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

GABE BEAUPERTHUY, et al.,)	Case No. 06-715 SC
)	
Plaintiffs,)	ORDER RE: MOTIONS TO
)	DECERTIFY CONDITIONAL FLSA
v.)	<u>CLASSES</u>
)	
24 HOUR FITNESS USA, INC., a)	
California corporation dba 24 HOUR)	
FITNESS; SPORT AND FITNESS CLUBS)	
OF AMERICA, INC., a California)	
corporation dba 24 HOUR FITNESS,)	
)	
Defendants.)	
)	

I. INTRODUCTION

This is a collective action filed by employees and former employees of Defendants 24 Hour Fitness USA, Inc. and Sport and Fitness Clubs of America, Inc. (collectively "24 Hour" or "Defendants"). Before the Court are two Motions to Decertify Conditional Fair Labor Standards Act Classes, both filed by Defendants. Defendants' first Motion seeks to decertify a class of employees and former employees who worked as personal trainers for Defendants ("Trainer Class"). Docket No. 362 ("Defs.' First Mot."). Defendants' second Motion seeks to decertify a class of employees and former employees who worked as managers for Defendants ("Manager Class"). Docket No. 371 ("Defs.' Second Mot."). Plaintiffs have filed an Opposition to each Motion.

United States District Court
For the Northern District of California

1 Docket Nos. 385 ("Pl.'s First Opp'n"), 386 ("Pl.'s Second Opp'n").
2 Defendants have filed Replies. Docket Nos. 409 ("Defs.' First
3 Reply"), 410 ("Defs.' Second Reply").

4 In addition, Plaintiffs have filed two Motions to Strike
5 ("MTS") Declarations Filed in Support of Defendants'
6 Decertification Motions. In their first Motion to Strike,
7 Plaintiffs move to strike the declarations of six witnesses filed
8 in support of Defendants' Motion to Decertify the Trainer Class.
9 Docket No. 403 ("Pl.'s First MTS"). In their second Motion to
10 Strike, Plaintiffs seek to strike the declarations of two witnesses
11 filed in support Defendants' Motion to Decertify the Manager Class.
12 Docket No. 405 ("Pl.'s Second MTS"). Defendants have submitted a
13 single consolidated Opposition in response to both motions. Docket
14 No. 412 ("Defs.' Cons. MTS Opp'n"). Plaintiffs have filed a single
15 consolidated Reply. Docket No. 420 ("Pl.'s Cons. MTS Reply").

16 Lastly, Defendants have filed a Motion to Strike all
17 declarations filed in support of Plaintiffs' Oppositions to
18 Defendants' Decertification Motions. Docket No. 414 ("Defs.'
19 MTS"). Plaintiffs filed an Opposition. Docket No. 416 ("Pl.'s
20 Opp'n to Defs.' MTS"). Defendants replied. Docket No. 419
21 ("Defs.' MTS Reply").

22 Having considered all of the papers submitted by both parties,
23 this Court concludes that the matter is appropriate for decision
24 without oral argument. As detailed below, the Court concludes that
25 decertification of both the Trainer Class and the Manager Class is
26 warranted.

27

28 **II. BACKGROUND**

1 The Court has previously issued several orders that detail the
2 procedural and factual background in this dispute. See Docket Nos.
3 26 ("Apr. 11, 2006 Order"), 66 ("Nov. 28, 2006 Order"), 124 ("Mar.
4 6, 2007 Order"), 190 ("Mar. 24, 2008 Order"). This Order will
5 therefore assume familiarity with the background of this case. In
6 short, Plaintiffs are alleging that Defendants' employment and
7 payment policies improperly denied Plaintiffs overtime payments, in
8 violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.
9 ("FLSA"). See First Am. Compl. ("FAC"), Docket No. 33, ¶¶ 85-97.
10 Prior to discovery, the Court granted conditional certification of
11 the Manager Class and the Trainer Class in accordance with the two-
12 stage FLSA certification process described below. See Mar. 24,
13 2008 Order; Mar. 6, 2007 Order.

14 The present motions arise after the close of non-expert
15 discovery. Pl.'s First Opp'n at 4. Defendants have produced over
16 200,000 documents, including payroll records for each Plaintiff.
17 Id. Defendants deposed forty class members. Defs.' First Reply at
18 2. Plaintiffs deposed ten 24 Hour witnesses. Pl.'s First Opp'n at
19 4. Both sides have disclosed experts and produced damages
20 computations. Id. Plaintiffs have submitted declarations from 119
21 class members -- the forty deponents plus seventy-nine others.

22
23 **III. LEGAL STANDARD**

24 The FLSA provides that "no employer shall employ any of his
25 employees . . . for a workweek longer than forty hours unless such
26 employee receives compensation for his employment in excess of the
27 hours above specified at a rate not less than one and one-half
28 times the regular rate at which he is employed." 29 U.S.C. §

1 207(a)(1). Section 16(b) of the FLSA provides employees with a
2 private right of action to sue an employer for violations of the
3 Act "for and in behalf of himself or themselves and other employees
4 similarly situated." 29 U.S.C. § 216(b). The latter sort of action,
5 often referred to as a "collective action," works somewhat
6 differently than a Rule 23 class action: an employee who wishes to
7 join an FLSA collective action must affirmatively opt-in by filing
8 a written consent to join in the court where the action was
9 brought. Id. In Hoffman-La Roche Inc. v. Sperling, the Supreme
10 Court recognized the discretion of district courts to facilitate
11 the process by which potential plaintiffs are notified of FLSA
12 collective actions into which they may be able to opt. 493 U.S.
13 482, 486 (1989).¹ Building on this, a majority of courts,
14 including district courts in the Ninth Circuit, have adopted a two-
15 stage certification procedure. See, e.g., Leuthold v. Destination
16 America, Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004); Wynn v.
17 National Broadcasting Co., 234 F. Supp. 2d 1067, 1082-84 (C.D. Cal.
18 2002); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1106
19 (10th Cir. 2001). At the first stage, the district court approves
20 conditional certification upon a minimal showing that the members
21 of the proposed class are "similarly situated"; at the second
22 stage, usually initiated by a motion to decertify, the court
23 engages in a more searching review. Leuthold, 224 F.R.D. at 467.

24 The FLSA does not define "similarly situated," and the Ninth
25 Circuit has not spoken to the issue. Reed v. County of Orange, 266

26 _____
27 ¹ Sperling addressed a collective action brought under the Age
28 Discrimination in Employment Act, which, the Court recognized,
incorporates § 16(b) of the FLSA. 493 U.S. at 486.

1 F.R.D. 446, 449 (C.D. Cal. 2010) ("The FLSA does not define the
2 term 'similarly situated,' and there is no Ninth Circuit precedent
3 interpreting the term.") (citations omitted). The Supreme Court,
4 in Sperling, also left the term undefined, but indicated that a
5 proper collective action encourages judicial efficiency by
6 addressing, in a single proceeding, claims of multiple plaintiffs
7 who share "common issues of law and fact arising from the same
8 alleged [prohibited] activity." 493 U.S. at 486. This has been
9 distilled by courts into a lenient standard for step one -- the
10 conditional certification stage -- requiring "nothing more than
11 substantial allegations that putative class members were together
12 victims of a single decision, policy, or plan." Thiesen 267 F.3d
13 at 1102 (internal quotations omitted); see also, e.g., Gerlach v.
14 Wells Fargo & Co., No. C 05-0585, 2006 WL 824652, at *2 (N.D. Cal.
15 Mar, 28, 2006). This Court applied the lenient stage-one standard
16 when it previously certified the conditional Trainer Class and
17 Manager Class. See Mar. 24, 2008 Order; Mar. 6, 2007 Order. At
18 step two of the process, where this case currently stands, courts
19 engage in a more searching review. Leuthold, 224 F.R.D. at 467.
20 At this stage, in order to overcome a motion to decertify a
21 conditionally certified class, "it is plaintiffs' burden to provide
22 substantial evidence to demonstrate that they are similarly
23 situated." Reed, 266 F.R.D. 446 at 449. The Eleventh Circuit has
24 noted that at this second stage, "[l]ogically the more material
25 distinctions revealed by the evidence, the more likely the district
26 court is to decertify the collective action." Anderson v. Cagle,
27 488 F.3d 945 (11th Cir. 2007).

