."). At the class certification stage, "the court makes no findings of fact and announces no ultimate conclusions on Plaintiffs' claims." Alonzo v. Maximus, Inc., 275 F.R.D. 513, 519 (CD. Cal. 2011) (quoting Mazza v. Am. Honda Motor Co., 254 F.R.D. 610, 616 (CD. Cal. 2008). Therefore, the Court may consider inadmissible evidence at this stage. Keilholtz v. Lennox Hearth Prods, Inc., 268 F.R.D. 330, 337 n. 3 (N.D. Cal. 2010). "The court need not address the ultimate admissibility of the parties' proffered exhibits, documents and testimony at this stage, and may consider them where

necessary for resolution of the [Motion for Class Certification]." Alonzo, 275 F.R.D. at 519; Waine-Golston v. Time Warner Entertainment-Advance/New House P'ship, 2012 U.S. Dist. LEXIS 179611, 2012 WL 6591610, at *9 (S.D. Cal. Dec. 18, 2012). Accordingly, the Court overrules the parties' evidentiary objections. It shall review all the evidence presented, whether admissible or not.

V. PLAINTIFF'S EVIDENCE

Plaintiff presents evidence in support of two subclasses of non-exempt hourly employees. The first subclass involves workers who were not paid for all hours worked based on either being required to (1) work after clocking out of closing shifts or (2) wait, after having clocked out, for someone to unlock the door so they could leave the store. The second subclass involves Kmart workers that were not provided compliant wage statements. Specifically, Plaintiff alleges that Defendant overstated the overtime rate on some wage statements.

1. General Polices and Evidence Relating to Uncompensated Work

In support of certification, Plaintiff provides several of Kmart's policy documents. (See Perez Decl., Exs. A, C.[2]) Plaintiff provides an "Opening and Closing Checklist for store managers. (Id., Ex. A.) The document lists things to do at closing to include locking the store doors and "Allowing associates to exit; one associate should walk out with you." Exhibit C describes wage and hour laws and describes how non-exempt employees must be paid for all time worked, must be paid for all overtime accrued, even if unauthorized, and that accurate records must be kept. (Id., Ex. C.)

Plaintiff provides relevant parts of her deposition testimony. (Perez Decl., Ex. B.) In her declaration she states that: "generally everybody" remained after the store closed and that after clocking out she was forced to wait until everyone was ready to leave before she could leave (Id. at 125, 145); that the doors were locked and only

[2] It appears that exhibits C and D to the Declaration or Raul Perez have been juxtaposed. For the sake of consistency, the Court shall refer to Kmart's bates stamped document "Kmart-000747" as exhibit C, despite being included as exhibit D.

management had a key to unlock the doors (Id. at 132.); that sometimes she helped others with their work after clocking out, but could not clock back in without manager approval (Id. at 135.); and that she would get written up if she worked late and accrued overtime (Id. at 142-143.).

Plaintiff also provides a declaration in support of her claims. (Holak Decl., ECF No. 82-2.) She explains that she worked as an hourly employee at the Coalinga Kmart store from July 2008 to February 2010, and from December 2010 to September 2011. (Id. at ¶ 2.) Plaintiff worked several shifts including closing shifts. (Id. at ¶ 5.) When the store closed, the store manager would lock the doors, preventing customers from entering and employees from leaving. (Id. at ¶ 6.) After the store closed, Plaintiff explained that employees were expected to complete all job duties and make sure the store was ready for the opening shift the next day. (Id. at ¶ 7.) Plaintiff explains in her declaration how she was forced to perform work or remain in the store after she clocked out:

> When I worked the closing shift, I was required clock out at the end of my scheduled shift, or clock out when I was done with my own closing shift job duties. However, my managers would not permit me to leave the store until all of the closing shift job duties were completed in every area or department of the store. After I had finished my own duties and clocked out, I was instructed to help other employees complete their job duties as well. So, even though I had clocked out, I was forced to wait about 20 to 30 minutes for other employees to complete their closing duties, for my manager to confirm that all closing duties had been completed in each department, unlock the doors and let us out all at the same time.

(Id. at ¶ 8.) As her manager locked the doors, Plaintiff asserts that he was aware that employees remanded in the store performing uncompensated work.

2. Inaccurate Wage Statement Claim

Finally, Plaintiff asserts that her "wage statements did not include all applicable hourly rates for overtime in effect during the pay periods when [she] earned a service commission." (Id. at ¶ 12.) As a result, Plaintiff contends that she had to refer to outside sources to figure out how to calculate her overtime rate. (Id.) Plaintiff attached four pay stubs in support of her claim. (Holak Decl., Ex. A.) Three of the pay stubs list Plaintiff's

overtime rate as only three to nine cents more than Plaintiff's normal pay rates. (Id.)

VI. DEFENDANT'S EVIDENCE

Defendant provides several sources of evidence in opposition to summary judgment.

