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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

JACQUELINE CAVALIER NELSON, et  
al.,

Plaintiff,

v.

AVON PRODUCTS, INC., et al.,

Defendants.

Case No. [13-cv-02276-BLF](#)

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION**

[Re: ECF 56]

This purported class action involves a dispute over alleged employment misclassification. The named Plaintiffs are former District Sales Managers of Defendant Avon Products, Inc. The Plaintiffs allege that Avon improperly misclassified DSMs as exempt from overtime wages. Plaintiffs move the Court to certify a class of “all persons employed by Defendant in California as District Sales Managers from April 8, 2009 to the present,” as well as to appoint Plaintiffs’ counsel, Blumenthal, Nordrehaug & Bhowmik, as class counsel, and to designate the named Plaintiffs as class representatives. For the reasons below, the Court GRANTS Plaintiffs’ motion.

**I. BACKGROUND**

**A. The Job Duties and Major Responsibilities of Avon DSMs**

The nineteen named Plaintiffs were employed as District Sales Managers (“DSMs”) by Avon in California between April 8, 2009 and the present. DSMs were classified by Avon as exempt from overtime wages during this time period. Martin Depo., Bhowmik Decl., ECF 56-2 at 103:18-23. DSMs are responsible for recruiting Representatives to sell Avon products. *See, e.g., id.* at 134:11-137:19.<sup>1</sup> Several named Plaintiffs in this case testify that this recruiting, called

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<sup>1</sup> Avon sells consumer goods, including skin care products and household items. Its business model relies on nearly six million “Avon Representatives” who are responsible for selling these

1 “prospecting” in Avon corporate parlance, was a DSM’s primary job responsibility. *See* Bandini  
2 Depo., Bhowmik Decl., ECF 56-2 Exh. 10 at 107:20-110:12 (describing meeting with and  
3 recruiting prospective Representatives to be her “primary task” as a DSM); Colon Decl., Bhowmik  
4 Decl., ECF 56-9 at ¶ 4 (“My main responsibility as a District Sales Manager for Avon was to  
5 recruit independent contractor Sales Representatives in and around my assigned district.”); Bilitch  
6 Depo., Bhowmik Decl. ECF 56-2 Exh. 6 at 116:4-14 (testifying that she was instructed to “go out  
7 and prospect with my reps, get my reps involved, teach them how to prospect and spend my time  
8 prospecting”); Flores Decl., ECF 56-10 at ¶ 4 (“Defendant’s company policy required me and  
9 other District Sales Managers to spend at least eight (8) hours each day in the ‘field’ recruiting  
10 independent contractor Sales Representatives.”). DSMs would also train their Representatives to  
11 do their own prospecting, in addition to providing some training in general sales skills. *See, e.g.,*  
12 Campbell. Depo., Bhowmik Decl., ECF 56-2 Exh. 13 at 93:23-94:24 (“What I did for training was  
13 I would teach [the Representatives] how to sell, but that was very, very minimal because most of  
14 what Avon wanted us to do was to recruit them and teach them how to recruit.”). DSMs do not  
15 themselves sell Avon products. *See, e.g.,* Martin Depo. at 38:21-23.

16 Avon provides its DSMs with materials to assist in prospecting and training  
17 Representatives, including promotional materials, product samples, recruiting tents, and other  
18 props. *See* Martin Depo. at 121:1-122:3. DSMs testify that they would set up these tents, which  
19 could be quite heavy, around their assigned districts when attempting to recruit new  
20 Representatives. *See, e.g.,* Branson Decl. ¶ 9 (“I had to set up the recruiting tent multiple times  
21 during my employment in the parking lots of local businesses . . . in order to recruit Sales  
22 Representatives. The tent was so big I had to ask random strangers to help me set it up.”).

23 DSMs also testify that they are subject to substantial supervision. Division Managers, to  
24 whom DSMs report, can access a DSM’s work calendar and schedules. *See* Cabrera Depo. at 32:1-  
25 33:24 (testifying that she was able to review her DSM’s work schedules and calendars); Gaskell  
26 Depo., Bhowmik Decl., ECF 56-2 Exh. 8 at 13:20-14:1 (testifying that she could review DSM

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27  
28 and other Avon products directly to consumers. These Representatives are independent  
contractors. *See* Martin Depo. at 10:11-25, 38:24-39:2.

1 work calendars). An Avon employee further testified in the company’s 30(b)(6) deposition that  
2 Division Managers supervised DSMs in a manner such that they were able to know “where,  
3 geographically, [a DSM] might be in the district.” Martin Depo. at 62:2-12. District managers also  
4 ride along with their DSMs while the DSMs are prospecting in order to directly supervise their  
5 work. *See* Gordon Depo., Bhowmik Decl., ECF 56-2 Exh. 9 at 54:24-55:2. DSMs are also  
6 monitored by their Division Managers with regard to Avon’s Key Performance Indicators  
7 (“KPIs”), which includes, among other data, the number of Representatives a DSM recruits and  
8 the sales those Representatives makes. *See* Martin Depo. at 30:9-23, 37:15-24; *see also* Gaskell  
9 Depo. at 21:8-22:5. At least one Division Manager testified that she reviewed her DSMs’ KPI  
10 reports on a daily basis. *See* Cabrera Depo. at 35:20-37:22, 40:15-23.