28 In deciding whether plaintiffs have met their stage-two

1 burden, courts weigh various factors that require a fact-specific
2 inquiry. Reed, 266 F.R.D. 446 at 449. These factors include: (1)
3 the disparate factual and employment settings of the individual
4 plaintiffs; (2) the various defenses available to defendants with
5 respect to the individual plaintiffs; and (3) fairness and
6 procedural considerations. Id. Courts in this circuit have found
7 that certification is not warranted in the absence of proof that
8 plaintiffs' alleged injuries resulted from a single, unified
9 policy. Id. (citing Smith v. T-Mobile USA, Inc., No. 05-5274 ABC
10 (SSx), 2007 U.S. Dist. LEXIS 60729, at *6-8 (C.D. Cal. Aug. 15,
11 2007); Castle v. Wells Fargo Fin., Inc., No. C-06-4347-SI, 2008
12 U.S. Dist. LEXIS 106703, at *5 (N.D. Cal. Feb. 20, 2008)).
13 Nevertheless, courts have emphasized that Plaintiffs "must only be
14 similarly -- not identically -- situated to proceed collectively."
15 Falcon v. Starbucks, 580 F. Supp. 2d 528, 534 (S.D. Tex. 2008).
16 Ultimately, "the decision whether to proceed as a collective or
17 class action turns on whether this device is the superior way of
18 resolving a controversy. The benefits to the parties of a
19 collective proceeding need to be balanced against any prejudice to
20 [the defendant] and any problems of judicial administration that
21 may surface." Campanelli v. The Hershey Co., 2010 U.S. Dist. LEXIS
22 92364 at *14 (N.D. Cal. Aug. 13, 2010)(citation omitted). The
23 decision whether to decertify a collective action is within the
24 district court's discretion. See, e.g., Mooney v. Aramco Servs.
25 Co., 54 F.3d 1207, 1213 (5th Cir. 1995) ("[T]he district court's
26 application of the [legal] standard must be reviewed for abuse of
27 discretion."); Pendlebury v. Starbucks Coffee Co., 518 F. Supp. 2d
28 1345, 1348-49 (S.D. Fla. 2007).

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IV. DISCUSSION

A. Motions to Strike

Plaintiffs filed their two MTS on November 12, 2010. See Pl.'s First MTS; Pl.'s Second MTS. In their First MTS, Plaintiffs argue that the declarations of six witnesses filed in support of Defendants' Motion to Decertify the Trainer Class should be stricken because Defendants allegedly failed to disclose the identities of the witnesses during discovery as required by Federal Rule of Civil Procedure 26. Pl.'s First MTS at 1. Plaintiffs also contend that the declarations by three of these witnesses lack foundation and are irrelevant because the witnesses were employed in California, while the Trainer Class is limited to employees who worked outside of California. Id. at 1 n. 1. In their Second MTS, Plaintiffs argue that the declarations of two witnesses -- Marla Loar and Julius Soriano -- filed in support of Defendants' Motion to Decertify the Manager Class should be stricken, again because Defendants allegedly failed to disclose the witnesses' identities during discovery. Pl.'s Second MTS at 1. In their consolidated Opposition to Plaintiffs' motions, Defendants argue that they disclosed the names of nearly all of the witnesses at issue during discovery. Defs.' Cons. MTS Opp'n at 1. They further contend that some of the declarations merely authenticate documents made known to Plaintiffs during discovery. Thus, according to Defendants, any failure to disclose was justified and harmless. Id.

On December 6, 2010, Defendants countered with their own MTS all declarations filed in support of Plaintiffs' Oppositions to Defendants' Motions to Decertify. See Defs.' MTS. Defendants

1 argue that several of the 119 declarations filed by Plaintiffs
2 contain statements that contradict the declarants' prior deposition
3 or declaration testimony. Id. at 1. Defendants therefore contend
4 that "all of the declarations are suspect and entitled to no weight
5 whatsoever." Id. In response, Plaintiffs argue that none of the
6 declarants' statements contradict their prior testimony. Pl.'s
7 Opp'n to Defs' MTS at 1. Plaintiffs also note that Defendants' MTS
8 is procedurally improper because it violates Local Rule 7-3(c),
9 which requires that "any evidentiary and procedural objections to
10 the opposition must be contained within the reply brief or
11 memorandum." Id. at 1; Civ. L. R. 7-3(c). Defendants note in
12 reply that Plaintiffs' two MTS also violate Local Rule 7-3. Defs.'
13 MTS Reply at 2.

14 Local Rule 7-3(b) requires evidentiary and procedural
15 objections to a motion to be contained within the opposition brief,
16 which is limited to twenty-five pages in length. Civ. L. R. 7-
17 3(b). Similarly, Local Rule 7-3(c) requires evidentiary and
18 procedural objections to an opposition to be contained within the
19 reply brief, which is limited to fifteen pages in length. Civ. L.
20 R. 7-3(c). The Court finds that Plaintiffs' two MTS violate Local
21 Rule 7-3(b) and Defendants' MTS violates Local Rule 7-3(c). Both
22 parties have attempted to evade the briefing page limits by filing
23 MTS instead of fully voicing their evidentiary and procedural
24 objections in their opposition and reply briefs as required by the
25 Local Rules. Accordingly, the Court DENIES all MTS and will only
26 address the evidentiary arguments to the extent they are raised in
27
28

1 the parties' briefs.²

2 **B. Evidentiary Objections Properly Raised in the Briefs**

3 In their First Opposition, Plaintiffs raise objections
4 "pursuant to FRCP 37" to the declarations of Jeremy Smith, Josh
5 Morehouse, JP McFarland, Butch Cooper, and Sam Kader (Docket Nos.
6 363, 364, 365, 366, and 367, respectively). Pl.'s First Opp'n at
7 24. They contend that these witnesses were not disclosed in
8 discovery. They also object to the declarations of Smith, Kader,
9 and Cooper on the grounds of foundation and relevance, arguing that
10 these witnesses have no non-California experience or knowledge.

11 Plaintiffs' argument that the declarations lack relevance and
12 foundation is not persuasive. The crux of Plaintiffs' allegations
13 is that 24 Hour denied trainers overtime pursuant to a company-wide
14 policy that was the same at every club. Testimony of witnesses who
15 worked at clubs in California is undeniably relevant to whether
16 such a company-wide policy existed. However, Plaintiffs' objection
17 to the declarations on the grounds that the witnesses' names were

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19 ² The Court is not persuaded by Plaintiffs' argument that, while
20 Defendants' MTS is evidentiary in nature and therefore improper
21 under the Local Rules, Plaintiffs' MTS was proper because it was
22 "based primarily upon a self-executing Federal Rule of Civil
23 Procedure for a discovery/disclosure violation." Pl.'s Opp'n to
24 Defs.' MTS at 2. Rather, the Court agrees with Defendants that
25 Plaintiffs seek to selectively apply the Local Rules to their
26 advantage. Defs.' MTS Reply at 2. The Court notes that
27 Plaintiffs' First MTS contains evidentiary arguments asserting that
28 certain witnesses lacked foundation for their testimony. Pl.'s
29 First MTS at 3. Moreover, some of the arguments that Plaintiffs
30 now contend are not evidentiary in nature were contained in
31 Plaintiff's Opposition brief under the heading "Evidentiary
32 Objections." Pl.'s First Opp'n at 24. Lastly, the Court notes
33 that Local Rule 7-3 provides that evidentiary and procedural
34 objections must be contained within the opposition brief. Both of
35 Plaintiffs' MTS are at least procedural in nature, as they argue
36 that Defendants failed to disclose witnesses in violation of Fed.
37 Rule of Civ. Proc. 26. As such, Plaintiffs' MTS, like Defendants'
38 MTS, are in violation of the Local Rules.

1 not disclosed during discovery is SUSTAINED. The declarations of
2 witnesses Smith, Morehouse, McFarland, Cooper, and Kader are
3 accordingly stricken.³

4 In their Second Opposition, Plaintiffs raise a number of
5 evidentiary objections buried in a lengthy footnote on the last
6 page of their brief, with the footnote text smaller than the 12-
7 point type required by Civil Local Rule 3-4(c)(2). Pl.'s Second
8 Opp'n at 25 n. 21.

9 First, Plaintiffs object to the declaration of Julius Soriano
10 and attached exhibits (Docket No. 375) on the grounds that Soriano
11 was not disclosed as a witness during discovery. Soriano's
12 declaration merely authenticates payroll records and W-2 forms that
13 Plaintiffs already knew existed. Both parties listed W-2 forms and
14 payroll records in their initial disclosures. The Court finds that
15 the failure to disclose Soriano is harmless and striking his
16 testimony is thus not warranted under Fed. Rule of Civ. Proc.
17 37(c)(1). Accordingly, this objection is OVERRULED.

18 Second, Plaintiffs object to the declaration of Marla Loar and
19 attached exhibits (Docket No. 372) filed in support of Defendants'
20 Motion to Decertify the Manager Class.⁴ Plaintiffs argue that
21 Loar's testimony states only that the exhibits are "several
22 versions and/or drafts" of employee job descriptions with no
23

24 ³ The Court is not persuaded by Defendants' argument that including
25 the names and addresses of McFarland and Morehouse among a list of
26 over 16,000 names of potential class members satisfies the
supplemental disclosure requirements of Fed. Rule Civ. Proc. 26(e).
See Defendants' First Reply at 5 n. 2.

27 ⁴ Defendants also submitted a declaration by Marla Loar in support
of their Motion to Decertify the Trainer Class. Loar Decl. Docket
28 No. 369. Plaintiffs' Opposition to that motion did not object to
Loar's declaration. Accordingly, Loar's declaration supporting the
Motion to Decertify the Trainer Class is not excluded.

