

1 David W. Sanford, DC Bar No. 457933 (*Pro Hac Vice*)
Felicia Medina, CA Bar No. 2550804
2 Kyle Chadwick, DC Bar No. 453003 (*Pro Hac Vice*)
3 **SANFORD, WITTELS & HEISLER, LLP**
1666 Connecticut Ave., NW, Suite 310
4 Washington, D.C. 20009
Telephone: (202) 742-7777
5 Facsimile: (202) 742-7776

6 Steven L. Wittels, NY Bar No. 2004635 (*Pro Hac Vice*)
Jeremy Heisler, NY Bar No. 1653484 (*Pro Hac Vice*)
7 Janette Wipper, DC Bar No. 467313 (*Pro Hac Vice*)
8 **SANFORD, WITTELS & HEISLER, LLP**
1350 Avenue of the Americas, Suite 3100
9 New York, NY 10019
Telephone: (646) 723-2947
10 Facsimile: (646) 723-2948

11 Edward D. Chapin, CA Bar No. 053287
Jill M. Sullivan, CA Bar No. 185757
12 **OF COUNSEL**
SANFORD, WITTELS & HEISLER, LLP
13 550 West "C" Street, Suite 2000
14 San Diego, CA 92101
Telephone: (619) 241-4810
15 Facsimile: (619) 955-5318

16 Michael Ram, CA Bar No. 104805
Karl Olson, CA Bar No. 104760
17 **OF COUNSEL**
SANFORD, WITTELS & HEISLER, LLP
18 639 Front Street, Fourth Floor
19 San Francisco, CA 94111
Telephone: (415) 433-4949
20 Facsimile: (415) 433-7311

21 Marc Litton, CA Bar No. 119985
OF COUNSEL
22 **SANFORD, WITTELS & HEISLER, LLP**
100 Montgomery Street, Suite 1600
23 San Francisco, CA 94104
24 Telephone: (415) 391-6900
Facsimile: (415) 391-6901
25

26 *Attorneys for the Plaintiffs and the Plaintiff Class*
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARY PYTELEWSKI, ERIC STILLER,
SAM CARROLL, STEVE VRISMO,
JEREMY MONCAUSKAS, ALBERT
COOPER, AND JOSEPH MORO, on behalf
of themselves individually and all others
similarly situated,

PLAINTIFFS,

VS.

COSTCO WHOLESALE CORPORATION
AND DOES 1 THROUGH 25, INCLUSIVE,

DEFENDANTS.)

) Case No.: 3:09-cv-2473-H (BGS)

) Assigned to Hon. Marilyn H. Huff

) **PLAINTIFFS' MEMORANDUM OF**
) **POINTS OF AUTHORITIES IN**
) **SUPPORT OF PLAINTIFFS' MOTION**
) **FOR COLLECTIVE ACTION AND**
) **CLASS CERTIFICATION**

) *[Filed concurrently with Plaintiffs' Notice of*
) *Motion and Motion for Collective Action and*
) *Class Certification; Declaration of David*
) *Sanford in Support of Plaintiffs' Motion for*
) *Collective Action and Class Certification;*
) *Declaration of Kristen Nicolls in Support of*
) *Plaintiffs' Motion for Collective Action and*
) *Class Certification]*

) Date: December 13, 2010

) Time: 10:30 am

) Place: Courtroom 13

) Complaint Filed: May 15, 2009

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT 1

II. FACTUAL BACKGROUND..... 2

 A. Overview of Plaintiffs’ Claims 2

 B. Overview of Proposed Classes..... 3

 C. Costco’s Centralized Corporate Structure 3

 D. Costco’s Centralized Uniformly Applied Compensation Policies..... 4

 E. Costco’s Centralized Uniformly Applied Lockdown Policy 5

 F. Costco’s Centralized Uniformly Applied Disciplinary Policy 8

III. ARGUMENT 10

 A. The Court Should Conditionally Certify Class I..... 10

 1. The Standard for Certification of an FLSA Collective Action Is Lenient, and Courts Routinely Grant Conditional Certification..... 10

 2. The Class I Members are Similarly Situated 12

 3. The Court Should Order *Hoffman-La Roche* Notice 14

 B. The Court Should Certify Class II Under Rule 23(b)(3) 14

 1. The Rule 23 Standard..... 14

 2. Class II Satisfies Rule 23(a)..... 15

 a. Class II Is Readily Ascertainable 15

 b. Class II Is Numerous..... 15

 c. There Are Common Questions of Law and Fact 16

 d. Mr. Moro’s Claims Are Typical of the Class II Claims 18

 e. Mr. Moro and Counsel Will Adequately Represent the Class 19

 3. Class II Is Maintainable Under Rule 23(b)(3) 19

 a. Costco’s Centralized Policies Create Predominant Common Issues 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

b. A Class Action Is Superior to Individual Suits..... 23

IV. CONCLUSION..... 25

TABLE OF AUTHORITIES

FEDERAL CASES

Adams v. Inter-Con Sec. Sys., Inc.,
242 F.R.D. 530 (N.D. Cal. 2007).....11, 12, 13, 14