11 Finally, the named Plaintiffs contend that DSMs are far removed from the general business  
12 operations of Avon’s business, because they exercise no control over Avon’s operating or  
13 managerial policies since their main job was to recruit “anyone with a pulse” as a Representative.  
14 *See, e.g.*, Bishop Decl., ECF 56-7 at ¶¶ 3-4 (“I could not hire, fire, discipline, or promote any  
15 Avon employees . . . Avon would allow me to accept anyone with a pulse.”); Branson Decl. ¶ 3 (“I  
16 possessed zero authority to make any employment-related, personnel decisions.”).

17 Avon’s own documents support the named Plaintiffs’ testimony that the main role of  
18 DSMs is to recruit new Representatives. Avon’s “DSM Roles & Responsibilities” document  
19 outlines that DSMs have six primary areas of responsibility, the first two being “training and  
20 developing 1st generation representatives/top sellers (through coaching and mentoring)” and  
21 “appointing, training, and developing new sales leaders.” *See* “Direct Sales Manager Role &  
22 Responsibilities,” Bhowmik Decl., ECF 56-2 Exh. 4 at 1, 3. Avon again describes the importance  
23 of prospecting new Representatives in a training presentation entitled “US Sales Training &  
24 Development,” ECF 56-2 Exh. 3 at 8, which says that “Direct Sales Managers are the key to  
25 achieving direct selling excellence through outstanding recruiting, motivating, and training of  
26 Avon Representatives.” This document further states that “Direct Sales Manager and  
27 Representative’s (sic) roles are clearly defined,” *id.* at 9, and identifies four tasks in which DSMs  
28 are expected to engage: (1) planning, (2) recruiting Representatives, (3) training and developing

1 Representatives, and (4) measuring performance and reporting results. *See id.* at 12. Avon  
2 identifies the “fundamental expectations” of DSMs with regard to these four tasks to include  
3 “prospect[ing], recruit[ing], and appoint[ing] Representatives,” “maintain[ing] high levels of  
4 Representative coverage,” “enthusiastically promot[ing] and manag[ing] the New Representative  
5 Development Process,” and “improv[ing] Representative retention.” *Id.* at 14-18.

6 After this lawsuit was filed, Avon commissioned a study by Dr. Christina Banks which  
7 was designed to “determine what tasks and activities DSMs actually perform on the job.” *See*  
8 Banks Decl., ECF 61 at ¶ 3.<sup>2</sup> The study observed thirty DSMs over the course of a day, and Dr.  
9 Banks identified 153 discreet tasks that DSMs perform, grouped into nineteen “Task Areas”:

- 10 1. Planning Recruiting Activities
- 11 2. Promoting Avon and Recruiting Representatives
- 12 3. Growing the Representative Base Through Others
- 13 4. Educating Representatives on Building their Sales and Recruiting Skills
- 14 5. Demonstrating Sales and Recruiting Activities to Representatives
- 15 6. Coaching and Mentoring Representatives in Marketing and Sales
- 16 7. Coaching and Mentoring Representatives in Recruiting
- 17 8. Facilitating Representatives’ Orders and Customer Service
- 18 9. Developing and Implementing Strategies for Growing Revenue
- 19 10. Reviewing and Analyzing District Performance
- 20 11. Business Planning and Scheduling
- 21 12. Updating Product Knowledge and Sales Skills
- 22 13. Managing District Budget
- 23 14. On-boarding New Representatives
- 24 15. Selling Products and Performing Sales Support Activities
- 25 16. Maintaining and Securing Facilities and Equipment
- 26 17. Performing Clerical Activities
- 27 18. Managerial Drive Time
- 28 19. Non-Managerial Drive Time

Banks Decl. at p. 17, Table 4.

Dr. Banks noted in short that “DSMs serve as the interface between the company and the

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<sup>2</sup> Plaintiffs object to, and move to strike, the Banks Declaration on two grounds: (1) that Dr. Banks was not disclosed to Plaintiffs and (2) that her Declaration contains improper legal conclusions. *See Reply*, ECF 67 at 15. For the reasons stated on the record at the February 19, 2015 hearing, the objection is **overruled** and the motion to strike is **denied**. The Court will disregard any improper legal conclusions contained within the Banks Declaration.

1 independent sales representatives, the people who sell Avon’s products directly to consumers.” *Id.*  
2 at ¶ 5. Though the study found that all DSMs engaged in these nineteen Task Areas, it found  
3 variations among the DSMs regarding the amount of time each spent undertaking certain tasks.  
4 For example, the least amount of time spent by an observed DSM engaging in “updating product  
5 knowledge and sales skills,” Task Area 11, was no time at all, while the most time spent by an  
6 observed DSM undertaking tasks in this Task Area was 5 hours and 37 minutes. *See id.* at ¶ 34.