1 foundation for determining which are drafts and which were actually
2 implemented. This objection is SUSTAINED. The declaration of
3 Marla Loar (Docket No. 372) is hereby stricken.

4 Lastly, Plaintiffs object to the declaration of Scott White
5 (Docket No. 374) filed in support of Defendants' Motion to
6 Decertify the Manager Class⁵ on the grounds that White has only
7 been employed since 2008 and testified that he has no knowledge of
8 24 Hour operations prior to March 2008. His declaration attempts
9 to authenticate compensation plans for managers prior to 2008.
10 This objection is SUSTAINED on the grounds that White's testimony
11 lacks foundation. The declaration of Scott White (Docket No. 374)
12 is hereby stricken.

13 **C. Defendants' Motion to Decertify the Trainer Class**

14 The conditionally certified trainer class is comprised of 772
15 employees and former employees who worked at hundreds of different
16 24 Hour Fitness clubs outside of California and who held any of
17 fifteen different job titles involving a personal training
18 component.⁶ Defs.' First Mot. at 5; Mar. 24, 2008 Order at 15.
19 The relevant class period is October 29, 1999 to November 10, 2008.
20 Defs.' First Mot. at 4; Pl.'s First Opp'n at 8 n. 4.

21 Plaintiffs' underlying claims allege that the members of the
22 Trainer Class were classified as "non-exempt" hourly employees, but

23 ⁵ As was the case with Marla Loar, Defendants also submitted a
24 declaration by Scott White in support of their Motion to Decertify
25 the Trainer Class. Docket No. 370. Plaintiffs' Opposition to that
26 motion did not object to White's declaration. Accordingly, White's
declaration in support of the Motion to Decertify the Trainer Class
is not excluded.

27 ⁶ The class includes the job titles of PT Trainer, Certified
28 Personal Trainer ("CPT"), CPT I, CPT II, CPT III, CPT Elite,
Trainer Fit Pro ("TFP"), TFP I, TFP II, TFP III, TFP Elite, FLS,
Apex Tech, Fitness Instructor, and Floor Instructor. See Mar. 24,
2008 Order at 15.

1 that 24 Hour Fitness failed to compensate them for any hours they
2 worked in excess of 40 hours per week and did not pay any overtime
3 premium. See Mar. 24, 2008 Order; Pl.'s First Opp'n at 2. In
4 other words, Plaintiffs contend that the trainers were forced to
5 perform "off-the-clock" tasks for which they should have, but did
6 not, receive overtime compensation. Pl.'s First Opp'n at 2.
7 Plaintiffs claim that this violated the FLSA, which requires
8 overtime compensation for time worked in excess of forty hours per
9 week. See 29 U.S.C. § 207(a)(1).

10 Plaintiffs argue that 24 Hour deprived trainers of overtime in
11 three distinct ways. Id. First, Plaintiffs contend that trainers
12 were not paid for all of the personal training-related hours, or
13 "session hours" they worked.⁷ They argue that 24 Hour's
14 timekeeping system did not allow them to record all of the session
15 hours they worked, which prevented them from getting paid for all
16 of the time spent performing those personal training-related tasks.
17 Id. at 2, 9. More specifically, they contend that trainers
18 recorded session hours in one system, known as GMS, and FIT hours
19 in another system. Id. According to Plaintiffs, the GMS system
20 did not allow trainers to record the actual start and stop time of
21 their session-related work. Id. Instead, the system automatically
22 "presumed" that one hour's worth of work was performed for each
23 training session, when in fact, the session-related tasks trainers

24 ⁷ The parties agree that the hours trainers worked were divided
25 into two separate categories: (1) "session hours," which included
26 time spent training clients and performing other session-related
27 activities such as client intake, creating nutrition plans, or
28 performing body measurements; and (2) "FIT hours," which included
time spent performing all other duties, such as racking weights,
cleaning, and attending meetings. Defs.' First Mot. at 6-7; Pl.'s
First Opp'n at 2. Trainers were paid a higher rate for session
hours than for FIT hours. Id.

1 had to perform often required more than one hour to accomplish.
2 Id.

3 Second, Plaintiffs contend that trainers were not paid for all
4 of the non-session related hours, or "FIT" hours, they worked. Id.
5 at 2. Plaintiffs allege that the number of FIT hours each trainer
6 was allowed to record was determined not by how many FIT hours he
7 or she actually worked, but rather by a strict quota of FIT hours
8 allocated to each particular club by district-level managers.
9 Pl.'s First Opp'n at 2, 9.

10 Third, Plaintiffs contend that, prior to 2003, 24 Hour did not
11 include session hours in its calculation of hours for overtime
12 eligibility. Id.; See also Docket No. 297 ("Pl.'s Motion for
13 Summary Judgment" at 1). Plaintiffs further contend that, during
14 the entire class period, when 24 Hour did pay trainers overtime, it
15 included the overtime payments in the trainers' subsequent paycheck
16 instead of issuing the payments on their regular payday. Id.
17 Plaintiffs claim that this violated the provisions of 29 C.F.R.
18 § 778.106, which require that overtime compensation be paid on the
19 employees' "regular payday." Id.

20 In opposition to the instant motions for decertification,
21 Plaintiffs argue that they have provided substantial evidence
22 demonstrating that all class members were similarly situated, and
23 that proceeding with a collective action to try their claims is
24 therefore proper. Pl.'s First Opp'n at 2.

25 Defendants argue for decertification on the grounds that
26 Plaintiffs have failed to identify a company-wide decision, policy,
27 or plan common to all putative class members relating to how
28 trainers were paid for time worked. Defs.' First Mot. at 2. They

1 argue that: (1) any alleged off-the-clock work was a function of an
2 individual trainer's unique circumstances, such as his or her job
3 title and experience level and the practices of the club managers
4 at the particular club where he or she worked; (2) Plaintiffs
5 recorded their hours via different timekeeping systems and were
6 paid according to different compensation plans over the course of
7 the class period -- in particular, the dual timekeeping system of
8 which Plaintiffs complain was only used until 2003 and thus
9 impacted only some class members; (3) some or all trainers, during
10 some or all periods of their employment, were exempt from FLSA
11 overtime requirements based on the "commissioned retail sales
12 exemption" set forth in §7(i) of the FLSA, 29 U.S.C. § 207(i); and
13 (4) fairness dictates decertification because collective treatment
14 would deprive 24 Hour of due process. Defs.' First Mot. at 2-3.

15
16 **1. Disparate Factual and Employment Settings of the Individual**
17 **Class Members**

18 When determining whether a plaintiff has met its burden of
19 producing substantial evidence to show that putative class members
20 are similarly situated, the first factor courts consider is the
21 degree of similarity among plaintiffs' factual and employment
22 settings. See, e.g., Reed, 266 F.R.D. at 449. When conducting
23 this inquiry, courts consider such factors as whether plaintiffs
24 had differing job titles or duties, worked in different geographic
25 locations, worked under different supervisors, or allege different
26 types of violative conduct. Id. (noting, "[d]ecertification is
27 appropriate where plaintiffs are subject to varying work conditions
28 in different work locations or under different supervisors"); Moss

1 v. Crawford & Co., 201 F.R.D. 398, 409 (W.D. Pa. 2000) ("The first
2 factor assesses the opt-in plaintiffs' job duties, geographic
3 location, supervision, and salary."); Molina v. First Line
4 Solutions LLC, 566 F.Supp.2d 770, 787 (N.D. Ill. 2007) (considering
5 "whether plaintiffs had differing job titles or assignments, worked
6 in different locations, were under different supervisors or
7 decision makers, or allege different types of violative conduct").
8 Courts in several circuits, including this one, also evaluate
9 whether plaintiffs have provided substantial evidence that their
10 claims arise out of a single policy, custom or practice that led to
11 FLSA violations. Reed, 266 F.R.D. 446 at 450.

12 a. Job Titles and Duties

13 The Trainer Class includes persons who held fifteen different
14 job titles over a ten-year period. Plaintiffs contend that,
15 despite this variance, all putative class members shared the same
16 primary job duties. Pl.'s First Opp'n at 7. They assert that all
17 trainers (1) physically exercised clients; (2) performed other
18 session-related activities such as documenting medical and food
19 histories and body measurements, developing nutrition plans, and
20 following up with clients; and (3) performed non-training related
21 duties, such as sales, re-racking weights, and cleaning. Id.

22 However, testimony of class members shows that the job duties
23 of trainers varied somewhat depending on factors such as each
24 trainer's job title, the time period during which he or she worked,
25 and the certification levels he or she had earned. Deposition
26 testimony of Plaintiff Dennis Sciacca shows that not all job titles
27 encompassed by the Trainer Class were actually permitted to train
28 clients. Sciacca testified that trainers who held the title of

1 "Floor Instructor" were not permitted to train clients at all.
2 Kloosterman Decl. ¶ 24, Exh. 19 (Sciacca Dep. 29:1-8) (stating "a
3 floor instructor is not allowed to conduct personal training
4 sessions").⁸ Thus, the duties of some Plaintiffs were dramatically
5 different from the duties of others, as they did not include
6 physically exercising clients or performing other session-related
7 tasks at all.