Alba v. Papa John’s USA, Inc.,
No. C 05-7487, 2007 U.S. Dist. LEXIS 28079 (C.D. Cal. Feb. 7, 2007).....23, 24

Ansoumana v. Gristede's Opg. Corp.,
201 F.R.D. 81 (S.D.N.Y. 2001)22

Blackie v. Barrack,
524 F.2d 891 (9th Cir. 1975)14, 20

Castaneda v. Costco Wholesale Corp.,
No. BC 399302 (Cal. Super. Ct. 2010).....1, 18

Cervantez v. Celesica Corp.,
253 F.R.D. 562 (C.D. Cal. 2008).....14, 15

Damassia v. Duane Reade, Inc.,
250 F.R.D. 152 (S.D.N.Y. 2008)21

Dilts v. Penske Logistics, LLC,
267 F.R.D. 625 (N.D. Cal. 2010).....16

Dukes v. Wal-mart Stores, Inc.,
603 F.3d 571 (9th Cir. 2010)16, 18

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974).....14

Farmer v. Directsat USA, LLC,
No. 08 C 3962, 2010 U.S. Dist. LEXIS 105738 (N.D. Ill. Oct. 4, 2010).....20

Feret v. Corestates Fin. Corp.,
No. 97-6759, 1998, U.S. Dist. LEXIS 12734 (E.D. Pa. Aug. 18, 1998)16

General Tel. Co. of the S.W. v. Falcon,
457 U.S. 147 (1982).....18

Gilbert v. Citigroup, Inc., No. 08-0385,
2009 U.S. Dist. LEXIS 18981 (N.D. Cal. Feb. 18, 2009)13

Haley v. Medtronic, Inc.,
169 F.R.D. 643 (N.D. Cal. 1996).....24, 25

1	<i>Hanlon v. Chrysler Corp.</i> ,	
	150 F.3d 1011 (9th Cir. 1998)	16, 18
2		
3	<i>Harris v. Vector Mktg. Corp.</i> , No. C-08-5198,	
	2010 U.S. Dist. LEXIS 56110 (N.D. Cal. May 18, 2010)	12
4		
5	<i>Hill v. R+L Carriers, Inc.</i> ,	
	690 F. Supp. 2d 1001 (N.D. Cal. 2010)	11, 12, 13
6		
7	<i>Hoffmann-La Roche, Inc. v. Sperling</i> ,	
	493 U.S. 165 (1989)	11, 14
8		
9	<i>Jankowski v. Castaldi</i> ,	
	No. 01-cv-0164, 2006 U.S. Dist. LEXIS 4237 (E.D.N.Y. Jan. 11, 2006)	15, 20
10		
11	<i>Kress v. PricewaterhouseCoopers, LLP</i> ,	
	263 F.R.D. 623 (E.D. Cal. 2009)	11, 12
12		
13	<i>Kurihara v. Best Buy Co.</i> ,	
	No. C 06-01884, 2007 U.S. Dist. LEXIS 64224 (N.D. Cal. Aug. 30, 2007).....	23
14		
15	<i>Leuthold v. Destination Am., Inc.</i> ,	
	224 F.R.D. 462 (N.D. Cal. 2004).....	11
16		
17	<i>Lewis v. Wells Fargo & Co.</i> ,	
	669 F. Supp. 2d 1124 (N.D. Cal. 2009)	11, 12, 13
18		
19	<i>Lindow v. United States</i> ,	
	738 F.2d 1057 (9th Cir. 1984)	23
20		
21	<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.</i> ,	
	244 F.3d 1152 (9th Cir. 2001)	19, 20
22		
23	<i>Lopez v. G.A.T. Airline Ground Support, Inc.</i> ,	
	No. 09-cv-2268, 2010 U.S. Dist. LEXIS 95636 (S.D. Cal. Sept. 13, 2010).....	13
24		
25	<i>Lymburner v. U.S. Fin. Funds, Inc.</i> ,	
	263 F.R.D. 534 (N.D. Cal. 2010).....	18
26		
27	<i>Mevorah v. Wells Fargo Home Mortgage Co.</i> ,	
	571 F.3d 953 (9th Cir. 2009)	20, 21, 22
28		
	<i>Mowdy v. Beneto Bulk Transport</i> ,	
	No. C 06-056982, 2008 U.S. Dist. LEXIS 26233 (N.D. Cal. Mar. 31, 2008).....	12
	<i>Murillo v. Pacific Gas & Elec. Co.</i> ,	
	266 F.R.D. 468 (E.D. Cal. 2010)	11, 12