7 At oral argument on the motion, Plaintiffs’ counsel did not disagree with the Task Areas  
8 identified by the Banks Study’s Task Areas as comprising the activities in which DSMs engaged:

9 The Court: In your reply brief you seemed to be willing, at least for  
10 purposes of this motion, to accept the 19 tasks identified by Ms.  
11 Banks. Did I read that correctly?

12 Mr. Bhowmik: Absolutely.

13 The Court: Okay. But I presume at trial you would have your own  
14 list of tasks and you are not adopting those for all purposes.

15 Mr. Bhowmik: I would have to look at them a little more closely. I  
16 think the point is *I agree that’s what the people do.*

17 February 19 Hearing Transcript at 28:21-29:5 (emphasis added).

18 **B. The Legal Claims**

19 Plaintiffs contend that they have been denied overtime pay in violation of California Labor  
20 Code §§ 510, 1194, and 1198. California law provides that the Industrial Welfare Commission  
21 (“IWC”) may establish exemptions from the requirement that employees be paid overtime  
22 compensation. *See* Cal. Labor Code § 515. The IWC has promulgated, through California Wage  
23 Order 4-2001 (hereinafter “Wage Order 4”), three exceptions to the general rule that employees  
24 must be compensated for overtime, for “executive,” “administrative,” and “professional”  
25 employees. *See* Wage Order 4 §§ 1(A)(1)—(3). In this case, Avon contends that DSMs fall within  
26 the administrative exemption of Wage Order 4, and are thus not entitled to overtime.

27 Wage Order 4 outlines a five-part test to determine whether an employee falls within the  
28 administrative exemption:

The employee must (1) perform “office or non-manual work directly  
related to management policies or general business operations” of  
the employer or its customers, (2) “customarily and regularly

1 exercise[] discretion and independent judgment,” (3) “perform[]  
2 under only general supervision work along specialized or technical  
3 lines requiring special training” or “execute [] under only general  
supervision special assignments and tasks,” (4) be engaged in the  
activities meeting the test for the exemption at least 50 percent of  
the time, and (5) earn twice the state's minimum wage.

4 *See, e.g., Eicher v. Adv. Bus. Integrators, Inc.*, 151 Cal. App. 4th 1363, 1371 (2007) (citing Wage  
5 Order 4 § 1(A)(2)).

6 Critically, Avon bears the burden of proof with regard to whether the DSMs are properly  
7 classified as exempt from the provisions of Wage Order 4. *See, e.g., Ramirez v. Yosemite Water*  
8 *Co., Inc.*, 20 Cal. 4th 785, 794-95 (1999) (“[T]he assertion of an exemption from the overtime  
9 laws is considered to be an affirmative defense, and therefore the employer bears the burden of  
10 proving the employee’s exemption.”) (citing *Nordquist v. McGraw-Hill Broad. Co.*, 32 Cal. App.  
11 4th 555, 562 (1995)). Further, Wage Order 4’s requirements are stated in the conjunctive: if only  
12 one of the requirements for the administrative exemption is lacking, the administrative exemption  
13 is inapplicable to the employee. *See Eicher* at 1372 (2007) (“Stated in the conjunctive, each of the  
14 five elements must be satisfied to find the employee exempt as an administrative employee.”).

15 The parties dispute whether the Court can determine if DSMs were properly classified as  
16 exempt on a class-wide basis. Because Defendant bears the burden of proof with regard to the  
17 administrative exemption, Plaintiffs proffer four questions of law or fact that they contend can be  
18 adjudicated on a classwide basis, each of which they contend would render all DSMs misclassified  
19 under the law: (1) whether DSMs’ duties and responsibilities involve the performance of non-  
20 manual work; (2) whether DSMs’ duties and responsibilities involve work directly related to  
21 management policies or general business operations; (3) whether DSMs customarily and regularly  
22 exercise discretion and independent judgement; and (4) whether DSMs work under only general  
23 supervision.

24 Plaintiffs contend that these four questions predominate over any individual inquiries,  
25 because if they prevail as to any of these four questions they would show that the administrative  
26 exemption is inapplicable to Avon’s California DSMs. Defendant argues in response that while  
27 DSMs might have the same job description, the manner in which they actually perform their jobs  
28 varies too widely for the Court to be able to determine whether DSMs as a class were exempt, and

1 that such questions must instead be adjudicated individually.

2 **II. LEGAL STANDARD**

3 Recognizing that “[t]he class action is an exception to the usual rule that litigation is  
4 conducted by and on behalf of the individual named parties only,” Federal Rule of Civil Procedure  
5 23 demands that two requirements be met before a court certifies a class. *Comcast Corp. v.*  
6 *Behrend*, 133 S. Ct. 1426, 1432 (2013).

