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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 STARVONNA HARRIS, et al.,

8 Plaintiffs,

9 v.

10 BEST BUY STORES, L.P.,

11 Defendant.

Case No. [17-cv-00446-HSG](#)

**ORDER DENYING PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION, GRANTING
DEFENDANT'S MOTION FOR LEAVE
TO FILE A RESPONSE TO
PLAINTIFF'S OBJECTIONS AND
REQUEST TO EXCLUDE EVIDENCE,
AND DENYING PLAINTIFF'S
MOTIONS FOR RELIEF FROM
ORDERS OF MAGISTRATE JUDGE**

Re: Dkt. Nos. 85, 94, 95, 118

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15 On January 25, 2018, the Court held a hearing on Jonathan Strickland and Starvona
16 Harris's motion for class certification and Defendant Best Buy Stores, L.P.'s ("Best Buy") motion
17 for summary judgment on Plaintiff Jonathan Strickland's claims. See Dkt. Nos. 85 ("Mot."), 91;
18 see also Dkt. Nos. 97 ("Opp."), 104 ("Reply"). The Court took the motions under submission, and
19 granted Defendant's motion for summary judgment. Dkt. No. 123 ("Strickland Summary
20 Judgment Order").¹ Also in that order, the Court dismissed Plaintiff Harris's seventh cause of
21 action under the Private Attorneys General Act ("PAGA").

22 Because the Court's summary judgment order altered the bases for class certification, on
23 April 19, 2018 the Court heard further argument on Plaintiff Harris's class certification motion.
24 See *id.* at 20. After carefully considering the parties' arguments, the Court **DENIES** the motion.

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27 ¹ The Strickland Summary Judgment Order set forth this litigation's extensive procedural and
28 factual history. This order incorporates those unchanged facts. In this order, the Court only
discusses the facts and legal standards as necessary to address the issues raised by Plaintiff's
motion for class certification.

1 **I. LEGAL STANDARD**

2 Plaintiff bears the burden of showing by a preponderance of the evidence that class
3 certification is appropriate under Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v.*
4 *Dukes*, 564 U.S. 338, 351 (2011). Class certification is a two-step process. First, Plaintiff must
5 establish that each of the four requirements of Rule 23(a) is met: numerosity, commonality,
6 typicality, and adequacy of representation. *Id.* Second, Plaintiff must establish that at least one of
7 the bases for certification under Rule 23(b) is met. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33
8 (2013). Where, as here, Plaintiff seeks to certify a class under Rule 23(b)(3), Plaintiff must show
9 that “questions of law or fact common to class members predominate over any questions affecting
10 only individual members, and that a class action is superior to other available methods for fairly
11 and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

12 “[A] court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap
13 with the merits of the plaintiff’s underlying claim.’” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*,
14 568 U.S. 455, 465–66 (2013) (quoting *Wal-Mart*, 564 U.S. at 351). Nevertheless, Rule 23 does
15 not permit “free-ranging merits inquiries at the certification stage.” *Id.* at 466. “Merits questions
16 may be considered to the extent—but only to the extent—that they are relevant to determining
17 whether the Rule 23 prerequisites for class certification are satisfied.” *Id.* If a court concludes
18 that the moving party has met its burden of proof, the court has broad discretion to certify the
19 class. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), opinion amended on
20 *denial of reh’g*, 273 F.3d 1266 (9th Cir. 2001).

21 **II. ANALYSIS**

22 Plaintiff’s putative class comprises “Defendant’s non-exempt employees who were
23 employed in California during the period from four years prior to the filing of the Prior Federal
24 Action (February 11, 2011) until this Court’s order granting class certification who fall within one
25 or more of the following subclasses. . . .” Dkt. No. 55 (“SAC”) at 6–7.² At the April 19 hearing,

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27 ² “The Prior Federal Action” refers to Harris’s first suit against Defendant, Case No. 4:15-cv-
28 00657-HSG. In the Prior Federal Action, the Court found that material disputes of fact precluded
summary judgment on Plaintiff’s claim for “failure to provide itemized wage statements” in
violation of California Labor Code Section 226, and her claim for “failure to pay wages within

1 the parties agreed that only two putative subclasses remained following the Strickland Summary
2 Judgment Order: a “Wage Statement Subclass” and a “Waiting Time Subclass.” See *id.* The
3 Wage Statement Subclass comprises:

4 [A]ll nonexempt individuals employed by DEFENDANT in
5 California who received wage statements containing one or more
6 “Previous Period Hrs” entries, (2) all members of the Overtime
7 Wage Subclass, and (3) all non-exempt individuals employed by
8 DEFENDANT in California who received wage statements listing
9 hours worked that do not match the hours worked in their time
10 records for the same pay periods [during the applicable limitations
11 period].