8 Moreover, the duties trainers were required to perform varied
9 over the course of the ten-year claims period. Twenty-Four Hour
10 repeatedly changed the types of personal training programs it
11 offered between 1999 and 2008. Lyon Decl. ¶¶ 7-9.⁹ For example,
12 prior to 1999, the training programs offered by 24 Hour did not
13 include any nutritional component. Id. Then, from 1999 to 2004,
14 24 Hour offered some personal training programs that did include a
15 nutritional component and others that did not. Id. During this
16 five-year period, only trainers who had earned a particular
17 certification were allowed to service clients who wanted their
18 personal training sessions to include a nutritional component.
19 Kloosterman Decl. ¶ 24, Exh. 19 (Sciacca Dep. 33:16-34:2). Thus,
20 prior to 2004 the duties of some Plaintiffs did not include
21 documenting food histories and developing nutrition plans.

22 Trainers who did not work for the company when nutrition plans were
23 offered, or whose clients did not opt for those plans, will be hard
24 pressed to contend they were forced to develop nutrition plans off

25 ⁸ John Kloosterman ("Kloosterman"), attorney for Defendants, filed
26 a declaration with accompanying exhibits in support of Defendants'
27 Motion to Decertify the Trainer Class. ("First Kloosterman
Decl."). Docket Nos. 381-384.

28 ⁹ Josh Lyon ("Lyon"), Senior Director of Fitness for 24 Hour
Fitness, submitted a declaration in support of Defendants' Motion
to Decertify the Trainer Class. Docket No. 368.

1 the clock. This is an especially significant disparity in job
2 duties because developing nutrition plans is one of the primary
3 session-related activities that Plaintiffs claim they were forced
4 to perform off the clock.

5 The evidence thus reflects that class members shared some but
6 not all of the same job duties. The differences in trainers'
7 duties based on their job title, training certifications, and the
8 types of programs offered at the time of their employment would
9 make adjudicating Plaintiffs' off-the-clock claims with
10 representative proof difficult but, taken alone, may not require
11 decertification. However, when combined with the other disparate
12 factual and employment settings and individualized defenses below,
13 decertification becomes necessary.

14 b. Common Policy and Supervision

15 "To proceed as a collective action, Plaintiffs must present
16 substantial evidence of a common policy, plan, or scheme of
17 permitting or requiring uncompensated off-the-clock work. An
18 allegation of an overarching policy is generally insufficient;
19 plaintiffs must produce substantial evidence of a single decision,
20 policy or plan." Reed, 266 F.R.D. at 458 (internal citations
21 omitted). Plaintiffs have failed to produce substantial evidence
22 that they were compelled to perform off-the-clock work pursuant to
23 a common policy, plan, or scheme. Rather, the evidence shows that
24 24 Hour's official policy was to pay its employees for all hours
25 worked. While Plaintiffs offer substantial evidence that many
26 trainers did perform off-the-clock work, the evidence indicates
27 that the decisions of individual club-level managers, not a
28 company-wide policy, were the causal factor.

1 It is uncontested that 24 Hour had an official written policy
2 requiring all nonexempt employees to record all of their work time
3 and providing that employees would be paid for overtime in
4 accordance with state and federal law. The employee handbooks
5 issued to every employee contained this policy. See Loar Decl., ¶¶
6 2-5, Exhs. 1-4.¹⁰ Additionally, during the years in which paper
7 timesheets were used (until November 2003), each time sheet
8 required employees to initial their total hours and swear to their
9 accuracy. Kloosterman Decl. ¶ 8, Exh. 3 (Kathleen Busick Dep. 156:
10 18-25, Exh. 8). The timesheets warned employees against under
11 reporting their hours. Id.

12 One of Plaintiffs' central allegations is that trainers were
13 not paid for all of the FIT hours they worked because each club was
14 given a quota of FIT hours it could not exceed. Pl.'s First Opp'n
15 at 2, 9. However, testimony of multiple witnesses shows that the
16 manner in which FIT hours were distributed amongst trainers was
17 determined on a club-by-club basis, typically by the Fitness
18 Manager of that club. For example, Plaintiff Lawrence Srubas
19 testified that when he worked under Fitness Manager Tony Kuo, he
20 was not paid for some of the FIT hours he worked, but when Kuo was
21 replaced by Eric Hood, Srubas was paid for all of his FIT hours.
22 Kloosterman Decl. ¶ 26, Exh. 19 (Srubas Dep. 52:5-19; 53:25-54:9).
23 Srubas continued to be paid for all FIT hours worked under the
24 subsequent managers who succeeded Hood. Id. Other class members
25 testified that their particular club-level managers told them not
26

27 ¹⁰ Marla Loar ("Loar"), Senior Director of Human Resources for 24
28 Hour Fitness, submitted a declaration in support of Defendants'
Motion to Decertify the Trainer Class. Docket No. 369.

1 to record certain hours worked, but no class member points to any
2 company-wide policy or decision underlying the club-level manager's
3 directions. See Defs.' First Mot. at 16. Indeed, Plaintiffs fail
4 to point to any testimony stating that working off the clock was
5 part of a company-wide policy or directive. Instead, Plaintiffs
6 maintain that the policy of allocating a certain number of FIT
7 hours to each club created incentives for club-level managers to
8 make trainers work off the clock. Pl.'s First Opp'n at 14. Such
9 allegations are insufficient to constitute evidence of a common
10 decision, policy, or plan, especially in light of 24 Hour's formal
11 written policies to the contrary. See Brechler v. Qwest
12 Communications Intl., 2009 U.S. Dist. LEXIS 24612 at *9 (D. Az.
13 Mar. 17, 2009) (decertifying a class where plaintiffs did not
14 produce evidence of a unified policy but instead "relie[d] on a
15 subtler system of pressure and coercion that, ultimately, appears
16 to have been backed or not by individual managers"); Proctor v.
17 Allsup's Convenience Stores, Inc., 250 F.R.D. 278, 282 (N.D. Tex.
18 2008) (finding that incentives created by allocating a certain
19 number of work hours per week to individual stores did not
20 constitute a single decision, policy, or plan causing putative
21 class members to work off the clock).¹¹

22
23 ¹¹ Plaintiffs rely heavily on Falcon v. Starbucks, 580 F. Supp. 2d
24 528 (S.D. Tex. 2008). In Falcon, the court certified a class of
25 Starbucks employees who alleged that "despite the official 'time
26 worked is time paid' policy, [Starbucks] enforced an unwritten
27 policy of encouraging or allowing [class members] to work off the
28 clock in order to control overtime costs." Id. at 532. As noted
by Defendants, however, the Falcon court applied a different legal
standard than that used by courts in this circuit. Defs.' First
Reply at 3. The Falcon court rejected the requirement, which
courts in this circuit have adopted, that plaintiffs must show they
were affected by a single, unified policy or plan in order to
proceed collectively under section 216(b) of the FLSA. Id. at 535.

1 c. Method of calculating overtime

2 Plaintiffs assert that all class members were subject to a
3 "common method for calculating overtime" which violated the FLSA.
4 Pl.'s First Opp'n at 10. They allege that 24 Hour's payroll
5 department did not include personal training session hours when
6 calculating hours worked for overtime eligibility, used the wrong
7 procedure to calculate the rate of overtime pay trainers were due,
8 and paid overtime compensation during the pay period after it was
9 due. Id. However, Plaintiffs concede that, as shown by the
10 testimony of 24 Hour designee Kathleen Busick, 24 Hour changed
11 these practices in November of 2003. Id. The class period runs
12 from October 1999 to November 2008. Thus, one of Plaintiffs' main
13 theories of liability does not apply to nearly half of the claims
14 period. Class members who worked after November 2003, therefore,
15 are not similarly situated to class members who worked before
16 November 2003 with regard to Plaintiffs' overtime calculation
17 allegations. Certifying the Trainer Class would result in an
18 overbroad class containing both injured and uninjured parties with
19 regard to one of Plaintiffs' central claims. Courts are reluctant
20 to certify such overbroad classes. See In re Wells Fargo Home
21 Mortg. Overtime Pay Litig., 268 F.R.D. 604, 612 (N.D. Cal. 2010).

22 d. Compensation plans

23 Similarly, Plaintiffs admit that 24 Hour used a variety of
24 different compensation plans over the course of the ten-year class
25

26 Moreover, the plaintiffs in Falcon all held the same job title, and
27 the class period was only three years. Here, Plaintiffs held
28 fifteen different job titles over a ten-year period. Indeed,
Plaintiffs point to no case wherein a comparable number of
plaintiffs over a comparably long class period were found to be
similarly situated under FLSA § 216(b).