First, Defendant provides portions of Plaintiff Holak's declaration. (Wohl Decl., Ex. F.) In the deposition, Plaintiff stated that she worked one closing shift a week for the last three months of her employment. (Id. at 71-72.) She explained that during her closing shifts, after the store closed, she performed various tasks for a half hour to an hour and would then clock out. (Id. at 124-28.) Sometimes after clocking out, she would leave, but sometimes she would then help other employees or wait for the supervisors to let her out of the building. (Id.) Specifically she remembered two or three instances where, after she was done working and had clocked out, she waited roughly a half hour to leave the store. (Id.)

Plaintiff explained that she observed other employees waiting on those occasions on which she worked late, but did not know if employees waited or worked off the clock when she was not working. (Wohl Decl., Ex. F at 140.) She also had no knowledge if this occurred at other Kmart stores. (Id.) She did not know if the other employees clocked out early or at the time they left the store. (Id. at 145-46.) When asked whether she was aware of the company policy that it is the responsibility for each employee to record the time he or she works, that employees must never work off the clock, and that employees should obtain approval to work overtime, and that all overtime work must be recorded, Plaintiff answered affirmatively. (Id. at 55-56.)

With regard to her wage statements, Plaintiff explained that Kmart had moved to an electronic wage statement while she was working. (Id. at 147-49.) During the time that she worked closing shifts, she was being paid through the electronic system, and she did not look at her wage statements. (Id.)

Defendant also presented the declaration of Aimee Grabau, the Format Leader of Human Resources for Kmart Corporation. (Grabau Decl., ¶ 1, ECF No. 90.) She is

responsible for human resources and employment functions for Kmart throughout California. (Id. at ¶ 2.) According to Grabau, Kmart prohibits employees from working off the clock and requires that associates be paid for all hours worked, including unapproved overtime. (Id. at ¶ 3.)

Grabau also described the method that Kmart employees clocked in and out of work. Kmart associates used cash registers, and since at least January 1, 2008, associates could ask their managers or human resources to make a correction. (Id. at ¶ 4.) Prior to 2010, if an employee's time records were incorrect, the employee could submit a physical correction form. (Id.) Since 2010, an employee could make corrections to his or her time records by using the timekeeping software on the store's registers or by submitting a physical correction form. (Id.)

Grabau explained that Kmart's timekeeping policies were listed in the associate handbook available to associates in physical copy and online. (Id. at ¶ 6.) She also provided relevant sections of the employee handbook and a copy of a policy document "LMT 03 – Punch Time Audit Report (May 2013)" describing procedures for accurately entering and keeping associates' time. (Id. at ¶ 10, Exs. A-E.) Grabau attached copies of training materials provided to managers and supervisors regarding work and pay policies. (Id. at ¶¶ 12-13, Exs. F-I.) All of the documents provided by Grabau instruct employees and supervisors regarding proper timekeeping, including accounting for all time worked.

In addition to Grabau's declaration, Defendant presents portions of Grabau's deposition. (See Wohl Decl., Ex. E, ECF No. 89.) There Grabau testified that Kmart associates had the ability to enter the timekeeping systems and change the time that they clocked in and out, and that the changes were then reviewed by supervisors. (Id., Ex. E at 25-26.) The default of the timekeeping system is to consider changes as approved, and a supervisor reviewed the changes only to ensure that they were correct. (Id.)

Defendant supports its contentions with several declarations of employees of the

Coalinga Kmart store. William Watts, an assistant manager of the Coalinga store since 2002 explained that to ensure accurate timekeeping, Kmart has strictly enforced a policy of not allowing employees to work off the clock. (Watts Decl., ECF No 91-2 at 174-78, ¶ 6.) He stated that if an employee believes that his or her clock records are incorrect, an employee must make a time correction so that they are accurately paid. (Id.) The timekeeping polices are communicated to hourly associates at orientation, and are provided in the employee handbook. (Id. at ¶ 7.) Watts was not aware of any Kmart corporate policy that directs, condones, or encourages closing-shift supervisors to have employees to clock out and continue to work before leaving the store, and he has never been instructed to engage in such a practice. (Id. at ¶¶ 8-9.)

In discussing the closing procedures for the Coalinga store, Watts explained that four cash registers and the service desk may be used as time clocks for employee use in clocking in and out. (Id. at ¶ 10.) The store has two parallel rows of doors at the front of the store. (Id. at ¶¶ 12-14.) At closing, only the outside doors, the doors facing the parking lot, are locked. (Id.) All of the outside doors have a twist lock on the inside of the door, allowing anyone inside the store to lock and unlock the doors. (Id.) One of the outside doors has a keyed lock, facing the outside of the store, allowing a key-carrying employee to lock the store upon leaving and unlock the store upon arriving. (Id.)

In general, some closing shift employees finish work and leave before the store is closed. (Id. at ¶¶ 15-23.) Once the store is closed, if there are any customers left in the store, an employee leaves one of the front doors unlocked, and stands by the unlocked door so that they can lock it when the customers exits the store. (Id.) Once all customers have left, Watts instructs the last cashier to take the money from the register and deliver it to the service desk. (Id.) On occasions, the cashier may then clock out and leave before the other employees. If so, another employee or Watts would unlock the exit door to allow the cashier to leave and then re-lock the door. (Id.)