12 *Id.* at 7.³ Plaintiff’s Waiting Time Subclass includes, in relevant part: “all non-exempt individuals
13 formerly employed by DEFENDANT in California who either did not receive their final hourly
14 wages on the date their employment was terminated or within 72 hours of their resignation” during
15 the applicable limitations period. *Id.* The Court addresses the adequacy of each putative subclass
16 under Rule 23.

17 **A. Wage Statement Subclass**

18 The parties generally agree on the systems and procedures that Defendant uses to produce
19 wage statements. To track employee hours worked, Best Buy maintains a time entry system called
20 the Time and Labor Center (“TLC”). *Mot.* at 2; *Opp.* at 10; see Dkt. No. 97-1 (“Compendium of
21 Evidence” or “CE”) at 317. The TLC requires managers to approve certain time entries input by
22 employees, referred to as “timesheet exceptions.” CE at 318–19. Timesheet exceptions can
23 include manually input time entries and corrections to prior time entries. See *id.* Other timesheet
24 exceptions include:

25 (1) [P]unching in 15 minutes early for a scheduled shift; (2)
26 punching out more than one hour later than a scheduled shift; (3)
27 missing a punch in sequence or punching out of sequence, such as
28 when an employee accidentally hits a start meal button instead of a
clock in button; (4) working a shift that was not scheduled; (5)

26 [the] required time in violation of California Labor Code Sections 201, 202, and 203. See Dkt.
27 No. 102 (“Harris Summary Judgment Order”), Case No. 4:15-cv-00657-HSG. In this litigation,
28 Plaintiff seeks to represent subclasses corresponding to those claims.

³ As mentioned, the Strickland Summary Judgment Order mooted Plaintiff’s Overtime Wage
Subclass. The Court in this order therefore does not analyze that component of either Plaintiff’s
Wage Statement Subclass, or her Waiting Time Subclass.

1 working when a Time Off Request Form is not submitted before a
2 schedule is issued; (6) punching in or out or starting or ending a
meal period using the wrong date; and (7) punching out at midnight
and punching back in after midnight.

3 See Mot. at 2; Opp. at 10–11; CE at 318–19. The TLC does not require managers to approve non-
4 timesheet exceptions (i.e., those that can be input using buttons “to clock on for a shift, to clock
5 out for a meal period, to clock in from a meal period and clock out at the end of a shift”). Mot. at
6 2; CE at 318.

7 TLC time entries determine how much an employee is paid and when. Best Buy’s pay
8 periods are two weeks, and Best Buy’s work week is Sunday (12:00 am) to Saturday (11:59 pm).
9 Opp. at 11; CE at 457. It is an employee’s responsibility to ensure that “their time records are
10 complete, accurate and authorized by 5:00 pm (local time) on Sunday.” Opp. at 11; CE at 319–
11 320. If a timesheet exception lacks approval by 5:00 pm Central Time on the Monday following
12 the end of a payroll week, the corresponding time entry will not be paid on the Friday pay date for
13 that pay period. Opp. at 11; Mot. at 4; CE at 320. Those time entries appear on the following
14 wage statement as “Previous Period Hrs.” Opp. at 11; Mot. at 4.

15 Plaintiff contends that the “Previous Period Hrs.” wage statement entry is misleading.
16 According to Plaintiff, this entry prevents Best Buy employees from determining “whether the
17 hours were worked and the wages were earned in the prior pay period or an earlier pay period.”
18 Mot. at 4. Plaintiff claims that the TLC’s deficiencies are further compounded by other procedural
19 inadequacies, including Best Buy’s failure to: (1) instruct employees to use automatic entry
20 buttons and/or correct missing or inaccurate entries; (2) provide adequate instruction regarding
21 which entries might trigger delayed approval; or (3) instruct managers that they need to approve
22 timesheet exceptions without delay. Id. at 3.

23 In response, Defendant contends that Plaintiff’s Wage Statement Subclass cannot satisfy
24 Rule 23’s commonality and predominance requirements. To begin, Defendant claims that the
25 “Previous Period Hrs.” entry does not itself violate California Labor Code Section 226. Opp. at
26 13–14. Defendant stresses that Plaintiff cannot show, as she must, that Defendant’s violation was
27 knowing and intentional. Id. at 15–16. Defendant argues that discerning the question of intent on
28 these facts requires adjudicating “thousands of distinct decisions” made by Defendant’s employees

1 and managers with respect to when a timesheet exception was approved, and why that approval
2 may have been delayed. Opp. at 13–16.