7 A party must first meet the requirements of Rule 23(a), which demands that the party  
8 “prove that there are in fact sufficiently numerous parties, common questions of law or fact,  
9 typicality of claims or defenses, and adequacy of representation.” *Behrend* at 1432. If a party  
10 meets Rule 23(a)’s requirements, the proposed class must also satisfy at least one of the  
11 requirements of Rule 23(b). Here, Plaintiffs invoke Rule 23(b)(3), which demands that “the  
12 questions of law or fact common to class members predominate over any questions affecting only  
13 individual members, and that a class action is superior to other available methods for fairly and  
14 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The predominance inquiry  
15 inherent in a Rule 23(b)(3) analysis asks “whether proposed classes are sufficiently cohesive to  
16 warrant adjudication by representation,” focusing on “the relationship between common and  
17 individual issues.” *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th  
18 Cir. 2009) (further noting that the express purpose of Rule 23(b)(3) was to “achieve economies of  
19 time, effort, and expense and promote [] uniformity of decision as to persons similarly situated”).  
20 Rule 23 outlines four pertinent factors to the Court’s analysis in determining the appropriateness  
21 of a (b)(3) class: the class members’ interest in individually controlling the action; the extent and  
22 nature of already-existing litigation regarding the action; the desirability (or lack thereof) of  
23 concentrating the litigation of the claims in a single forum; and manageability of the action. *See*  
24 *Fed. R. Civ. P. 23(b)(3); see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).

25 The party seeking class certification bears the burden of showing affirmative compliance  
26 with Rule 23. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). A court’s  
27 analysis of class certification “may entail some overlap with the merits of the plaintiff’s  
28 underlying claim[s],” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194

1 (2013), though the merits can be considered only to the extent they are “relevant to determining  
2 whether the Rule 23 prerequisites to class certification are satisfied.” *Id.* at 1195. Within Rule 23’s  
3 framework, the district court maintains broad discretion over whether to certify a class or subclass.  
4 *See, e.g., Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

5 **III. DISCUSSION**

6 Plaintiffs seek to certify a class of “all persons employed by Defendant in California as  
7 District Sales Managers from April 8, 2009 to the present.” *See* Mot. at 1. Class certification  
8 requires the Court to engage in a two-step analysis. First, it must determine whether the four  
9 requirements of Rule 23(a) have been established: (1) numerosity, (2) common questions of law or  
10 fact, (3) typicality, and (4) adequate representation.” *See, e.g., Ellis v. Costco Wholesale Corp.*,  
11 657 F.3d 970, 974 (9th Cir. 2011). Second, Plaintiffs must satisfy at least one of Rule 23(b)’s  
12 provisions. *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011). When a party  
13 invokes Rule 23(b)(3), as Plaintiffs do here, the Court is tasked with deciding whether “the actual  
14 interests of the parties can be served best by settling their differences in a single action.” *Hanlon* at  
15 1022. “In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between common  
16 and individual issues. When common questions present a significant aspect of the case and they  
17 can be resolved for all members of the class in a single adjudication,” a court may certify a class  
18 pursuant to Rule 23(b)(3). *See id.*

19 The Court turns first to the four requirements of Rule 23(a). Defendant argues that  
20 Plaintiffs cannot meet the Rule’s commonality or typicality requirements. For the reasons  
21 discussed below, the Court disagrees.

22 **A. Rule 23(a)**

23 **1. Numerosity**

24 Under Rule 23(a)(1), a class must be “so numerous that joinder of all members is  
25 impracticable.” Courts have repeatedly held that classes comprised of “more than forty” members  
26 presumptively satisfy the numerosity requirement. *See, e.g., DuFour v. BE LLC*, 291 F.R.D. 413,  
27 417 (N.D. Cal. 2013).

28 Defendant does not dispute that the class is sufficiently numerous, and stated in its Notice





1 generating a classwide resolution. Defendant points to wide discrepancies in the testimony of  
2 named class member DSMs in terms of how much manual labor they perform. *See, e.g.*, Nielson  
3 Depo., ECF 60-5 at 105:5-107:4 (describing spending twenty hours per week on manual labor  
4 tasks, including loading and unloading boxes from her car); Espinoza Depo. ECF 60-6 at 105:3-  
5 108:19 (describing an office-based work environment in which he spent most of the day  
6 contacting his independent Representatives, with no discussion of manual labor tasks). Defendant  
7 further points to declarations from non-plaintiff DSMs in which they describe performing varying  
8 degrees of manual labor. *See* Guerrios Decl., ECF 60-13 at ¶ 9 (“The physical tasks associated  
9 with [recruiting] activities are not a major production and are a minimal, insignificant part of my  
10 job.”); *see also* Montalvo Decl. ¶ 10 (“[W]hen I was a DSM, I spent only about 20 to 30 minutes  
11 in a day performing physical tasks.”).