When the store is closed and locked, Watts would account for and secure the money in the safe while hourly associates straightened up the store for the next day. (Id.)

Upon the store being adequately cleaned, Watts would announce over the intercom that it was time to clock out, and for everyone to collect their belongings and meet at the registers in the front of the store. (Id.) Watts would hold a brief meeting, and then have the employees clock out. (Id.) Upon clocking out, the employees unlock the front door and exit the store. (Id.)

After all the employees leave, the loss prevention employee then clocks out as Watts sets the store alarm, and then he and the loss prevention employee exit the store together and lock the door from the exterior using a key. (Id.)

While the above process was normally followed, sometimes an employee was instructed to exit before the rest of the employees. (Id. at ¶¶ 24-26.) When this happened, Watts allowed the employee to clock out, he unlocked the front door to allow the employee to exit, and then re-locked the door. (Id.) Further, if an employee could not find Watts, the employee could unlock the door from the inside without a key and exit the store. (Id.) Watts worked at the store during the period Plaintiff was employed, but in a separate department. (Id. at ¶ 28.) Nevertheless, Plaintiff could have contacted him if she had had a problem during the closing of the store. (Id.) Watts had no recollection of Plaintiff complaining to him regarding the closing procedures of the store. (Id.)

In addition to the declaration of Watts, Defendant presented the declarations of eight hourly associates either employed or formerly employed at the Coalinga Kmart store. (See Decls. of Sophia Escobar, Estephanie Garcia, Ruben Lopez, James Milstead, Audra Mitchell, Elvia Silva, Maricela Stevens, and Sheila Todd, ECF No. 92, Exs. 25, 32, 46, 56-57, 76, 80, 82.) All of the hourly associates indicate in their declarations that they never had to wait to leave the store. (Id.) This was because the following reasons: (1) the store doors were not locked at the time the employee clocked out, (2) if the doors were locked, the store manager or another employee unlocked the doors right after the employee clocked out, and (3) the time clock was located in the front of the store, making it easy to exit the store quickly upon clocking out. (Id.) Further, the Coalinga hourly associates stated that they never performed work off the clock for which

they were not compensated. (Id.)

Specifically, hourly associate Estephanie Garcia indicated that she did not have to wait because "[a]t the end of the night, the manager calls the employees to the front of the store, I punch out, and then I leave." (Garcia Decl., ECF No. 92, Ex. 32.) Hourly associate James Milstead explained that "[t]he doors were not locked on the inside of the store and I could let myself out." (Milstead Decl., ECF No. 92, Ex. 56.) Hourly associate Audra Mitchell indicated that she "could open the locked door [her]self and simply leave." (Mitchell Decl., ECF No. 92, Ex. 57.) Hourly associate Marcella Stevens described the closing procedure consistently with the description given by assistant manager Watts. She explained, "[a]ll employees gather at the front of the store at the end of the night, the manager holds a brief meeting, I clock out, and the manager or another employee unlocks the door, and I walk out." (Stevens Decl., ECF No. 92, Ex. 80.) Hourly associate Sheila Todd explained that "[s]ecurity is by the door to let me out." (Todd Decl., ECF No. 92, Ex. 82.)

VII. ANALYSIS

A. RULE 23(a) REQUIREMENTS

1. Numerosity

Plaintiff asserts that the class consists of 38,396 employees that worked for Defendants as hourly or non-exempt employees from 2008 to 2012. (See Perez Decl., Ex. E.) Defendants do not dispute numerosity. As the potential class consists of tens of thousands of employees, the Court holds that the numerosity requirement is met.

2. Commonality

a. Uncompensated Work Sub-Class

Plaintiff asserts that the subclass presents a common factual question, namely "whether employees worked off-the-clock after their shift ended." (Mot. for Certification, ECF No. 82 at 8.) While Defendant's policies clearly required employees to accurately record their time, and that all time worked is paid, Plaintiff contends that Defendant had a policy of forcing employees who were clocked out to remain either working or waiting in

the locked store until management released all employees. (See Reply at 3-6.) Plaintiff claims that employees are "in effect trapped by Kmart until Kmart doors are unlocked and they are permitted to leave." (Id.) Further, Plaintiff claims that the policies require employees to clock out at the end of their shift and the time system prohibits employees from clocking out outside of the scheduled time without manager approval. (See Grant Decl., Ex. 2.)

i. Analysis

Under California law, an employer must pay an employee for all "hours worked," which is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Morillion v. Royal Packing Co., 22 Cal. 4th 575, 94 Cal. Rptr. 2d 3, 995 P.2d 139, 141 (Cal. 2000) (quotation omitted). Under this rule, an employer is deemed to have "suffered or permitted [an employee] to work" if it knew or should have known that its employees were working off-the-clock. Id. at 145. [3] Accordingly, the common question relating to whether Defendant's policies or practices permitted uncompensated work is congruent with the relevant legal standard for uncompensated work.