3 The Court agrees with Defendant. As set forth in the Prior Federal Action, California
4 Labor Code Section 226 “requires an employer at the time that wages are paid to provide an
5 accurate itemized statement that contains nine items.” See *infra* n.2; Harris Summary Judgment
6 Order at 13. Those nine categories of information include, in relevant part, gross wages earned,
7 total hours worked, net wages earned, “the inclusive dates of the period for which the employee is
8 paid,” and all “applicable hourly rates in effect during the pay period and the corresponding
9 number of hours worked at each hourly rate by the employee” See Cal. Lab. Code § 226.
10 “To recover under § 226(e), a plaintiff must show: (1) a violation of § 226(a) that (2) was knowing
11 and intentional, and (3) an injury suffered as a result of the violation.” Harris Summary Judgment
12 Order at 13. A “knowing and intentional violation” occurs when the employer actually knows that
13 it has omitted from a pay statement any item required by § 226(a). See *id.* A knowing and
14 intentional failure “does not include an isolated and unintentional payroll error due to a clerical or
15 inadvertent mistake.” Cal. Lab. Code § 226(e)(3).

16 Here, Plaintiff fails to set forth how she could show, on a classwide basis, that Best Buy
17 managers knowingly and intentionally delayed their approval of timesheet exceptions. To meet
18 Rule 23(a)’s commonality requirement, Plaintiff’s wage statement claim “must depend upon a
19 common contention. . . capable of classwide resolution—which means that determination of its
20 truth or falsity will resolve an issue that is central to the validity of each one of the claims in one
21 stroke.” *Dukes*, 564 U.S. at 349. As the *Dukes* Court stated, the commonality analysis is
22 “rigorous.” *Id.* at 350. Plaintiff accordingly cannot assert “any common question”—rather, she
23 must define a question that “will produce a common answer” to the question driving the resolution
24 of the litigation. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citing *Dukes*,
25 564 U.S. at 349). That question in this case is whether Defendant’s managers knowingly and
26 intentionally failed to timely approve timesheet exceptions. Notably, Plaintiff fails to show that
27 Best Buy, as a corporate actor, knew or intended for timesheet exceptions to be approved late.
28 Plaintiff also fails to present evidence demonstrating that Best Buy otherwise sought to mislead

1 employees as to their hours worked and wages earned through the Previous Period Hrs. entry.

2 Partly as a consequence, answering Section 226’s liability inquiry requires individual
3 examination of numerous context-specific factors. Those factors include the circumstances in
4 which an employee entered a timesheet exception, when the manager approved the exception, and
5 why the manager failed to timely approve the exception. To discern each of these factors, a
6 factfinder needs to evaluate the mental state and conduct of, and perhaps even the relationship
7 between, the relevant manager and employee. See Opp. at 16; *Dukes*, 564 U.S. at 351 (rejecting
8 that a putative class member can “sue about literally millions of employment decisions at once”).

9 Contributing to the difficulty of classwide proof is the decentralized nature of entering and
10 approving hours worked at Best Buy. Considering that the TLC gives employees and managers
11 some discretion in how to enter and approve timesheet exceptions, liability will in most cases
12 hinge on individualized assessments of the conduct of particular employees. As mentioned,
13 Plaintiff fails to present evidence that Best Buy, at the corporate level, knowingly or intentionally
14 administered the TLC so as to violate Labor Code Section 226. See *Dukes*, 564 U.S. at 353
15 (noting that the plaintiffs lacked “significant proof” that the defendant operated under a generally
16 unlawful policy). Defendant, in contrast, presents evidence that 99.6% of the checks issued during
17 the class period did not include a Previous Period Hrs. entry. Time entries were accordingly
18 approved without delay in the vast majority of cases. In “.14% of the total checks” issued during
19 the class period (i.e., 2,177 out of 1,576,198 total checks), the Previous Period Hrs. entry appeared
20 where an employee appropriately entered their time before the end of the pay period, but the
21 manager failed to timely approve the entry. Mot. at 11; CE at 24, 32–33.⁴

22 In the absence of evidence showing liability on a systematic basis, Plaintiff cannot satisfy
23 Rule 23(a)’s commonality requirement. The *Dukes* court rejected the premise that providing
24 “local supervisors” with discretion comprises a “uniform employment practice.” 564 U.S. at 356.
25 As in *Dukes*, Plaintiff here has not presented evidence of a “common mode of exercising
26 discretion that pervades the entire company.” *Id.* Rather, it will be up to the trier of fact to find on
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28 ⁴ Plaintiff’s objection to the Reardon Report, see Dkt. No. 108 at 1, is addressed below.