12 Plaintiffs argue that Avon’s corporate policy demanding DSMs be able to lift 35 pounds,  
13 as well as the fact that Avon provides DSMs with an eighty pound tent for campaign events, is  
14 evidence that the class as a whole engages in manual labor. This argument is unpersuasive,  
15 however, because the evidence presented to the Court by both parties shows that individualized  
16 inquiries are necessary to determine whether the “primary duty” of each individual DSM was the  
17 performance of office or non-manual work. *See Rincon v. AFSCME*, 2013 WL 4389460, at \*17  
18 (N.D. Cal. Aug. 13, 2013) (finding that “fieldwork is not necessarily manual work” for purposes  
19 of a union organizer who engaged in substantial out-of-office organizing activities). As the Court  
20 in *Rincon* noted, “an exempt employee can perform some manual work without losing exempt  
21 status.” *Id.* (citing *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394, 401 (6th Cir. 2004)).  
22 Plaintiffs’ proposed common question is not susceptible to classwide resolution due to the wide  
23 disparity in testimony from named Plaintiffs and other DSMs with regard to how much of their  
24 work is manual labor, and the need for the Court to individually determine whether each DSM was  
25 primarily involved in manual labor rather than office work.

26 Plaintiffs’ second through fourth questions, however, fare better in the commonality  
27 inquiry. Plaintiffs’ second question, whether the DSMs’ duties and responsibilities involve work  
28 “directly related to management policies or general business operations,” can be determined by

1 examining the tasks in which DSMs engage, and does not rise or fall depending on how much  
2 time each DSM spends engaged in those activities. Defendant’s own argument supports a finding  
3 of commonality with regard to this question: Defendant does not argue that some DSMs engage in  
4 work directly related to management policies while others do not, but rather that “DSMs satisfy  
5 this requirement because they independently manage their own mini-Avon business and perform  
6 promotional work through recruiting, training and motivating reps.” *See* Opp. at 20. Both parties  
7 thus offer a single class-wide argument on the merits of the “directly related” prong. The argument  
8 between the parties boils down to whether the types of tasks in which DSMs engage are directly  
9 related to management policies, in contrast to the “non-manual work” element, which would force  
10 individualized inquiries as to the amount of time spent on those tasks. Plaintiffs are correct that  
11 “[t]he trier of fact can determine if the nineteen (19) finite tasks identified by Defendant are  
12 exempt or non-exempt tasks” for purposes of the “directly related” element of the administrative  
13 exemption, and therefore this question is sufficient to meet Rule 23(a)(2)’s commonality prong.  
14 *See* Reply, ECF 67 at 2.

15           Though “even a single common question will do” for purposes of Rule 23(a)(2), *see Dukes*  
16 at 2556, the Court notes that the remaining two questions identified by Plaintiffs are also  
17 sufficiently common to justify class certification. The third question, whether DSMs customarily  
18 and regularly exercise discretion and independent judgment, is susceptible to common proof  
19 because of the theory on which Plaintiffs rely. Plaintiffs contend that because Avon  
20 Representatives are independent contractors, DSMs are precluded by California law from  
21 exercising direct control over them. Defendant responds by arguing that “DSMs use their  
22 judgment in a variety of ways including, but not limited to, calendar planning and management,  
23 training and coaching [Representatives], resolving issues they encounter in the field, and  
24 developing strategies to improve sales.” Opp. at 22. Defendant’s argument is similar to the one it  
25 offered with regard to the “directly related” prong: that DSMs necessarily exercise discretion  
26 based on their job responsibilities. This question is therefore also susceptible to class-wide  
27 resolution.

28           Similarly, Plaintiffs’ fourth proposed common question, whether DSMs work under

1 general supervision, relies on proof common to the class. Plaintiffs point to two policies put in  
2 place by Avon with regard to all DSMs: both a minimum, baseline supervision policy, and that  
3 Avon permits its Division Managers – who supervise DSMs – to impose more supervision over  
4 DSMs as desired. *See* Reply at 7-8. This supervision includes a uniform attendance policy, access  
5 to each DSM’s daily calendar, and the monitoring of a DSM’s performance goals. *See id.* at 4-5.  
6 Defendant argues in contrast that DSMs are subject to “infrequent direct supervision and are not  
7 required to have their calendars approved by their supervisor,” and contends that the Court will  
8 need to make individual inquiries as to whether each DSM was subject to general supervision. *See*  
9 *Opp.* at 21.

10           Though this is a closer call than the “directly related” and “discretion and independent  
11 judgment” questions, the Court finds that this fourth proposed question is also subject to common  
12 proof. Plaintiffs argue that there is sufficient evidence to show that class members were subject to  
13 far more than just “general supervision,” including a uniform attendance policy, *see* Bhowmik  
14 Decl., ECF 56-2 Exh. 7 (stating that DSMs are to “adhere to their work calendar and to advise  
15 their Division Manager of any deviation from that schedule.”), Division Managers having the  
16 ability to access DSMs’ daily calendars, and the capacity of Division Managers to impose  
17 additional supervision when key performance indicators (“KPIs”) were not being met. Defendant  
18 argues that Plaintiffs’ declarations show that they were subject to varying degrees of supervision,  
19 and thus the Court would need to engage in individualized inquiries, but this argument is  
20 unpersuasive: Plaintiffs point to evidence that shows various *additional* forms of supervision  
21 which were imposed upon DSMs which, if true, would allow the factfinder to determine that  
22 DSMs are subjected to more than just general supervision despite the slight variations in the forms  
23 of supervision imposed. *See, e.g.,* Gaskell Depo. at 13:20-14:13 (noting that she, as a Division  
24 Manager, has access to her DSMs’ calendars and is “able to review their calendars”); Cabrera  
25 Depo. at 32:1-33:23; *see also* Martin Depo. at 90:15-18 (stating that Division Managers “hold  
26 [DSMs] accountable to [the various, you know, job responsibilities and duties]”); Gordon Depo. at  
27 54:24-55:19 (describing riding along with DSMs in order to supervise them in the field).