The Court holds that the subclass, on its face, presents "a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of [the] claim in one stroke" as required under Wal-Mart. See Abdullah v. U.S. Sec. Assocs., 731 F.3d at 957. Here, the common question is whether the class members performed uncompensated and unrecorded work after the closing of the store. At trial, should Plaintiff prove the truth of the contention that uncompensated work was

[3] "[T]he California Labor Commissioner notes that the time the employee is suffered or permitted to work, whether or not required to do so can be interpreted as time an employee is working but is not subject to an employer's control. This time can include work such as unauthorized overtime, which the employer has not requested or required. Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. The employer knows or has reason to believe that he is continuing to work and the time is working time." Morillion at 145 (citations and internal punctuation omitted).

performed, she would establish the central common issue regarding liability for the claim.

a. Kmart's Policies

Plaintiff contends that Kmart's uniform policy required employees, at the end of a shift, to clock out and remain in the store under the control of Kmart until a manager gave them permission to leave. (ECF No. 82 at 7.) Specifically, Plaintiff describes the alleged uniform polies of Kmart that led to uncompensated work being performed:

> Kmart is liable to subclass members for maintaining closing policies requiring closing-shift employees to be locked in the stores at closing time, but do not require closing managers to allow them to leave store premises immediately after clocking out. Instead, Kmart's undisputed corporate policies (1) require subclass members to clock-out at the end of their shift; (2) require closing managers to lock the doors when their stores close and then perform various closing tasks—one of which is to allow employees to exit the store; and (3) permit managers to establish their own closing procedures or routine for performing required closing tasks. As a result, until they are permitted to exit, subclass members are obligated to remain on the store premises under Kmart's control and are not compensated for this time.

(ECF No. 109 at 1.) Plaintiff further asserts that it is "Kmart's lack of a uniform class-wide closing policy requiring employees to be permitted to leave store premises immediately after clocking-out that violates California minimum wage laws." (Id. at 1-2.) In support of certification, Plaintiff relies upon her own declaration and several documents regarding Kmart's policies and procedures. (ECF No. 82 at 7-8.)

Plaintiff provides an opening and closing checklist for store managers and directors. (Perez Decl., Ex. A, ECF No. 82-1.) In pertinent part, the checklist instructs managers to "lock all perimeter doors," "lock the front door," ensuring that all customers have left the store, and that the money is placed in safe. (Id.) The checklist further instructs the manager to "[a]llow associates to exit" and that "one associate should walk out with you." (Id.)

Defendants' employee handbook explains that employees must record all work performed, regardless of failure to obtain prior approval:

> Associates must accurately record the time they start and end work, as well as the beginning and ending time of each meal period. The Company is obligated to pay for all time worked, which means associates should never work off the clock regardless of the circumstances. Working

> off the clock is strictly prohibited and should be reported immediately if an associate believes it has occurred. Associates also should obtain prior management approval before working overtime. All overtime work must be recorded, regardless of whether the associate obtained prior approval.
>
> Altering, falsifying, or tampering with timekeeping records or devices (including punching in or out for another associate), working off the clock or working overtime on an unauthorized basis or any other violation of the Company's pay for work policies and rules may result in disciplinary action, up to and including termination. Associates who need a correction or modification to a time record must report the change to their manager or human resources representative as soon as reasonably possible.

(See Grabau Decl., ¶¶ 3-6, 9, Exh. C, ECF No. 90.) If time records were incorrect and did not accurately reflect the hours of time worked, then managers and members of human resources could make a "punch correction" to correct the time records. (Id. at ¶ 4.) Furthermore, during the relevant period employees were able to submit physical time correction forms, and since 2010, employees could submit a time correction through the timekeeping software at the store's registers. (Id.)

None of the evidence provided shows that Kmart had a policy, as Plaintiff asserts, of requiring closing-shift employees to remain in the store after clocking-out and until permitted to leave by a supervisor. The manager opening and closing checklist clearly explains that managers should lock the store doors upon the closing of the store, and that the manager should at some unspecified time later let the associates leave. (Perez Decl., Ex. A.) However, the checklist provides no guidance and is silent regarding when managers should allow employees to clock out, and whether the associates should remain in the store after clocking out. Accordingly, the checklist does not provide favorable support for Plaintiff's position regarding the alleged policy of requiring off-the-clock work.[4] Further, Kmart's policies, as indicated by presentation materials and the employee handbook, indicate that associates are to accurately record all time worked. (Perez Decl., Ex. D; Grabau Decl., ¶¶ 3-6, 9, Exh. C.)

Plaintiff attaches to her reply further documentation regarding Kmart's policies

[4] Nor does the checklist provide favorable support to Defendant's position that hourly employees clock-out immediately before leaving.

regarding timekeeping. (See Grant Decl., ECF No. 109, Exs. 1-2.) These documents similarly fail to support the contentions raised by Plaintiff. The documents confirm that hourly associates must accurately record hours worked, and that clocking out at a time that does not conform with a scheduled shift requires manager approval. (Id.) While clocking out after the end of a scheduled shift requires manager approval, the document notes that a manager need not approve the "punch" when made. The manager need only approve the "punch" prior to the end of the workweek. (Id.) While Plaintiff is correct that Kmart does not have a specific policy stating that a manager must immediately unlock the store doors to allow employees to leave upon clocking out, nothing in the company policies support Plaintiff's contention that the policy is for managers to keep employees in the store after they clocked out of their shift.