1 a case-by-case basis why a Best Buy manager failed to timely approve an employee’s timesheet
2 exception. See Opp. at 12-13.⁵ In that regard, Defendant presents numerous examples of
3 unintentional late approvals arising, for instance, from miscommunication between managers and
4 employees, unexplained absences, human error, vacation, sickness, and confusion among
5 managers as to who was responsible for approving a particular time entry. See CE at 672, 677,
6 703, 707, 723, 736, 749, 779, 784. Other California district courts have rejected class claims in
7 analogous circumstances. *Lanzarone v. Guardsmark Holdings, Inc.*, No. CV06-1136 RPLAX,
8 2006 WL 4393465, at *4 (C.D. Cal. Sept. 7, 2006) (finding that the “bulk of the issues” “truly in
9 dispute” were “inherently individualized” because there was no evidence to support that the
10 defendant had an unlawful “systematic policy or practice,” and because the “precise manner and
11 circumstances” in which the defendant administered the relevant policy could “vary from account
12 to account”).

13 Plaintiff does not expressly dispute that late approvals can result from error or
14 unintentional conduct. Rather, Plaintiff argues that this conclusion requires the Court to make an
15 inappropriate finding on the merits. But *Dukes* clarified that a rigorous commonality analysis
16 “will entail some overlap with the merits of the plaintiff’s underlying claim.” 564 U.S. at 351.
17 Though Plaintiff claims that the commonality showing is “minimal,” virtually all of the authorities
18 cited Plaintiff predate *Dukes*. See Mot. at 13.

19 Even if Plaintiff’s putative subclass could satisfy Rule 23’s commonality requirement, it
20 would not survive under its predominance requirement. Under Rule 23(b)(3), “the separate
21 adjudication of each class member’s individual claim or defense” renders certification
22 inappropriate. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir.), opinion
23 *amended on denial of reh’g*, 273 F.3d 1266 (9th Cir. 2001) (finding causation and damage
24 determinations could present “triable individualized issues” unsuitable for class treatment despite
25 the possibility of common issues pertaining to the defendant’s liability). “[T]he main concern in

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27 _____
28 ⁵ Plaintiff claims that 5,012 employees entered timesheet exceptions before the Monday cutoff but failed to get timely approval. See Mot. at 5–6. Even if the Court accepted Plaintiff’s statistic, Plaintiff’s claim would still fail for lack of common proof as to Defendant’s intent.

1 the predominance inquiry” is “the balance between individual and common issues. In re Wells
2 Fargo Home Mortg. Overtime Pay Litig., 571 F.3d 953, 959 (9th Cir. 2009) (finding that the
3 district court abused its discretion in certifying a class based on a uniformly applied exemption
4 policy, by disregarding “the existence of other potential individual issues that may make class
5 treatment difficult if not impossible”). In striking that balance, the Court searches for some
6 “common proof” to dispose of “otherwise individualized issues,” and thereby facilitate judicial
7 economy. *Id.* at 958.

8 As mentioned, Plaintiff does not present evidence suggesting that Best Buy knowingly or
9 intentionally instructed or encouraged managers to unlawfully delay their approval of timesheet
10 exceptions. See *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 531 (C.D. Cal.2011) (collecting
11 cases, and concluding that “[t]he predominance requirement is more likely to be satisfied when the
12 conduct complained of is the result of a common practice by the employer, and when the
13 individualized inquiries that will be required concern class members’ damages if the employer is
14 found liable”). Contrary to Plaintiff’s suggestion, nothing about the TLC system on its own is
15 unlawful or inadequate under Section 226. See *Mot.* at 21. Rather, “the questions susceptible of
16 classwide proof” (for instance, whether an employee’s pay statement includes the Previous Period
17 Hrs. entry) offer limited answers as to Defendant’s liability. See *Pryor*, 278 F.R.D. at 533.
18 Plaintiff provides no aggregate method for determining the issue of intent, which Defendant’s
19 records cannot show on their own. Thus, the factfinder will need to determine in each case the
20 conduct and circumstances giving rise to a delayed approval.