28           Though some DSMs may be subject to greater supervision than others, the common

1 question here is whether DSMs were subject to more than just general supervision. Defendant  
2 points to no persuasive reason why individualized inquiries are required to answer this question,  
3 and the Court therefore finds Plaintiffs' fourth question also sufficiently common to the class.

### 4 **3. Typicality**

5 Class representatives must have claims that are "typical of the claims" of the other  
6 members of the class, in order to ensure that "the named plaintiffs' claim and the class claims are  
7 so interrelated that the interests of the class members will be fairly and adequately protected in  
8 their absence." *Gen. Tel. Co. Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982) (citing Rule 23(a)(3)).  
9 Typicality is "directed to ensuring that plaintiffs are proper parties to proceed with the suit." *Reis*  
10 *v. Arizona Beverages USA*, 287 F.R.D. 523, 539 (N.D. Cal. 2012). The standard for determining  
11 typicality, however, is a permissive one, *see id.*, and asks only whether the claims of the class  
12 representatives are "reasonably co-extensive with those of absent class members; they need not be  
13 substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

14 Defendant argues that Plaintiffs' claims are not typical "[b]ecause the evidence  
15 demonstrates that the manner in which plaintiffs performed their job duties is dissimilar to the way  
16 other DSMs performed them." Opp. at 23. Defendant's argument is unpersuasive, and relies on a  
17 conflation of the commonality and typicality inquiries. The named Plaintiffs and absent class  
18 members have claims that are "reasonably co-extensive" with one another – slight variations in the  
19 manner in which Plaintiffs performed their jobs as DSMs does not render a single named  
20 Plaintiffs' claim atypical from the rest of the class. All named Plaintiffs challenge the  
21 classification of DSMs as exempt – none seek to advance claims that are divergent from the claims  
22 of absent class members. *See Hanlon* at 1020. As such, the named Plaintiffs set forth claims that  
23 are typical of the other members of the class.

### 24 **4. Adequacy**

25 The final requirement of Rule 23(a) is that the named Plaintiffs "fairly and adequately  
26 protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy inquiry requires the  
27 Court to make two determinations: (1) whether the named plaintiffs and class counsel have any  
28 conflicts of interest with other class members; and (2) whether counsel and the class

1 representatives will “vigorously prosecute the action on behalf of the class.” *Reis*, 287 F.R.D. 523,  
2 540 (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011)). The Court has an  
3 obligation to “ensure that the litigation is brought by a named Plaintiff who understands and  
4 controls the major decisions of the case.” *Sanchez v. Wal-Mart Stores, Inc.*, 2009 WL 1514435, at  
5 \*3 (E.D. Cal. May 28, 2009).

6 Defendant does not challenge the adequacy of the named Plaintiffs or of Plaintiffs’  
7 counsel, Blumenthal, Nordrehaug & Bhowmik. Plaintiffs offer declarations in which they  
8 recognize that their duty as named Plaintiffs is to the interests of the class as a whole, and that they  
9 will not put their own individual interests before those of the class. *See, e.g.*, Becerra Decl. ¶¶ 10-  
10 11; Bilitch Decl. ¶¶ 10-11. Neither party identifies any possible conflict between the class  
11 representatives and any absent class members. Further, Plaintiffs’ counsel has outlined the firm’s  
12 experience in class litigation of this type, and points to several other district courts that have found  
13 the firm to be adequate counsel. *See* Mot. at 18; *see also* Blumenthal Decl. Exh. A.

14 The Court finds that Plaintiffs are adequate class representatives and that Plaintiffs’  
15 counsel will vigorously prosecute this action on the class’ behalf. Plaintiffs have therefore met  
16 Rule 23(a)(4)’s adequacy requirement.

17 Plaintiffs have made a sufficient showing under all four prongs of Rule 23(a). The Court  
18 therefore turns to the requirements of Rule 23(b)(3) to determine if “a class action would achieve  
19 economies of time, effort and expense, and promote uniformity of decision as to persons similarly  
20 situated, without sacrificing procedural fairness or bringing about other undesirable results.”  
21 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (citing the Advisory Committee Notes  
22 on Rule 23, 28 U.S.C. App. at 697).

23 **B. Rule 23(b)(3)**

24 Rule 23(b)(3) permits a court to certify a class only when two criteria are met: (1) the  
25 questions of law or fact common to members of the class predominate over any questions  
26 affecting only individual members, and (2) that a class action is superior to other available  
27 methods for the fair and efficient adjudication of the controversy. *See Zinser* at 1189. The party  
28 seeking class certification bears the burden of showing that common questions of law or fact

1 predominate. *See id.* Though these criteria are interrelated, the court must address each  
2 independently. *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996).  
3 Defendant’s argument against Rule 23(b)(3) certification focuses on predominance, and the Court  
4 begins its inquiry there.