Plaintiff argues that despite having a policy prohibiting off-the-clock work, a class can still be certified if it is shown that Defendants acted inconsistently with the stated policies and allowed off-the-clock work to be performed. (See Reply at 6-7.) The Court agrees with that general proposition. Here, the policies alone do not provide favorable support for the claim that hourly associates indeed performed off-the-clock work. To make a favorable showing that common questions exist regarding whether associates performed off-the-clock work during closing shifts, evidentiary support must come from other sources, specifically the anecdotal evidence of the employees.

b. Employees' Declarations

As described above, Plaintiff states in her declaration that she was required to clock out at the end of her scheduled shift or when finished with her job duties. (Holak Decl. at ¶ 8, ECF No. 82-2.) After clocking out, she had to either wait or help other employees finish their job duties before leaving the store. (Id.) Of specific note, Plaintiff explained in her deposition that only the managers had keys to unlock the store doors that could not be otherwise opened once locked. (Perez Decl, Ex. B, ECF No. 82-1 at 132.) When asked why she did not attempt to make a punch correction to include the additional time spent at work, Holak stated that she attempted to, but the computer

system required manager approval to do so. (Id. at 136.) She did not seek manager approval because she "just wanted to get out of there." (Id.) She also stated that the reason that she did not wait until she was to be let out of the store to clock out was because if she clocked out late, she could get an administrative write-up. (Id. at 142-43.)

Despite her testimony regarding uncompensated work, Holak explained that she understood that it was a company policy for employees to accurately record the time worked, and that work off the clock was not permitted. (Wohl. Decl., Ex. F at 55-56, ECF No. 89.) She also revealed that she had only worked approximately twelve closing shifts during her employment. (Id. at 71-72.) Plaintiff was also not aware if the same alleged practices occurred at other K-mart stores. (Id. at 141.)

Defendant provides anecdotal evidence in the form of declarations from one assistant manager and eight employees; they provide different accounts of the closing procedures. (See ECF No. 91, Ex. 48, ECF No. 92, Exs. 25, 32, 46, 56-57, 76, 80, 82.) As described above, assistant manager William Watts explained that employees were allowed to leave upon clocking out, even if the rest of the employees were not ready to leave. (Watts Decl., ECF No. 91.) Watts further explained that Kmart has a policy that employees must record all time worked and make time corrections if the time records are not accurate. (Id. at ¶ 6.)

In marked contrast to Holak's claim, Watts explained that the front doors of the Coalinga Kmart store had a twist lock on the inside of the store, allowing anyone in the store to unlock the doors from the inside. (Id. at ¶ 13.)

In addition, Defendant presents the declarations of eight hourly associates employed at the Coalinga Kmart during the relevant period who did not share the Plaintiff's experiences regarding off-the-clock work during closing shifts. (See Decls. of Sophia Escobar, Estephanie Garcia, Ruben Lopez, James Milstead, Audra Mitchell Elvia Silva, Maricela Stevens, and Sheila Todd, ECF No. 92, Exs. 25, 32, 46, 56-57, 76, 80, and 82.) In general, the hourly associates explained that they did not perform off-the-clock work and were not prevented from leaving the store after shifts ended.. The

associates stated that they did not have to wait to leave the store because the doors either were not locked, or someone such as a manager or other employee would unlock the doors after the employee clocked out.

c. Analysis

In viewing the declarations of the employees of the Coalinga Kmart, the Court is presented with Plaintiff's declaration stating that she performed off the clock work, and the declarations of one assistant manager and eight hourly associates that uniformly state that employees were not kept in the store performing uncompensated work during closing shifts.

Plaintiff has provided no testimony, besides her own, that the practice or polices at the Coalinga Kmart store required hourly associates to perform off-the-clock work during closing shifts. Her testimony alone is not substantial proof that the purported class of hourly associates performed uncompensated work. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2553-54 (Describing how "significant proof" of a wrongful employment action can establish the commonalty requirement of Rule 23.). Evidence that Plaintiff alone performed uncompensated work does not establish or even create an inference that all other store employees suffered from the same wage practices. Moreover, Plaintiff has not provided any other admissible evidence that similar wage practices occurred at other Kmart stores in California.

Plaintiff attempts to argue that the fact that members of the class may have not engaged in uncompensated work does not defeat certification because the presence of individualized damage inquires alone is not a basis to defeat certification. See Leyva v. Medline Indus., 716 F.3d 510, 514 (9th Cir. 2013). While individualized inquires with regard to damages will not defeat certification, the issue of whether there is common liability of class members is directly relevant to the commonality inquiry. See Kurihara v. Best Buy Co., 2007 U.S. Dist. LEXIS 64224, 25-26 (N.D. Cal. Aug. 29, 2007) ("[C]ourts are comfortable with individualized inquires as to damages, but are decidedly less willing to certify classes where individualized inquiries are necessary to determine liability.")