1 period. Nevertheless, Plaintiffs contend that all of these plans
2 shared the common feature of preventing trainers from recording all
3 of their hours worked. Pl.'s First Opp'n at 10-11. Plaintiffs
4 point to a variety of features from 24 Hour compensation plans that
5 allegedly resulted in trainers having to perform off-the-clock
6 work. Id. However, they do not specify when each of these
7 compensation plan features was in effect, instead leaving the Court
8 to reconstruct the timeline. Id.

9 The Court agrees with Defendants that this hodgepodge of
10 allegations only calls attention to the fact that Plaintiffs are
11 unable to identify a single policy, plan, or decision which
12 required them to work off-the-clock. Defs.' First Reply at 6.
13 Moreover, because the compensation plans have materially changed
14 throughout the ten-year class period, a jury would need to review
15 the specific compensation plan that governed each employee's work
16 period in order to evaluate each class member's claims. The need
17 for such individualized inquiries militates in favor of
18 decertification.

19 In light of the above differences among the experiences of
20 class members, the Court finds that the balance of class members'
21 factual and employment settings -- the first factor in determining
22 whether Plaintiffs are similarly situated -- weighs in favor of
23 decertification.

24 **2. Individualized Defenses**

25 The second factor courts consider on decertification is
26 whether the defendant asserts defenses that would require
27 individualized proof. Reed, 266 F.R.D. at 460. Here, Defendants
28 argue as a key defense that some or all of the putative class

1 members were exempt from overtime under the commissioned retail
2 salesperson exemption set forth in FLSA § 7(i). Defs.' First Mot.
3 at 21. Section 7(i) creates an exemption from overtime
4 requirements for employees who work in a retail or service
5 establishment if: (1) the employee's regular rate of pay during a
6 workweek exceeds one and one-half times the minimum wage; and (2)
7 more than half of the employee's compensation for a representative
8 period (not less than one month) represents commissions on goods or
9 services. 29 U.S.C. § 207(i).

10 Courts have noted that § 7(i) is "a highly individualized
11 defense because its application requires week-by-week and other
12 periodic calculations . . . specific to each individual Plaintiff
13 and his or her particular circumstances." Johnson v. TGF Precision
14 Haircutters, Inc., 2005 U.S. Dist. LEXIS 44259 at *27 (S.D. Tex.
15 Aug. 17, 2005) (noting that "the § 7(i) defense weighs heavily in
16 favor of decertification"). The FLSA takes a single workweek as
17 its standard in determining the applicability of the exemption. 29
18 C.F.R. § 778.104. Thus, "it is . . . necessary to determine the
19 hours worked and the compensation earned by . . . commissioned
20 employees on a weekly basis." Id.; Johnson, 2005 U.S. Dist. LEXIS
21 44259 at *29 n. 16.

22 Twenty-Four Hour's trainer compensation plan documents show
23 that trainers earned commissions for sales of personal training
24 sessions and/or retail supplements. White Decl. ¶ 2, Exhs. 1-11.¹²

25
26 ¹² Scott White ("White"), Senior Vice President of Total Rewards
27 for 24 Hour filed declarations in support of both of Defendants'
28 decertification motions. As explained in note 5, supra, his
declaration filed in support of Defendants' Motion to Decertify the
Manager Class is excluded for lack of foundation. His declaration
in support of Defendants' Motion to Decertify the Trainer Class is

1 For example, the 1999 "Trainer Fit-Pro/Personal Trainer/Floor
2 Supervisor/Floor Instructor Compensation Plan" provided that all
3 trainers received a ten percent commission on each training session
4 he or she sold and a ten percent commission on all nutritional
5 supplements he or she sold. Id., Exh. 1. In addition, trainers
6 holding the title "Personal Trainer" or "Trainer Fit Pro" received
7 a fixed percentage of the cost of each training session they
8 conducted. Id. The details of the commission compensation system
9 varied over the course of the class period. Id. Payroll records
10 show that some of the putative class members received more than
11 fifty percent of their compensation from commissions during some
12 pay periods. Kloosterman Decl. ¶ 8, Exh. 3 (Busick Dep. 126:23-
13 127:8, Exh. 4); Kloosterman Decl. ¶¶ 6-7, Exhs. 1 and 2 (payroll
14 records for Plaintiffs John Davidson and Louis Ortiz).

15 Here, as in Johnson, determining whether the § 7(i) defense
16 applies to members of the putative class would require a highly
17 individualized inquiry and could not be accomplished by common
18 proof. The FLSA regulations make clear that the analysis must be
19 performed for each individual employee on a week-by-week basis. 29
20 C.F.R. § 778.104. Adding to the complexity in this case is the
21 fact that trainers received various wages and various commissions
22 depending on factors such as their experience level,
23 certifications, and the time period during which they worked.
24 Accordingly, "[t]he proof required to establish these
25 individualized § 7(i) exemption defenses would become the

26
27 not excluded, as Plaintiffs raised no objection to this declaration
28 in their moving papers. Accordingly, all references to "White
Decl." refer to the declaration filed in support of Defendants'
Motion to Decertify the Trainer Class.

1 overwhelming focus of a trial," resulting in the equivalent of
2 mini-trials for each Plaintiff. Johnson, 2005 U.S. Dist. LEXIS
3 44259 at *28.

4 Plaintiffs contend that the payments Defendants refer to as
5 commissions were not in fact bona fide commissions under § 7(i),
6 and that the § 7(i) defense could be defeated via common proof of
7 this fact. Pl.'s First Opp'n at 19. This argument is unavailing.
8 The argument is premature at this stage of the case; whether
9 plaintiffs actually meet the criteria of an FLSA exemption is
10 irrelevant to a determination of whether they are similarly
11 situated. Pfohl v. Farmers Ins. Group, 2004 U.S. Dist. LEXIS 6447
12 at *27 n. 5 (C.D. Cal. Mar. 1. 2004); Pendlebury v. Starbucks, 518
13 F. Supp. 2d 1345, 1353 (S.D. Fla. 2007) (noting, "an evaluation on
14 the merits of the exemption is not appropriate at [the
15 decertification stage]"). Even so, Plaintiffs' argument is
16 unpersuasive on the merits. Plaintiffs note that in order to
17 qualify as a commission under the § 7(i) exemption, courts have
18 required a payment to be (1) calculated as a percentage of the sale
19 price to the customer, and (2) de-coupled from the amount of time
20 spent on the task for which the commission is paid. Pl.'s First
21 Opp'n at 19 (citing Huntley v. Bonner's, Inc., 2003 U.S. Dist.
22 LEXIS 26643 at *8-9 (W.D. Wash. 2003); Yi v. Sterling Collision
23 Ctrs., Inc., 480 F.3d 505, 509 (7th Cir. 2007)). The compensation
24 plans for at least some of the years encompassed by the class
25 period appear to the Court to meet these criteria. Trainers were
26 paid a percentage of the cost of each training package sold, a
27 percentage of the cost of all supplements sold, and a percentage of
28 the cost of each training session conducted. See, e.g., White

1 Decl., Ex. 1. To the extent that later compensation plans varied,
2 this reinforces the difficulty of determining via common proof
3 whether particular employees qualified for the exemption across a
4 ten-year period.

5 **3. Fairness and Procedural Considerations**

6 "In evaluating fairness and procedural considerations, the
7 Court must consider the primary objectives of a collective action:
8 (1) to lower costs to the plaintiffs through the pooling of
9 resources; and (2) to limit the controversy to one proceeding which
10 efficiently resolves common issues of law and fact that arose from
11 the same alleged activity." Reed, 266 F.R.D. at 458 (citing
12 Johnson, 2005 U.S. Dist. LEXIS 44259 at *7). However, "the Court
13 must also determine whether it can coherently manage the class in a
14 manner that will not prejudice any party." Id. In other words,
15 "the court must balance the benefits of a reduction in the cost to
16 individual plaintiffs and any increased judicial utility that may
17 result from the resolution of many claims in one proceeding with
18 the cost of any potential detriment to the defendant and the
19 potential for judicial inefficiency that could stem from collective
20 treatment." Wilks v. Pep Boys, 2006 U.S. Dist. LEXIS 69537 at *26
21 (M.D. Tenn. Sep. 26, 2006).

22 Here, given Plaintiffs' varying factual and employment set-
23 tings and the lack of substantial evidence that Plaintiffs were
24 subjected to a uniform decision, policy or practice of requiring
25 trainers to perform work off-the-clock, the jury will have to make
26 individualized determinations as to factors such as what duties
27 each trainer performed, what compensation plan each trainer worked
28 under, the method of calculating overtime used by 24 Hour during

1 each trainer's employment period, and whether each particular
2 trainer qualified as exempt from overtime under § 7(i). The need
3 for such individualized inquiries would make proceeding by
4 representative testimony impracticable. The Court is persuaded
5 that, given the facts of this case, proceeding collectively would
6 be "unmanageable, chaotic, and counterproductive." Reed, 266
7 F.R.D. at 462.