21 Plaintiff’s own authorities recognize that these “individualized inquiries” are inappropriate
22 for certification under Rule 23(b)(3), and would “bog down the action in a series of ‘mini-trials.’”
23 See *Mot.* at 20 (citing cases); *Torres v. Air to Ground Servs., Inc.*, 300 F.R.D. 386, 403 (C.D. Cal.
24 2014) (quoting *Pryor*, 278 F.R.D. at 536). For instance, in *Torres*, the court found that Rule
25 23(a)’s commonality requirement was satisfied because the liability inquiry reduced to whether the
26 defendant’s uncompensated time off policy complied with a municipal living wage ordinance. See
27 300 F.R.D. at 403. Nonetheless, the court concluded that certification of this class claim was
28 inappropriate under Rule 23(b)(3) because “whether a given Class member suffered any injury due

1 the policy, in the event it is found unlawful, [would require] an individualized assessment.” Id.
2 That injury assessment would, as here, necessitate inquiry “into whether each member was denied
3 uncompensated time off, the reasons for the Class member’s request, whether the reason for the
4 request was sufficiently related to illness, when the request was made, and the context in which the
5 request was presented to the supervisor.” Id.⁶ Plaintiff’s other authorities likewise presume the
6 existence of some common proof, which is absent here. Cf. Taylor v. Fedex Freight, Inc., No. 13-
7 CV-1137-LJO-BAM, 2015 WL 2358248, at *15 (E.D. Cal. May 15, 2015) (holding that the
8 predominance requirement was satisfied by evidence of the defendant’s “uniform piece-rate
9 compensation policy that fail[ed] to separately compensate truck drivers for required activities”);
10 Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 490 (E.D. Cal. 2006) (certifying a class
11 in part because deciding any individual issues could “likely be determined with reference to
12 timecards and payroll records” and would therefore be “relatively straightforward”). Given that
13 individual liability issues will predominate over common concerns, the Court concludes that
14 certification of the Wage Statement Subclass is inappropriate.

15 **B. Waiting Time Subclass**

16 The Court turns next to Plaintiff’s putative Waiting Time Subclass. As set forth in the
17 Prior Federal Action, there are three key provisions of the California Labor Code. Section 201
18 states: “If an employer discharges an employee, the wages earned and unpaid at the time of
19 discharge are due and payable immediately.” Cal. Lab. Code § 201(a). Section 202 continues: “If
20 an employee not having a written contract for a definite period quits his or her employment, his or
21 her wages shall become due and payable not later than 72 hours thereafter” Id. § 202(a).
22 Finally, California Labor Code § 203 provides:

23 If an employer willfully fails to pay, without abatement or reduction,
24 in accordance with Sections 201, 201.3, 201.5, 201.9, 202, and
25 205.5, any wages of an employee who is discharged or who quits,
the wages of the employee shall continue as a penalty from the due

26 _____
27 ⁶ Though the Torres court proceeded to find that the plaintiffs’ claim for inaccurate wage
28 statements satisfied Rule 23, the court (1) did not consider the question of intent, and (2) found
that putative class members could provide common proof to support their alleged wage statement
claim in the form of the defendant’s payroll records. See 300 F.R.D. at 403–04. For the reasons
discussed, Defendant’s payroll records here are insufficient to show intent.

1 date thereof at the same rate until paid or until an action therefor is
2 commenced; but the wages shall not continue for more than 30 days.

3 Cal. Lab. Code § 203 (emphasis added). In analyzing Harris’s individual claim for untimely
4 payment, the Court in the Prior Federal Action concluded that there were genuine factual disputes
5 as to whether: (1) Harris resigned voluntarily or was terminated; (2) Harris timely received her
6 wages on September 15, 2014, or received them late on September 16, 2014; and (3) there was a
7 good faith dispute regarding wages owed that would preclude Harris’s ability to recover. Harris
8 Summary Judgment Order at 11–12.

9 With respect to this putative subclass, the parties at least agree that the following
10 procedures govern the termination of Best Buy employees. For involuntary terminations, the
11 responsible manager contacts an individual from Defendant’s Employee Relations (“ER”)
12 department to issue an “Involuntary Separation Notice” (“ISN”). The ISN provides a termination
13 date, the reasons for the employee’s termination, and signature and signature date lines for the
14 manager and employee. Mot. at 8; see CE at 256. An online “Manual Pay Request” (“MPR”) is
15 then created for the employee’s final wages. Id. The MPR draws time entries from the TLC. CE
16 at 256. ER therefore asks the responsible manager to ensure that all time in the TLC is up to date
17 through the date of the MPR. Id. The MPR provides: (1) whether the termination was involuntary
18 or voluntary; (2) the termination date; and (3) whether the final payment would be made by direct
19 deposit or paper check and, if the latter, where the paper check would be mailed. Id. The MPR is
20 sent to Defendant’s Payroll Department. Id. A manager then obtains the requisite signatures for
21 the ISN and faxes the completed ISN to ER. Mot. at 8; CE at 257. Following that, an ER
22 Coordinator enters the termination date into Oracle. Id.