Plaintiff provides several cases in which claims were certified based on strong evidence of uniform policy, despite declarations from defendants describing otherwise. See Kurihara v. Best Buy Co., 2007 U.S. Dist. LEXIS 64224; In re Autozone, Inc., 289 F.R.D. 526 (N.D. Cal. 2012); Vedachalam v. Tata Consultancy Servs., Ltd., No. 06-0963, 2012 U.S. Dist. LEXIS 46429, at *37-*39 (N.D. Cal. April 2, 2012); In re Taco Bell Wage & Hour Actions, No. 07-1314, 2012 U.S. Dist. LEXIS 168219, 2012 WL 5932833, at *6 (E.D. Cal. Nov. 27, 2012). Unlike the parties in those cases, Plaintiff has provided little evidence of a uniform policy that would adversely affect potential class members. In Kurihara v. Best Buy Co., Inc., No. 06-1884, 2007 U.S. Dist. LEXIS 64224 MHP, at *6 (N.D. Cal. Aug. 30, 2007), the court acknowledged that "a mere allegation of a company-wide policy does not compel class certification," but it noted that the plaintiff there had "provided substantial evidence of a company-wide policy where employees are subject to inspections, and are not compensated for the time spent on those inspections." Id. at *29. The court concluded, "Although Plaintiff has submitted little or no evidence as to the implementation of that policy, the detailed nature of the policy itself, and the reasonable inferences which can be drawn from them, constitute sufficient evidence to satisfy plaintiff's burden." Id. Such is not the case here. Nothing in Kmart's polices explicitly states or infers that the alleged policy exists, and Plaintiff only presents her own declaration explaining her experiences wile closing at one Kmart store.

Plaintiff has failed to present substantial evidence of commonality with regard to the uncompensated work subclass. The evidence shows that to the extent post-shift work was performed at all, many hourly employees in the Coalinga Store did not engage in it. Moreover, Plaintiff has not provided admissible evidence of such practices occurring at other Kmart stores. The rather detailed declaration of the closing procedure of the Coalinga Kmart store by assistant manager William Watts is persuasive in showing that there are individual questions regarding liability to potential class members. Plaintiff has not established that uncompensated work is a common issue affecting an entire sub-class. As Plaintiff has not shown that common issues affect the class, the Court need not

address the other requirements for class certification under Rule 23. Accordingly, the Court shall deny Plaintiff's motion to certify this subclass.

b. Accurate Wage Statements

i. Parties' Contentions and Evidence

Plaintiff contends that Defendant's wage statements do not state the correct overtime rates and therefore violate California Labor Code § 226(a)(9). Specifically, Plaintiff contends that her pay statements do not accurately state her overtime rate in weeks in which she earned both overtime and service commissions. Plaintiff provides in her declaration copies of four of her wage statements for the weeks ending on July 11 and November 28, 2009 and February 26 and April 23, 2011. (ECF No. 82-2 at 7-11.) The wage statements list Plaintiff's overtime wage rate as $9.28, $9.34, $9.31, and $13.85. As Plaintiff's regular wage rate was $9.25, the first three wage statements incorrectly state Plaintiff's overtime wage rate as only a few cents higher than her regular wage. However, if simple calculations are made, it is apparent from the information contained on the pay stubs that the overtime rate listed was incorrect.

For example, on Plaintiff's July 11, 2009 pay stub, it states that Plaintiff's overtime pay rate was $9.28, and that she worked 7.5 overtime hours, and was paid $104.16 for that time. When the amount of pay is divided by the hours worked, it shows that Petitioner was paid $13.89 per hour for overtime work for that time period, not $9.28. Additionally, when calculated, the overtime pay rate for the November 28, 2009 pay period was $13.92, and the overtime pay rate for the February 26, 2011 pay period was $14.00 per hour. The final pay stub for the April 23, 2011 period accurately stated Plaintiff's overtime pay rate as $13.85 per hour. In her pleadings, Plaintiff admits that while the overtime rate listed was incorrect, the amount of actual overtime paid may have been correct.[5] (See Cert. Mot., ECF No. 82 at 4, n.4.)

[5] Plaintiff also provides the pay stubs of declarant Tanya Meyers. (ECF No. 82-3 at 15-21.) While the declaration was stricken, and not to be considered with regard to the adjudication of this motion, it is noted that Meyer's pay stub for the week of July 28, 2012 states that her overtime pay rate of $8.55 was only five cents higher than her regular pay rate of $8.50 per hour. However, when calculated, the overtime (continued…)

ii. California Labor Code Section 226

California Labor Code Section 226(a)(9) states, in relevant part: "Every employer shall… furnish each of his or her employees… an accurate itemized statement in writing showing… (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." Section 226(e) grants payment of a penalty to an employee "suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a)." Finally, section 226(e) describes that an employee has suffered an injury in the following manner:

> (B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:
>
> (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

Cal. Labor Code § 226(e)(2)(b).

Labor Code Section 226 requires the employer to keep accurate and itemized pay statements setting forth gross wages, the actual number of hours and minutes worked, and all applicable hourly rates of pay. Plainitiff has shown that some of her wage statements inaccurately state her overtime rate.