8 **4. Proceeding by Subclasses**

9 Plaintiffs suggest that any disparities among the factual
10 circumstances of class members can be dealt with by dividing the
11 Trainer Class into subclasses. They cite several off-the-clock
12 cases in which courts have divided into subclasses plaintiffs whose
13 factual circumstances vary too widely to permit them to proceed as
14 a single class. However, Plaintiffs do not propose, and the Court
15 cannot envision, a partition of the Trainer Class that would result
16 in subclasses of similarly situated Plaintiffs. Plaintiffs'
17 experiences varied across so many dimensions -- the compensation
18 plan in place during their employment; the method used to calculate
19 overtime during their employment; their job title and
20 certification; and the method of distributing FIT hours used at
21 their particular club, etc. -- that neatly dividing them into
22 similarly situated subclasses would be impracticable.

23 **D. Defendants' Motion to Decertify the Manager Class**

24 The conditionally certified Manager Class is comprised of 430
25 employees and former employees of 24 Hour Fitness who held the job
26 titles of General Manager ("GM"), Operations Manager ("OM"), or
27
28

1 Fitness Manager ("FM") outside of California.¹³ Defs.' Second Mot.
2 at 3; Mar. 6, 2007 Order at 16. The relevant class period is
3 January 31, 1998 to July 24, 2008. Id.

4 Plaintiffs' theory of liability with regard to the Manager
5 Class is straightforward. They allege that 24 Hour misclassified
6 the managers as exempt from the overtime requirements of the FLSA
7 and therefore did not pay them overtime as required by FLSA
8 § 207(a)(1). In their Opposition to Defendants' Motion to
9 Decertify the Manager Class, Plaintiffs argue that they have
10 provided substantial evidence that all class members were similarly
11 situated with regard to 24 Hour's alleged misconduct and that a
12 collective action to try their claims is therefore proper. Pl.'s
13 Second Opp'n at 2.

14 Defendants argue that Plaintiffs cannot meet their burden of
15 proving that the class members are similarly situated because: (1)
16 each of the three manager classifications has a markedly different
17 job description and set of responsibilities; (2) deposition
18 testimony shows that even managers with the same position had
19 different duties and practices based on the particular club he or
20 she worked in, the region and time period in which he or she
21 worked, the management style and level of oversight from his or her
22 superiors, and the manager's own level of experience and training;

23 _____
24 ¹³ Twenty-Four hour divides its clubs into separate business
25 functions, or "silos." Over time, their model has shifted from two
26 silos: production (encompassing sales and fitness) and operations;
27 to three silos: sales (sales of membership agreements), operations
28 (administering club operations), and fitness (promotions of health
and physical training and sale of training packages). Generally
speaking, though not always, there is one manager in each club
overseeing each silo: GMs oversee sales; OMs oversee operations;
and FMs oversee the promotion of health and fitness and the sale of
personal training packages. Defs.' Second Mot. at 4.

1 (3) individualized defenses apply to each manager's claims --
2 namely, 24 Hour claims that each manager falls under one of the
3 exemptions from overtime established by FLSA; and (4) fairness
4 dictates decertification. Defs.' Second Mot. at 1-2.

5 Again, in evaluating whether decertification is warranted, the
6 Court considers whether Plaintiffs have produced "substantial
7 evidence to demonstrate that they are similarly situated." Reed,
8 266 F.R.D. 446 at 449. We again consider: (1) the disparate
9 factual and employment settings of the individual plaintiffs; (2)
10 the various defenses available to defendants with respect to the
11 individual plaintiffs; and (3) fairness and procedural
12 considerations, noting that courts in this circuit have found that
13 certification is not warranted in the absence of proof that
14 plaintiffs' alleged injuries resulted from a single, unified
15 policy. Id. Here, each factor weighs in favor of decertification.

16 **1. Disparate Factual and Employment Settings of the Individual**
17 **Class Members**

18 When comparing the factual and employment settings of class
19 members as part of a similarly situated inquiry, courts consider
20 such factors as whether plaintiffs had differing job titles or
21 duties, worked in different geographic locations, worked under
22 different supervisors, or allege different types of violative
23 conduct. Reed, 266 F.R.D. at 449.

24 Plaintiffs advance two main theories for why their factual and
25 employment settings warrant a finding that they are similarly
26 situated. They contend that: (1) 24 Hour admits that the class
27 members were similarly situated; and (2) class members performed
28 primarily nonexempt tasks while true managerial authority was

1 vested in their superiors at the district level.

2 a. Plaintiffs argue that 24 Hour admits class members were
3 similarly situated

4 Plaintiffs have two theories for how 24 Hour admits that
5 members of the Manager Class were similarly situated. First,
6 Plaintiffs argue that the deposition testimony of 24 Hour's Fed.
7 Rule Civ. Proc. 30(b)(6) designee, Todd Bruhn, conclusively
8 indicates that managers within each silo (GMs, OMs, and FMs) had
9 the same duties and responsibilities as other managers in the same
10 position across all clubs, regions, and states, throughout the
11 entire claims period. Pl.'s Second Opp'n at 1.

12 Second, Plaintiffs argue that 24 Hour classified managers as
13 exempt based solely upon their job title without performing any
14 sort of individualized inquiry into each particular manager's job
15 duties. According to Plaintiffs, this "blanket" classification
16 policy belies Defendants' argument that individualized inquiries
17 would be needed at trial to determine whether each individual class
18 member was exempt from overtime. Id. at 6-8.

19 As to Plaintiffs' first theory -- that Bruhn's deposition
20 testimony is sufficient to support a finding that all class members
21 are similarly situated -- Defendants offer several persuasive
22 rebuttals. First, Defendants note that Bruhn's testimony says
23 nothing about the job duties of managers across silos. In other
24 words, Bruhn's testimony is silent as to whether a GM's duties
25 resembled those of an OM or an FM. Defs.' Second Reply at 5.
26 Second, Defendants note that Bruhn only testified that managers
27 within each silo "would have" or "should have" performed the same
28

1 duties, not that they actually did so. See Karczag Decl.¹⁴ ¶ 11,
2 Exh. 126 (Bruhn Dep. 136:16-137:11). By contrast, Defendants point
3 to deposition testimony, discussed below, from numerous class
4 members suggesting that managers' job duties varied both within and
5 across silos. In light of the testimony of actual class members as
6 to differences among managers' job duties, both within and across
7 silos, Defendants contend that Bruhn's testimony that managers
8 within each silo "should have" had the same duties is not
9 substantial evidence that all class members are similarly situated.
10 Id. The Court agrees with Defendants.

11 Plaintiffs' deposition testimony shows that the job duties of
12 managers varied significantly across silos. Plaintiff Michael
13 Marino testified that among the main duties of an OM were: "making
14 sure the front desk was filled"; "driv[ing] revenue from supplement
15 tables"; "paperwork duties"; and being "responsible for the kids
16 club". Second Kloosterman Decl.¹⁵ ¶ 27, Exh. 22 (Marino Dep. 55:14
17 - 57:24). By contrast, other class members testified that the
18 primary job duties of FMs included: assigning FIT hours to
19 trainers¹⁶; overseeing trainers¹⁷; performing personal training
20 sessions with clients¹⁸; selling of personal training plans, and
21 assisting GMs in membership sales¹⁹. By comparison, the primary
22 job duties of a GM were selling memberships, setting up corporate
23

24 ¹⁴ Justin P. Karczag ("Karczag"), attorney for Plaintiffs, filed a
25 declaration in support of Plaintiffs' Oppositions to Defendants'
26 Motions to Decertify the Trainer Class and the Manager Class.

26 ¹⁵ John Kloosterman, attorney for Defendants, filed a declaration
27 support of Defendants' Motion to Decertify the Manager Class.
28 Docket No. 376. ("Second Kloosterman Decl.").

27 ¹⁶ Id. at ¶ 23, Exh. 18 (Kaipi Dep. 70:2-6)

27 ¹⁷ Id. at ¶ 27, Exh. 22 (Marino Dep. 58:23-60:10)

28 ¹⁸ Id. at ¶ 34, Exh. 29 (Reiter Dep. 105:10-19)

28 ¹⁹ Id. at ¶ 32, Exh. 27 (Ra'Oof Dep. 55:13-56:9, 63:4-22)

1 accounts,²⁰ club maintenance and cleanliness²¹, or as Bobby DeSoto
2 put it, "sell, sell, sell."²²

3 Similarly, Plaintiffs' deposition testimony shows that even
4 managers within the same silo often performed substantially
5 different functions. For example, managers in the same silo
6 testified to vastly different roles in the hiring process. FM
7 Louis Ortiz testified that his involvement in the hiring process
8 consisted solely of saying hello to someone dropping off an
9 application and reporting the exchange to his district manager. If
10 he ever sat in on an interview, he did not say anything. Id. at ¶
11 30, Exh. 25 (Ortiz Dep. 77:21-80:25). By contrast, FM Dennis
12 Sciacca testified that he asked candidates specific questions and
13 conveyed to the district manager his opinions as to whether the
14 applicant could effectively motivate others, build rapport, and put
15 people at ease. Id. at ¶ 37, Exh. 32 (Sciacca Dep. 120:5-10;
16 124:18-22).