5 **1. Predominance**

6 The Ninth Circuit has stated that the “focus of [the predominance factor] is on the  
7 relationship between the common and individual issues.” *In re Wells Fargo*, 571 F.3d 953, 957.  
8 “When common questions present a significant aspect of the case and they can be resolved for all  
9 members of the class in a single adjudication, there is clear justification” for certifying a class  
10 action. *Hanlon* at 1022. The Court must determine whether a “common nucleus of facts and  
11 potential legal remedies dominates” the litigation. *Id.*

12 Defendant’s primary argument against predominance is that a determination of liability by  
13 the Court requires “individualized inquiries regarding how DSMs actually perform their job  
14 duties,” an argument similar to the one it made regarding commonality. *See* Opp. at 23-24. Avon  
15 argues that Plaintiffs rely too heavily on its uniform exemption policy in support of class  
16 certification, while ignoring the individualized inquiries the Court will need to make. *See id.* at 24  
17 (“[T]he evidence overwhelmingly demonstrates that how DSMs perform their job duties, and the  
18 time spent on those duties, varies based on numerous factors. . . . On this basis alone, the Court  
19 should find that individual issues predominate.”). Defendant is correct that the Court cannot rely  
20 on Avon’s uniform exemption policy “to the near exclusion of other factors relevant to the  
21 predominance inquiry.” *In re Wells Fargo* at 960. That being said, “[a]n internal exemption policy  
22 that treats all employees alike for exemption purposes suggests that the employer believes some  
23 degree of homogeneity exists among the employees.” *Id.* at 957, 958-59 (“[U]niform corporate  
24 policies will often bear heavily on questions of predominance and superiority.”). Thus, the Court  
25 looks both the uniform policies identified by Plaintiffs as well as the specific differences between  
26 Plaintiffs outlined by Defendant. A review of the evidence proffered by both sides shows that  
27 though individual differences exist among the named Plaintiffs and absent class members – as  
28 they would in any case in which hundreds of employees engage in the same job – the issues

1 common to the class members predominate over those differences. *See, e.g.*, Banks Study, at ¶¶ 6-  
2 7.<sup>3</sup>

3 First, the three common questions that the Court found appropriate for class treatment –  
4 whether DSMs’ duties are directly related to management or business operations, whether DSMs  
5 regularly exercise independent judgment, and whether DSMs work only under general supervision  
6 – are subject to common proof that relies in no small part on the nature of their duties, not the  
7 amount of time in which individual DSMs spend on each task. The Court needs to look no further  
8 than Defendant’s own arguments and the Banks Study to ascertain that common issues will  
9 predominate over individual issues with regard to these three questions. Defendant argues that  
10 DSMs’ responsibilities are directly related to management policies because “they independently  
11 manage their own min-Avon business.” Opp. at 21. Nowhere does Avon suggest that some DSMs  
12 meet this criterion while others do not – Defendant’s argument rests on the idea that *all* DSMs  
13 engage in duties related to management policies. This broad characterization severely undercuts  
14 Defendant’s argument that the Court will need to engage in individual inquiries, let alone that  
15 those individual inquiries will predominate over questions common to the class.

16 Defendant’s arguments regarding Plaintiffs’ “exercise discretion” and “general  
17 supervision” questions are similarly unpersuasive. Defendant argues that DSMs exercise  
18 discretion “in a variety of ways including, but not limited to, calendar planning and management,  
19 training and coaching [Representatives], resolving issues they encounter in the field, and  
20 developing strategies to improve sales.” Opp. at 22. These, again, are tasks in which Avon claims  
21 all DSMs engage. *See, e.g.*, Banks Study. Defendant’s reliance on *Friend v. Hertz Corp.*, a 2011  
22 case from this district, actually undermines Avon’s argument here. In *Friend*, the district court  
23 noted that the applicability of an exemption to overcome compensation generally requires a fact-  
24 specific inquiry as to the way each employee actually spends his or her time, but that plaintiffs can  
25 still certify a class when they show “uniformity in work duties and experiences that would

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27 <sup>3</sup> The Banks Study characterized certain Task Areas as “exempt” and others as “non-exempt.” *See,*  
28 *e.g.*, ECF 61 at ¶¶ 17-18. The Court disregards these legal conclusions, but notes that the Banks  
Study contends all 30 DSMs observed spent the majority of their time engaged in the same set of  
Task Areas. *See id.* at ¶ 7.



1 diminish the need for individualized inquiry.” *See Friend*, 2011 WL 750741, at \*5 (N.D. Cal. Feb.  
2 24, 2011). Defendant has indicated that it intends to rely on the uniformity of DSMs’ work duties  
3 – the *nature* of the tasks they are expected to perform – in support of its classification of those  
4 employees as exempt. *See, e.g.*, *Opp.* at 20-23. Further, Plaintiffs’ legal argument on this question  
5 relies on its contention that California law prevents DSMs from exercising control over  
6 Representatives because Representatives are independent contractors. This is a legal question that  
7 is common to the class as it goes to the general relationship between DSMs and Representatives.