Plaintiff must also be able to prove that she suffered an injury as a result of the improper wage statements. See Cal. Lab. Code § 226.

However, the parties disagree about the type of injury that is necessary in order to state a claim under section 226. Plaintiffs assert that the injury requirement is minimal. See, e.g., McKenzie vs. Fed. Express Corp., 275 F.R.D. 290, 299-300 (C.D. Cal. 2011) ("[B]ecause [Defendant]'s inaccurate and incomplete wage statements require …

(…continued)
rate paid to Meyers was $12.75 per hour.

employees to engage in discovery and refer to outside sources to verify whether their pay is correct, the proposed class can prove on a class-wide level that they suffered an injury under section 226(e)."); Perez v. Safety-Kleen Sys., Inc., Nos. C 05-5338, 07-0886, 2007 U.S. Dist. LEXIS 48308, 2007 WL 1848037, at *9 (N.D. Cal. June 27, 2007) (merely filing the "lawsuit, and the difficulty and expense Plaintiffs have encountered in attempting to reconstruct time and pay records . . . is evidence of the injury").

Defendant argues the contrary, but this Court agrees that "the injury requirement should be interpreted as minimal in order to effectuate the purpose of the wage statement statute; if the injury requirement were more than minimal, it would nullify the impact of the requirements of the statute." See Seckler v. Kindred Healthcare Operating Grp., Inc., SACV 10-01188 DDP, 2013 U.S. Dist. LEXIS 29940, 2013 WL 812656, at *12 (C.D. Cal. Mar. 5, 2013); see also Wang v. Chinese Daily News, Inc., 435 F. Supp. 2d 1042, 1050-51 (C.D. Cal. 2006) (stating the purpose of Section 226's information requirement).

Furthermore, a recent statutory amendment to Section 226 provides a statutory definition for injury:

> Section 226(e) now states that "[a]n employee is deemed to suffer injury . . . if the employer fails to provide accurate and complete information as required by one or more of [the section (a) requirements] and if the employee cannot promptly and easily determine from the wage statement alone . . . (i) The amount of gross wages or net wages . . . (ii) Which deductions the employer made from gross wages to determine the net wages . . ." The Senate Bill Analysis indicates that because of the "contradictory and inconsistent interpretations of what constitutes 'suffering injury' . . . in the various court cases . . . it is necessary to provide further clarity on the issue . . ."

Seckler, 2013 U.S. Dist. LEXIS 29940, 2013 WL 812656, at *12 (internal citations omitted) (alterations in original). This amendment reinforces the Court's interpretation of the injury requirement under Section 226. See id.

Accordingly, the Court finds that Plaintiff's inability to determine her hourly wage meets the minimal-injury requirement of Section 226. Determining whether an incorrect overtime rate was present on pay records is not an individualized inquiry as the facts can

easily be derived through pay records.

ii. Analysis

a. Failure to Plead the Wage Statement Theory

Defendant first asserts that Plaintiff is not entitled to certification based on the wage statement claim because Plaintiff only asserted a derivative wage statement claim in the second amended complaint. Specifically, Defendant asserts that Plaintiff's claim is based on the alleged failure of Defendant to state the hours and wage worked based on the lack of compensation for post-shift work time. Instead, Plaintiff moves to certify a wage statement claim based on the failure to properly state the overtime rate on some pay statements.

Plaintiff has filed two amended complaints, however throughout this litigation, Plaintiff's fourth cause of action for non-complaint wage statements has remained the same. (See ECF No. 52 at 14-15.) Plaintiff alleges that :

> Defendants have intentionally and willfully failed to provide employees with complete and accurate wage statements. The deficiencies include, among other things, the failure to accurately list the total hours worked by Plaintiff and class members and the applicable hourly rates, as a result of Defendants' failure to capture the hours Plaintiff and class members worked off the clock while waiting to be let out of Defendants' stores after a closing shift.

(Second Amended Complaint ["SAC"] at ¶ 65.) Plaintiff further explains in the SAC the basis for the claim:

> Specifically, Plaintiff and class members have been injured by Defendants' intentional violation of California Labor Code section 226(a) because they were denied both their legal right to receive, and their protected interest in receiving, accurate, itemized wage statements under California Labor Code section 226(a). In addition, because Defendants failed to provide the accurate number of total hours worked on wage statements, Plaintiff has been prevented by Defendants from determining if all hours worked were paid and the extent of the underpayment. Plaintiff has had to file this lawsuit, conduct discovery, reconstruct time records, and perform computations in order to analyze whether in fact Plaintiff was paid correctly and the extent of the underpayment, thereby causing Plaintiff to incur expenses and lost time. Plaintiff would not have had to engage in these efforts and incur these costs had Defendants provided the accurate number of total hours worked. This has also delayed Plaintiff's ability to demand and recover the underpayment of wages from Defendants.

(SAC at ¶ 67.)