23 Defendant’s system for processing voluntary terminations differs slightly. Upon learning
24 of a resignation, a manager processes the MPR. Mot. at 8; CE at 258. The MPR states the nature
25 of the termination (voluntary or involuntary), the termination date or final day worked, and the
26 form of final payment (direct deposit or check by mail). Id. The manager also completes a
27 Voluntary Separation Notice (“VSN”), which is similar to an ISN. Id. The MPR is transmitted to
28 the Payroll Department. The date of termination entered in Oracle is the date last worked (or the

1 resignation date) listed in the MPR. Mot. at 8; CE at 258.

2 As for issuing final pay, the same general process pertains to voluntary and involuntary
3 terminations. Those MPRs received between noon on business day one and business day two are
4 processed for payment on business day two. Opp. at 18. The payday recorded in the payroll
5 system is business day three. Id.; see CE at 458–59. Direct deposit instructions are delivered on
6 the evening of business day two. Id. If the employee has requested a live check, the check is
7 overnight mailed on business day two for receipt on the next calendar day. Id.

8 According to Plaintiff, the aforementioned procedures are deficient in that they “do not
9 inform managers and other employees when final wages must be paid to employees. . . .” Id. at 7.
10 Plaintiff asserts that understaffing contributes to Defendant’s poor record keeping practices, and
11 has “resulted in hundreds of employees not receiving timely final wages.” Mot. at 14; Reply at
12 13. In response, Defendant claims that its training to managers is adequate and complies with
13 California law. Opp. at 18. Defendant submits evidence, including employee declarations and
14 training materials, to show that it instructs managers on the following three pay requirements: (1)
15 involuntary terminations must be paid immediately; (2) voluntary terminations with 72 hours’
16 notice must be paid immediately; and (3) any other voluntary termination must be paid within 72
17 hours of receiving notice. See id.; CE at 255–56, 287, 736. Defendant contends that its actual pay
18 practices reflect those instructions. Opp. at 18.⁷

19 _____
20 ⁷ Plaintiff filed two related requests for exclusion of evidence submitted by Defendant. See Dkt.
21 Nos. 108, 109. In her second request, Plaintiff asks the Court to exclude all of Defendant’s
22 evidence relating to ISNs, VSNs, and Manual Pay Requests (“MPRs”) due to Defendant’s alleged
23 failure to produce or disclose these documents during discovery. See Dkt. No. 109 at 1.
24 Defendant requested leave to respond to Plaintiff’s request to exclude this evidence, Dkt. No. 118.
25 The Court **GRANTS** Defendant’s request, and **DENIES** Plaintiff’s request. Plaintiff had
26 adequate notice of the relevant declarants such that Plaintiff was not prejudiced by Defendant’s
27 submission of related evidence in its supplemental disclosures. See Dkt. No. 118-1 at 2-3, 5-6;
28 Dkt. No. 118-2 (providing the names of specific Best Buy managers); Intel Corp. v. VIA Techs.,
Inc., 204 F.R.D. 450, 452 (N.D. Cal. 2001) (“[W]hen a fact witness is disclosed, all parties are on
notice that the disclosing side contends the witness has relevant knowledge. . . . All parties are
free to contact the fact witness and obtain their own statements.”). The Court, moreover, agrees
with Defendant that this ruling (finding that the questions posed by Plaintiff are too individualized
to warrant classwide treatment) would not change were certain employee-specific documents
excluded. See Dkt. No. 118-1 at 4. Furthermore, Plaintiff acknowledges that Magistrate Judge
Westmore already ruled on these issues during discovery. Dkt. No. 109 at 1. To that end, the
Court finds Judge Westmore’s rulings on Defendant’s need to produce all MPRs, Dkt. Nos. 89,
and employee contact information well-reasoned and not clearly erroneous or contrary to law. See