17 Managers in the same silo also testified to substantially
18 different roles in disciplining subordinates. For example, GM
19 William Clunn took part in the termination of an employee,
20 including completing the termination documents, issuing verbal
21 warnings for conduct violations, and reviewing the paperwork with
22 Human Resources. Id. at ¶ 8, Exh. 3 (Clunn Dep. 67:17-70:17). By
23 contrast, GM Cindy Magnani testified that she never had to
24 discipline anyone over her twelve-year career. She believed that
25 discipline was the responsibility of OMs and district managers.
26 Id. at ¶ 26, Exh. 21 (Magnani Dep. 68:21-69:5).

27 ²⁰ Id. at ¶ 32, Exh. 27 (Ra'Oof Dep. 129: 14-24)

28 ²¹ Id. at ¶ 7, Exh. 2 (Beauperthuy Dep. 28:20-29:1)

²² Id. at ¶ 12, Exh. 7 (DeSoto Dep. 87:25)

1 The above examples are mere excerpts of an extensive
2 comparison of class member deposition testimony presented by
3 Defendants that shows substantial differences in the core job
4 duties performed by managers within each silo. See Defs.' Second
5 Mot. at 11. As noted by Defendants, the testimony shows that for
6 every manager who says one thing about his or her job duties and
7 responsibilities, another says the opposite. Defs.' Second Mot. at
8 1. In light of this testimony by actual class members
9 demonstrating the differences in their job duties, 24 Hour designee
10 Bruhn's testimony that managers within each silo "should have"
11 performed the same duties is insufficient to support a finding that
12 Plaintiffs were similarly situated. The discrepancies between the
13 duties actually performed by class members weigh in favor of
14 decertification.

15 Plaintiffs next argue that Defendants' use of a uniform
16 "blanket" classification policy that categorized each manager as
17 exempt from overtime based solely on the manager's job title
18 amounts to an admission by 24 Hour that all managers with the same
19 job title performed the same duties and were similarly situated.
20 Pl.'s Second Opp'n at 6. The Ninth Circuit recently made clear,
21 however, that an analysis of what job duties each employee actually
22 performed is more probative than an employer's classification
23 policy when considering whether plaintiffs are similarly situated.
24 In In re Wells Fargo Home Mortgage Litigation, the plaintiffs
25 alleged that they were misclassified as exempt and argued that
26 Wells Fargo had uniform policies regarding their classification.
27 Wells Fargo, 268 F.R.D. 604, 609 (N.D. Cal. 2010), on remand from
28 571 F.3d 953 (9th Cir. 2009). In response, Wells Fargo argued that

1 individualized inquiries into each plaintiff's job duties were
2 needed to determine whether he or she qualified for various
3 overtime exemptions. Id. The district court rejected Wells
4 Fargo's argument and certified a Rule 23 class. The Ninth Circuit
5 reversed, stating:

6 The fact that an employer classifies all or most
7 of a particular class of employees as exempt does
8 not eliminate the need to make a factual
 determination as to whether class members are
 actually performing similar duties.

9 Wells Fargo, 571 F.3d 953, 959 (9th Cir. 2009). On remand, the
10 district court denied certification, finding that individualized
11 inquiries into each class member's job duties were required despite
12 the company's blanket classification policy. Wells Fargo, 268
13 F.R.D. at 611.

14 Although Wells Fargo dealt with a Rule 23 class action, other
15 courts in this district have extended its reasoning to FLSA cases.
16 See, e.g., Hernandez v. United Auto Credit Corp., No. C-08-03404,
17 2010 WL 1337702 at *7 (N.D. Cal. Apr. 2, 2010) (granting
18 decertification in a FLSA action because, despite an internal
19 policy classifying all class members as exempt, the actual duties
20 performed by the class members varied significantly). The case
21 Plaintiffs cite for the contrary proposition, Nerland v. Caribou
22 Coffee, 564 F. Supp. 2d 1010, 1023-24 (D. Minn. 2007) is from
23 outside this circuit and does not control.

24 b. Plaintiffs contend that members of the Manager Class did
25 not have true management authority

26 In their analysis of Plaintiffs' factual and employment
27 settings, Plaintiffs contend that 24 Hour vested true management
28 authority in district level, not club-level, managers. Pl.'s

1 Second Opp'n at 2, 9. They argue that the primary job duties of
2 the Manager Class were nonexempt tasks such as sales, cleaning, and
3 clerical functions. Id. at 11. In essence, Plaintiffs appear to
4 be arguing that their job duties are similar because they are all
5 non-managerial in nature. Even if Plaintiffs are correct that the
6 primary duties of class members were non-managerial, that would not
7 be enough to support a finding that they are similarly situated.
8 Rather, Plaintiffs must show that there was a substantial level of
9 commonality among the allegedly non-exempt duties they performed.
10 As discussed above, however, deposition testimony from class
11 members illustrates significant differences among the job duties of
12 managers both within the same silo and across silos.

13 Moreover, there is substantial deposition testimony to belie
14 Plaintiffs' argument that all class members performed primarily
15 non-exempt tasks. For example, Bruhn testified that class members
16 were able to hire, able to recommend termination subject only to HR
17 approval, and that they all primarily engaged in exempt duties and
18 were properly classified as exempt. Third Kloosterman Decl.²³ ¶ 5,
19 Exh. B (Bruhn Dep. 26:8-27:15, 33:8-16, 103:17-104:8). Testimony
20 of some class members also suggests that they engaged in exempt
21 activities. For example, FM Sciacca, OM Dillon, and GM DeSoto
22 testified that they participated in the hiring process. Second
23 Kloosterman Decl. ¶ 14, Exh. 9 (Dillon Dep. 88:2-90:23); Id. at ¶
24 12, Exh. 7 (DeSoto Dep. 74:16-75:24); Id. at ¶ 37, Exh. 32 (Sciacca
25 Dep. 120:5-10; 124:18-22; 169:9-23). FM Spencer, GM Clunn, and OM
26 Pieske testified that they participated in terminating employees.

27 _____
28 ²³ John Kloosterman, attorney for Defendants, filed a declaration
in support of Defendants' Second Reply. ("Third Kloosterman
Decl.").

1 Id. at ¶ 31, Exh. 26 (Pieske Dep. 76:19-77:11; 115:5-7); Id. at ¶
2 8, Exh. 3 (Clunn Dep. 67:17-70:17); Id. at ¶ 38, Exh. 33 (Spencer
3 Dep. 76:18-77:10). The Court notes, however, that the substantive
4 issue of whether class members qualified as exempt from FLSA
5 overtime requirements is not before the court at this stage.
6 Rather, the issue before the Court is simply whether this case
7 should proceed as a collective action. See Pfohl, 2004 U.S. Dist.
8 LEXIS 6447 at *21 (C.D. Cal. Mar. 1, 2004). The substantial
9 disparities among Plaintiffs' job duties weigh in favor of
10 decertification.

11 **2. Individualized Defenses**

12 The second factor courts consider on decertification is
13 whether the defendant asserts defenses that would require
14 individualized proof. Reed, 266 F.R.D. at 460. Here, Defendants'
15 primary defense is that Plaintiffs were properly classified as
16 exempt employees and not entitled to the overtime compensation they
17 seek to recover. Defs.' Second Mot. at 18. Under section
18 213(a)(1), employers are not required to provide overtime benefits
19 to any employee in a bona fide executive²⁴, administrative²⁵, or
20

21 ²⁴ Employees meet the executive exemption when: (1) they receive a
22 salary of not less than \$455 per week; (2) their primary duty is
23 management of the enterprise in which they are employed or of a
24 customarily recognized department or subdivision thereof; (3) they
25 customarily and regularly direct the work of two or more employees;
and (4) they have the authority to hire or fire other employees, or
their suggestions as to the hiring, firing, advancement, promotion,
or any other change of status of other employees are given
particular weight. 29 C.F.R. section 541.100(a).

26 ²⁵ Employees meet the administrative exemption if they receive a
27 salary of not less than \$455 per week, and their primary duties
28 consist of: (1) the performance of office or non-manual work
directly related to the management or general business operations
of the employer or its customers; and (2) duties that require the
exercise of discretion and independent judgment with respect to
matters of significance. 29 C.F.R. § 541.200(a)(1)-(3).

1 professional capacity. 29 U.S.C. § 213 (a)(1). As discussed in
2 Part C.2 above, FLSA § 207(i) also provides a "commissioned retail
3 sales exemption." Department of Labor regulations further provide
4 for an exemption for highly paid employees who meet certain weekly
5 and annual salary criteria. 29 C.F.R. § 541.601. Defendants argue
6 that, given the wide range of job duties performed by individuals
7 in the Manager Class, each Plaintiff will likely qualify for at
8 least one, if not more, of the executive, administrative, highly
9 compensated, or commissioned retail sales exemptions. Defs.'
10 Second Mot. at 18. Even managers with the same job title,
11 Defendants argue, may qualify for different exemptions in light of
12 the variation among their duties and experiences. Id. Defendants
13 contend that highly individualized inquiries will be necessary in
14 order to determine whether each class member falls under one of the
15 FLSA exemptions. These individualized inquiries, according to
16 Defendants, make proceeding as a collective action impracticable.