Defendant relies upon several district court cases for the proposition that courts should not certify claims not pled in the operative complaint. See Brown v. Am. Airlines, Inc., 285 F.R.D. 546, 560 (C.D. Cal. 2011); Evans v. IAC/Interactive Corp., 244 F.R.D. 568, 579 (C.D. Cal. 2007); Munoz v. Giumarra Vineyards Corp., 2012 WL 2617553, at *17 (E.D. Cal. July 5, 2012). The Court finds the cases and simple logic of Defendant's argument persuasive. However, the question presented is whether Plaintiff did indeed allege her innacurate wage state claim in the operative complaint.

Plaintiff focuses on the fact that she first set forth the generic language of a non-complaint wage claim in stating in the complaint that "Defendants have intentionally and willfully failed to provide employees with complete and accurate wage statements. The deficiencies include, among other things, the failure to accurately list the total hours worked by Plaintiff and class members and the applicable hourly rates…" On the other hand, Defendant correctly notes that Plaintiff continues the description to state that the reason for the non-compliant wage statements was the failure to record off-the-clock work. Defendant's argument carries more weight. In the complaint, Plaintiff explained that the non-complaint wage statements were "a result of Defendants' failure to capture the hours Plaintiff and class members worked off the clock while waiting to be let out of Defendants' stores after a closing shift." The manner in which the complaint was phrased gave Defendant no notice of claims that the overtime rate was incorrectly stated separate and apart from incidents relating to failure to account for hours worked after clocking out. As Plaintiff did not plead the claim in her complaint, it would be inappropriate to certify a class based on the claim. See, e.g., Anderson v. United States HUD, 554 F.3d 525, 528 (5th Cir. 2008). As the Court has not set a deadline for amendments to the complaint, it is quite possible that leave may be granted to amend the complaint to add the present claim, thereby making it procedurally appropriate to address certification of the claim. Id. ("[T]his problem may be remedied on remand by allowing the [plaintiffs] to amend their complaint…"). Accordingly, the Court shall determine if the subclass should be certified.

b. Rule 23 Requirements

Alternatively, Plaintiff's motion to certify the instant claim is not appropriate as Plaintiff has not presented sufficient evidence of commonality or that those common questions predominate the inquiry. In support of her motion for certification, Plaintiff provides only several of her pay statements indicating that the overtime rate was incorrect. In response, Plaintiff provides declarations of eight Kmart employees from the Coalinga store that stated that they were provided pay statements that accurately stated both the hours worked and the hourly wage rate. (ECF No. 92, Exs. 25, 32, 46, 56-57, 76, 80, 82.) While Plaintiff claims that the wage statements errors were "systematic," Plaintiff fails to provide admissible evidence from any other employees to support the claim that the injury was common to all class members. Plaintiff had access to all the employees of the Coalinga Kmart store, but failed to provide evidence from other putative class members of inaccurate wage statements.

Plaintiff relies upon several cases to show that courts have certified classes based on inaccurate wage statement claims. See McKenzie v. Fed. Express Corp., 275 F.R.D. 290, 298 (C.D. Cal. 2011); Jaimez v. Daiohs USA, Inc., 181 Cal. App. 4th 1286, 1294 (Cal. App. 2010). Unlike the above cases, Plaintiff has provided less proof that of common injury. In McKenzie, the plaintiff provided evidence to the court that defendants provided all hourly employees identical wage statements containing inaccuracies. McKenzie, 275 F.R.D. at 296. In Jaimez, plaintiff provided a declaration along with declarations of nine other employees alleging the injuries at issue. Jaimez, 181 Cal. App. 4th at 1294. Plaintiff here has not provided any other admissible evidence to show that other employees received inaccurate wage statements. Her testimony alone is not substantial proof that the purported class of hourly associates received inaccurate wage statements. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2553-54 (Describing how "significant proof" of a wrongful employment action can establish the commonalty requirement of Rule 23.). Evidence that Plaintiff alone received inaccurate wage statements does not establish or even create an inference that all other store employees

suffered from the California Labor Code violation. Moreover, Plaintiff has not provided any other admissible evidence that similar wage practices occurred at other Kmart stores in California. Plaintiff has not established that inaccurate wage statements are a common issue affecting the entire sub-class. As Plaintiff has not shown that common issues affect the class, the Court need not address the other requirements for class certification under Rule 23. Accordingly, the Court shall deny Plaintiff's motion to certify this subclass.

VIII. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the Court RECOMMENDS the following:

1. Defendant's motion to strike (ECF No. 95) be GRANTED and the declarations of six putative class members provided by Plaintiff be STRICKEN;
2. Plaintiff's motion to strike (ECF No. 104) be GRANTED IN PART and DENIED IN PART and that the declarations of the non-exempt employees provided by Defendant, notwithstanding the non-exempt employees from the Coalinga Kmart store, be STRICKEN;
3. Plaintiff's motion to modify the scheduling order (ECF No. 113) be DENIED; and
4. Plaintiff's motion for class certification (ECF No. 82) be DENIED.

These findings and recommendations are submitted to the United States District Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within fourteen (14) days after being served with a copy, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections shall be served and filed within fourteen (14) days after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are advised that failure

to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: June 5, 2014

/s/ *Michael J. Seng*
UNITED STATES MAGISTRATE JUDGE