1 This putative subclass also fails under Rule 23(a). Plaintiff does not identify a general
2 policy maintained by Best Buy that resulted in late payments, or some method for sampling
3 records to provide common proof that individual Best Buy managers acted unlawfully on a
4 systemic basis. See *Dukes*, 564 U.S. at 351. “While commonality may be established based on a
5 pattern of officially sanctioned illegal behavior, merely pointing to a pattern of harm, untethered to
6 the defendant’s conduct, is insufficient.” *Civil Rights Educ. & Enf’t Ctr. v. Hosp. Properties Tr.*,
7 867 F.3d 1093, 1104 (9th Cir. 2017) (concluding that the district court did not abuse its discretion
8 in finding that a class lacked commonality because the plaintiff failed to set forth evidence of a
9 non-compliant policy) (internal quotations and alterations omitted). Not only does Defendant
10 present sufficient proof that its training program is adequate, but also shows that individual and
11 unintentional payroll discrepancies preclude the type of common proof required for class
12 certification. See *Opp.* at 19. For instance, Oracle termination dates and payroll records can
13 differ, obscuring when a terminated employee received his or her final pay. *Id.* at 19–20; see *CE*
14 at 262–64. Discrepancies can also arise where a manager forgets to remove an employee from the
15 TLC system after ER inputs their ISN. See *Opp.* at 18–19; *CE* at 256–258. In those instances,
16 employees receive a duplicate payment for hours already paid. *Id.* Defendant claims, and Plaintiff
17 does not dispute, that Best Buy would not be liable for late payment in those cases. *Opp.* at 18–
18 19. Furthermore, Defendant provides numerous examples of duplicative payments, or allegedly
19 late payments that were actually paid on time. *Id.*

21 Fed. R. Civ. P. 72(a); see also 28 U.S.C. § 636(b)(1)(A). The Court accordingly **DENIES**
22 Plaintiff’s motions for relief from these non-dispositive orders, see *Dkt.* Nos. 94-95. To the extent
23 that Plaintiff raises other evidentiary objections, *Dkt.* No. 108, the Court **DENIES** Plaintiff’s
24 request. Declarants Laura Flint and Bonnie Nelson possess personal knowledge of the subjects
25 opined upon in their respective statements. See *Dkt.* No. 97-4 (“*Flint Decl.*”); *Dkt.* No. 97-7
26 (“*Nelson Decl.*”). Though Plaintiff identifies one hearsay statement in Nelson’s declaration, the
27 Court does not rely on that statement. See *Dkt.* 108 at 3; *CE* 458 ¶ 7 (“[W]e hear, however, that
28 some institutions deposit as early as Wednesday. . . .”). Plaintiff does not specifically identify any
hearsay statements in Flint’s declaration. See *Dkt.* No. 108 at 2. With regard to Plaintiff’s
objections to the Reardon Report, *Dkt.* No. 108 at 1, Plaintiff does not explain her objections or
provide any corresponding line citations. The Court finds that the limited portions relied upon are
not improper. The Court’s ruling does not depend on the remainder of the evidence that Plaintiff
cites as objectionable. In addition to Plaintiff’s objections, Defendant also objected to evidence
submitted by Plaintiff. See *Dkt.* Nos. 98, 99, 100. The Court does not rely on this evidence in
reaching its ruling, and **DENIES AS MOOT** Defendant’s requests to exclude this evidence.

1 These examples illustrate that resolving each allegation will require an individualized
2 assessment of each employee’s time records, wage statements, and deposition testimony. See CE
3 at 257, 262–63. California district courts have rejected requests for certification on similar
4 grounds. See *Washington v. Joe’s Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010) (denying
5 certification because the defendant maintained a “facially compliant policy” and the plaintiff’s
6 putative class required “individualized assessment of why employees did or did not take meal
7 breaks”); *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298-GHK, 2013 WL 1490667, at *8 (C.D.
8 Cal. Jan. 28, 2013) (declining to certify a class despite the existence of a common training
9 program in part because the defendant’s records provided “only piecemeal information” of the
10 alleged wrongdoing). To the extent that Best Buy’s payroll records contain discrepancies, that
11 itself is not evidence of non-compliance with any particular labor code section. Plaintiff cites no
12 authority suggesting that Best Buy is liable under California Labor Code Sections 201, 202, or 203
13 for these individual errors, or for allegedly understaffing the relevant processing departments.