17 The Court agrees with Defendants. Where, as here, significant
18 differences exist among the job duties of the putative class
19 members (even for managers with the same job title), a
20 determination whether class members qualify for FLSA overtime
21 exemptions will necessitate an individualized inquiry into the
22 circumstances of each Plaintiff. See, e.g., Johnson, 2005 U.S.
23 Dist. LEXIS 44259 at *27 (decertifying a class because determining
24 whether plaintiffs were subject to the commissioned retail sales
25 exemption would necessitate individualized inquiries); Hernandez,
26 2010 U.S. Dist. LEXIS 40209 at *8 (decertifying a class in part
27 because determining whether each Plaintiff met the executive
28 exemption would necessitate individualized inquiries); Pfohl, 2004

1 U.S. Dist. LEXIS 6447 at *27 (C.D. Cal. Mar. 1, 2004)(decertifying
2 a class because determining whether each Plaintiff met the
3 administrative exemption would necessitate individualized
4 inquiries). Johnson v. Big Lots Stores, Inc. is illustrative. 561
5 F. Supp. 2d 567, 586 (E.D. La. 2008). In Johnson, the court
6 decertified a FLSA class because it determined that the defendant's
7 claims that its employees were subject to the executive exemption
8 necessitated individualized inquiries. Id. The court explained,
9 "[u]sing representative proof is problematic if for every instance
10 in which an opt-in plaintiff reported that she hired subordinates,
11 there is an alternative response to the contrary." Id. As noted
12 above, the deposition testimony of members of the Manager Class
13 shows that for every manager who says one thing about his or her
14 job duties and responsibilities, another says the opposite. In
15 light of these discrepancies, representative testimony would be
16 inadequate to determine whether Plaintiffs were properly
17 categorized as exempt.

18 The Court is not persuaded by Plaintiffs' argument that 24
19 Hour was precluded from classifying managers as exempt because it
20 utilized a disciplinary policy that violated the "Salary-Basis
21 Test." Under this test, an employer may not classify its employees
22 as exempt if the employee's salary may vary due to the quantity or
23 quality of work performed. 29 CFR 541.602(a). Plaintiffs contend
24 that 24 Hour cannot meet the salary-basis test because, for part of
25 the class period, it maintained a policy of docking pay of managers
26 for certain violations of company policy. Plaintiffs therefore
27 argue that 24 Hour is precluded from raising exemptions as defenses
28 to Plaintiffs' claims. Pl.'s Second Opp'n at 12. Defendants offer

1 a number of factual and legal arguments to rebut Plaintiff's
2 claims. We need not address them all here, however, because one is
3 dispositive. Under Department of Labor regulations, even if an
4 employer incorrectly docks an exempt employee's salary, it loses
5 the exemption only for that workweek, not for all time. 29 C.F.R.
6 § 541.603 ("the exemption is lost during the time period in which
7 the improper deductions were made..."). Thus, whether 24 Hour
8 incorrectly docked a particular employee's pay and is therefore
9 barred from mounting an exemption defense as to that Plaintiff is
10 yet another individualized issue not amenable to common proof.

11 Lastly, Plaintiffs contend that 24 Hour has produced
12 insufficient evidence that any of the class members qualified for
13 any of the exemptions at issue. This argument fails for two
14 reasons. First, at this stage in the litigation, Defendants do not
15 have the burden of proving that the exemptions apply to the class
16 members. They will have that burden at trial. On the instant
17 motion, it is Plaintiffs who have the burden of proving that they
18 are similarly situated. Pfohl, 2004 U.S. Dist. LEXIS 6447 at *21,
19 27 n. 5 (whether collective action plaintiffs meet the criteria of
20 an exemption is irrelevant to the determination of whether
21 plaintiffs are similarly situated).

22 Second, Defendants have produced evidence that some class
23 members may qualify for the exemptions. For instance, some class
24 members admit to playing a material role in hiring and firing
25 decisions, which could qualify them for the executive exemption.
26 Second Kloosterman Decl. ¶ 22, Exh. 17 (Johnson Dep. 103:4-105:4);
27 Id. at ¶ 14, Exh. 9 (Dillon Dep. 88:2-90:23). Others testified
28 that they reviewed and processed paperwork relevant to business

1 operations, including payroll, timesheets, new hires, and
2 membership agreements, and that they handled their club's banking.
3 Id. at ¶ 14, Exh. 9 (Dillon Dep. 56:25-57:2; 62:2-10; 63:15-22;
4 65:9-66:1); Id. at ¶ 21 (Janke Dep. 38:6-12; 39:25-40:11). These
5 employees might qualify for the administrative exemption.
6 Additionally, payroll data for some class members shows that they
7 met the criteria for the commissioned retail sales exemption during
8 at least some pay periods. Soriano Decl.²⁶ ¶¶ 4-13, Exhs. 3-12
9 (sample paystubs for Plaintiffs Ra'Oof, Clunn, Beauperthuy,
10 Symmonds, Cromartie, showing that each received more than 50
11 percent of his or her income from commissions over a one-month
12 period).

13 In sum, the defenses asserted by 24 Hour will necessitate
14 individualized inquiries, making adjudication of Plaintiffs' claims
15 by common proof difficult. This weighs heavily in favor of
16 decertification.

17 **3. Fairness and Procedural Considerations**

18 When weighing fairness and procedural considerations, "the
19 court must balance the benefits of a reduction in the cost to
20 individual plaintiffs and any increased judicial utility that may
21 result from the resolution of many claims in one proceeding with
22 the cost of any potential detriment to the defendant and the
23 potential for judicial inefficiency that could stem from collective
24 treatment." Wilks, 2006 U.S. Dist. LEXIS 69537 at *26.

25 Here, fairness and procedural considerations weigh in favor of
26 decertification. The evidence demonstrates that Plaintiffs' job

27 _____
28 ²⁶ Julius Soriano ("Soriano"), Senior Director of Pay Processes for
24 Hour, submitted a declaration in support of Defendants' Motion
to Decertify the Manager Class.

1 duties varied significantly both within and across silos. Each
2 Plaintiff's job duties will therefore need to be determined on an
3 individual basis, and whether each Plaintiff qualified for an
4 exemption to FLSA overtime requirements will also require
5 individualized analysis. The judicial inefficiency that would
6 result from trying Plaintiffs' claims collectively outweighs the
7 benefits to Plaintiffs of proceeding collectively. Additionally,
8 the detriment to Plaintiffs from decertification is ameliorated by
9 the fact that each Plaintiff is subject to an arbitration agreement
10 with 24 Hour. While 24 Hour refused to proceed to a class-wide
11 arbitration, it would agree to arbitrate individual claims. Defs.'
12 Second Reply at 14. Thus, after decertification, Plaintiffs who
13 wish to pursue their individual claims need not file individual
14 lawsuits for relief.

15 **4. Proceeding by Subclasses**

16 Here, unlike with the Trainer Class, the division of managers
17 into three silos provides a plausible dimension along which to
18 divide the putative class into a subclass of GMs, a subclass of
19 OMs, and a subclass of FMs. However, the evidence shows that even
20 within each silo the duties and responsibilities of managers
21 differed widely. Moreover, proceeding with subclasses would not
22 change the fact that individualized inquiries will still be
23 required to determine whether each plaintiff qualifies for one of
24 the FLSA overtime exemptions. Proceeding with subclasses would
25 therefore do little to lessen the chaos and inefficiency that would
26 result from proceeding with a single collective action.

27 ///

28 ///

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court DENIES all Motions to
3 Strike. The Court GRANTS the Motion to Decertify the Trainer Class
4 filed by Defendants 24 Hour Fitness USA, Inc. and Sport and Fitness
5 Clubs of America, Inc. The Court also GRANTS the Motion to
6 Decertify the Manager Class filed by Defendants 24 Hour Fitness
7 USA, Inc. and Sport and Fitness Clubs of America, Inc. All opt-in
8 Plaintiffs are DISMISSED from this action without prejudice to each
9 such opt-in Plaintiff filing a suit in his or her own behalf. To
10 avoid prejudice to individual opt-in Plaintiffs who may choose to
11 file their own cases, the Court invokes its equity powers to toll
12 the applicable statutes of limitations for 30 days after the entry
13 of this Order.

14 The claims of the fifty-eight named Plaintiffs, Gabe
15 Beauperthuy, et al., remain pending herein for trial. The named
16 Plaintiffs have the option of withdrawing from the instant action
17 and seeking resolution of their claims by arbitration pursuant to
18 their arbitration agreement with Defendants, or proceeding to trial
19 before this Court separately in the order in which their names are
20 listed on the complaint. They shall notify the Court within 60
21 days of whether they wish to proceed to trial.

22
23 IT IS SO ORDERED.

24
25 Dated: February 24, 2011

26 
UNITED STATES DISTRICT JUDGE

27
28