8         Though the Court has already noted above that there are individual differences among  
9 DSMs with regard to whether they work under only general supervision, these differences do not  
10 render class treatment inferior to individual actions. This is because Plaintiffs’ theory is not  
11 dependent on the specific type of supervision one Division Manager imposes on one DSM, but  
12 rather on Avon’s corporate policies that give Division Managers wide latitude to exercise  
13 supervisory control over DSMs, and to impose *additional* supervision as needed. The evidence  
14 proffered by Plaintiffs is consistent with this argument, as they point to various ways in which  
15 Division Managers control DSMs’ calendars or scheduling, engage in ride alongs with their  
16 DSMs, or discipline them when they fail to meet their KPIs. Plaintiffs’ theory of this prong of the  
17 administrative exemption is based on both the minimum and maximum amount of supervision  
18 allowed by Avon’s company policies.

19         Though Avon contends that a determination of liability requires individualized inquiries as  
20 to the work DSMs perform, a review of the evidence and theories to be offered by both sides to the  
21 factfinder shows that the questions common to the class predominate over any of these individual  
22 questions. A comparison of Defendant’s arguments regarding Plaintiffs’ manual labor question,  
23 which the Court found inappropriate for class treatment, and the exercise of discretion question,  
24 which the Court found appropriate for class treatment, is instructive. Individual issues would  
25 predominate the manual labor question because its answer turns on how much manual labor an  
26 individual DSM actually performs. In contrast, common issues predominate with regard to the  
27 exercise of discretion question because it turns on whether the nature of the tasks in which DSMs  
28 engage require independent judgment or discretion. Because the parties *do not dispute* what tasks

1 DSMs engage in, a factfinder could determine whether, for example, each task outlined in the  
2 Banks Study requires a DSM to use his or her discretion. Thus, common questions sit at the heart  
3 of this case, and predominate over any individual differences between the Plaintiffs.

## 4 2. Superiority

5 In order to certify Plaintiffs' class under 23(b)(3), the court must also find "that a class  
6 action is superior to other available methods for fairly and efficiently adjudicating the  
7 controversy." Fed. R. Civ. P. 23(b)(3). "The superiority inquiry under Rule 23(b)(3) requires a  
8 determination of whether the objectives of the particular class action procedure will be achieved in  
9 the particular case," *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). The court  
10 finds that two facts weigh heavily in favor of class certification.

11 First, the proposed class includes employees that still work for Avon. These employees  
12 may be afraid to bring actions on their own behalf, for fear of retaliation by their employer.  
13 Allowing Plaintiffs to proceed in a representative capacity ensures that all class members will  
14 receive their day in court without requiring current employees of Avon to risk their employment to  
15 receive that right.

16 Second, if this action were to proceed on an individual basis, it is possible that a judgment  
17 in favor of Plaintiffs would bind Avon with respect to other class members by virtue of collateral  
18 estoppel, while a judgment in favor of Avon would not bind class members who are not party to  
19 the present litigation. For instance, if Plaintiffs were to proceed individually and prove that even  
20 the most minimal supervision of DSMs provided for in Avon's company policies constitutes more  
21 than "only general supervision," Avon would be bound by this finding in future actions by other  
22 class members. This would render Avon vulnerable to suit by every other class member without  
23 the benefit of the defense it asserts in the current action. On the other hand, if Avon were to  
24 succeed on this point, each class member not party to the present action would still retain the  
25 ability to bring suit and re-litigate this issue, since collateral estoppel would not apply with respect  
26 to non-parties to this litigation. In other words, allowing a class action in this case will ensure that  
27 the finality of judgment in this action is a two-way street, not one that adheres only to the benefit  
28 of the Plaintiffs and non-party members of an uncertified class.

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These two facts go directly to two of the four factors outlined in Rule 23(b)(3) and *Hanlon* which a court must consider in the superiority inquiry: the interests of class members in individually controlling the action and the desirability of concentrating the litigation in a single forum. The other two factors – the extent of already-existing litigation and manageability of the action – also support certification. First, neither party identifies in their briefing any existing actions regarding DSMs and overtime misclassification in California. Second, the Court is not persuaded by Defendant’s argument that this case will devolve into “200 mini-trials,” *see* Opp. at 25, because the questions common to the class will serve to streamline the litigation.

**IV. ORDER**

For the foregoing reasons, the Court certifies the following class: “[A]ll persons employed by Defendant in California as District Sales Managers from April 8, 2009 to the present.” The Court further appoints Blumenthal, Nordrehaug & Bhowmik as class counsel, and approves the designation of named Plaintiffs as representatives of the class.

**IT IS SO ORDERED.**

Dated: April 17, 2015

  
BETH LABSON FREEMAN  
United States District Judge