14 Even if Plaintiff could present a common question to satisfy Rule 23(a), the Court
15 concludes that individual issues predominate over common ones pursuant to Rule 23(b)(3).
16 Plaintiff does not dispute that her expert, to assess the number of untimely payments, simply
17 identified instances in which an employee’s Oracle termination date occurred before their final
18 payout as recorded by Best Buy’s Payroll Department. See *Opp.* at 24; *Reply* at 12–15. Based on
19 that analysis, Plaintiff claims that “[o]ne simply needs to compare the termination date with the
20 final payment date” for common proof of untimely payments. *Reply* at 14. Plaintiff’s position
21 ignores numerous other factual findings required to show liability, including: (1) whether the
22 employee voluntarily or involuntarily resigned; (2) the information in the employees’ ISN or VSN
23 and their MPR; (3) the day of the week the final payment was due; (4) what days were actually
24 worked and when; (5) when the final pay was processed, how that pay was delivered, and, if the
25 payment was a direct deposit, when the individual’s financial institution deposited that pay. See
26 *id.*

27 Harris’s claim in the Prior Federal Action is exemplary in this respect. As the Court
28 observed there, a claim for untimely payment under these circumstances entails evaluating how

1 much Defendant owed that employee for hours worked, when they were paid, how many hours the
2 employee actually worked, whether the employee was voluntarily or involuntarily terminated, and
3 the method of payment. See Harris Summary Judgment Order at 13. Individual testimony will in
4 many instances be required to assess the claim of each putative subclass member. Plaintiff
5 accordingly fails to provide “common evidence to support extrapolation from individual
6 experiences to a class wide judgment that is not merely speculative.” *Marlo v. United Parcel*
7 *Serv., Inc.*, 639 F.3d 942, 945 (9th Cir. 2011) (holding that the district court did not abuse its
8 discretion in decertifying a class where the plaintiff failed to provide common proof to support his
9 allegation that 1200 employees were unlawfully misclassified as exempt). Plaintiff’s authorities
10 can be distinguished based on this lack of common policy or proof. See Reply at 14–15; cf.
11 *Moreno v. AutoZone, Inc.*, 251 F.R.D. 417, 426 (N.D. Cal. 2008), vacated, No. CV 05-4432 CRB,
12 2009 WL 3320489 (N.D. Cal. Oct. 9, 2009), *aff’d*, 410 F. App’x 24 (9th Cir. 2010) (certifying a
13 timely payment class partly because the plaintiff planned to challenge a general practice “of not
14 cutting final checks until after an employee’s shift,” and liability could be determined by reference
15 to the defendant’s records); *Romero*, 235 F.R.D. at 490 (approving a class because key liability
16 questions could be resolved with “reference to a sample of several employees” “given the
17 purported uniformity of [employees’] activities”).

18 For instance, in *Brewer v. General Nutrition Corp.*, the district court certified a timely pay
19 subclass based on evidence of “a policy suggesting that [the defendant] was willful in its efforts to
20 circumvent [a] statute’s requirements of immediate payment at the time of discharge by including
21 a period of suspension to allow its payroll department to prepare a final paycheck.” 2014 U.S.
22 Dist. LEXIS 159380, *35. Considering that evidence, and statistics showing a systematic failure
23 by the defendant to pay upon discharge, the court concluded that “the liability question for
24 involuntary terminations presents a corporate-level issue amenable to class treatment.” *Id.*
25 (quotations omitted); see Reply at 15. But here, the only “uniform policies or practices” to which
26 Plaintiff expressly refers pertain to Defendant’s failure to pay overtime on Monthly STI bonuses, a
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1 claim that Harris lacks standing to bring.⁸ And even if Plaintiff is correct that employees
2 terminated from 2015 to 2017 received late payments in in one third of cases (“approximately
3 3,000 out of 10,750 employees”), Plaintiff presents no way of aggregating these accounts to
4 provide proof susceptible to class wide treatment. Reply at 13. Determining whether Defendant’s
5 managers timely authorized individual payments will require discrete determinations that fail to
6 achieve the judicial economy benefits of class actions. The Court declines to certify the Waiting
7 Time Subclass under Rule 23(b)(3).

8 **III. CONCLUSION**

9 For these reasons, the Court **DENIES** Plaintiff’s motion for class certification, **GRANTS**
10 Defendant’s motion for leave to file a response to Plaintiff’s objections and request to exclude
11 evidence, and **DENIES** Plaintiff’s requests for relief from the non-dispositive orders of Magistrate
12 Judge Westmore. The Court **SETS** a further case management conference (“CMC”) for Tuesday,
13 September 11, 2018 at 2:00 p.m. to discuss remaining issues and a case schedule. A joint CMC
14 statement is due by Tuesday, September 4, 2018.

15 **IT IS SO ORDERED.**

16 Dated: 8/16/2018

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18 HAYWOOD S. GILLIAM, JR.
United States District Judge

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⁸ As mentioned, the Court in the Prior Federal Action granted summary judgment on Harris’s
claim for failure to pay overtime wages. See Dkt. No. 124.