1	<i>N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.,</i>	
2	693 F.2d 847 (9th Cir. 1982)	24
3	<i>Noble v. 93 Univ. Place Corp.,</i>	
4	24 F.R.D. 330 (S.D.N.Y. 2004)	15, 22
5	<i>Orantes-Hernandez v. Smith,</i>	
6	41 F. Supp. 351 (C.D. Cal. 1982)	15
7	<i>Robidoux v. Celani,</i>	
8	987 F.2d 931 (2d Cir. 1993).....	16, 18
9	<i>Schwartz v Upper Deck Co.,</i>	
10	183 FRD 672 (S.D. Cal. 1999)	14
11	<i>Sullivan v. Kelly Servs., Inc.,</i>	
12	268 F.R.D. 356 (N.D. Cal. 2010).....	19, 21, 22
13	<i>Trautz v. Weisman,</i>	
14	846 F. Supp. 1160 (S.D.N.Y. 1994)	18
15	<i>Valentino v. Carter-Wallace, Inc.,</i>	
16	97 F.3d 1227 (9th Cir. 1996)	23
17	<i>Velez v. Majik Cleaning Serv., Inc.,</i>	
18	No. C 03-08698, 2005 U.S. Dist. LEXIS 709 (S.D.N.Y. Jan. 18, 2005).....	20, 24
19	<i>Wells Fargo Home Mortg. Overtime Pay Litig.,</i>	
20	No. C 06-01770, 2010 U.S. Dist. LEXIS 3132 (N.D. Cal. Jan. 12, 2010)	14
21	<i>Wren v. RGIS Inventory Specialists,</i>	
22	No. C 06-05778, 2007 U.S. Dist. LEXIS 95439 (N.D. Cal. Dec. 1, 2007)	13, 23
23	<i>Zinser v. Accufix Research Inst., Inc.,</i>	
24	253 F.3d 1180 (9th Cir. 2001)	24, 25
25	<u>FEDERAL STATUTES</u>	
26	29 U.S.C. § 201.....	1
27	29 U.S.C. § 216.....	1, 11
28	Fed. R. Civ. P. 23.....	<i>passim</i>

OTHER AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Lorazepam & Clorazepate Antitrust Litig.,
202 F.R.D. 12 (D.D.C. 2001).....19

Moore, James Wm., *et al.*, *Moore's Federal Practice*
§§ 23.21[4], 23.46[2][a] (3d ed. 2003)20

Newberg, Herbert B., *et al.*, *Newberg on Class Actions*,
§ 3.10 (3d ed. 1992)16

Newberg, Herbert B., *et al.*, *Newberg on Class Actions*,
§ 3.05 (2d ed. 1985)16

Schwarzer, William W., *et al.*, *Federal Civil Procedure Before Trial*
§ 10:293 (Rutter Group 2009)18

Wright, Charles Alan, *et al.*, *Federal Practice and Procedure*,
§ 1780 (2d ed. 1986)24

1 **I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT**

2 Plaintiffs Eric Stiller and Joseph Moro,¹ on behalf of themselves and the proposed
3 Classes, seek to redress a wrongful scheme by Defendant Costco to deny them wages rightfully
4 earned as Costco employees. From the beginning of the Class Period until October 2009,
5 Costco’s systematic policies and practices required Plaintiffs and other employees to remain
6 trapped inside Costco stores (called “warehouses”) without pay — sometimes for as long as
7 forty-five minutes — while Costco managers completed their extensive closing duties. These
8 unpaid “lockdowns” were mandated by centralized Costco policies for all of Costco’s United
9 States warehouses. Costco reaped the benefits of its unlawful conduct while depriving its
10 hourly workers of fair wages.

11 In enacting and enforcing these policies and procedures, Costco willfully violated both
12 the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201 *et seq.*, and California’s labor and
13 unfair competition laws. To provide suitable remedies, Plaintiffs respectfully ask the Court to
14 (1) conditionally certify a nationwide “opt-in” FLSA collective action pursuant to 29 U.S.C.
15 § 216(b) (“Class I” or “FLSA Class”); (2) certify a statewide “opt-out” class under Rule
16 23(b)(3) of the Federal Rules of Civil Procedure to redress violations of California law (“Class
17 II” or “California Class”); and (3) order the parties to confer upon and submit a proposed notice
18 to the Classes within fourteen days of the Court’s certification order.

19 In support of this motion, Plaintiffs rely on the deposition testimony of the Named
20 Plaintiffs and Costco representatives, testimony by deposition and declaration of six non-party
21 witnesses, Costco’s corporate records and policies, and documents from *Castaneda v. Costco*
22 *Wholesale Corp.*, No. BC 399302 (Cal. Super. Ct.). This evidence paints a uniform and
23

24 ¹ In their First Amended Complaint (“FAC”), filed with the Court on October 2, 2009, Mary
25 Pytelewski and Eric Stiller represented the FLSA Class, and Steve Vrismo and Joseph Moro
26 represented the California Class. In light of the Judge’s Order of November 3, 2010, Ms.
27 Pytelewski and Mr. Vrismo are no longer Plaintiffs [Dkt. 92]. Accordingly, Mr. Stiller and Mr.
28 Moro will represent the two classes, respectively.

1 common picture of Costco’s legal violations, and is more than sufficient to satisfy the liberal
2 requirements for conditional certification under the FLSA as to Class I, as well as the
3 requirements of Rule 23(b)(3) as to Class II.

4 **II. FACTUAL BACKGROUND**

5 **A. Overview of Plaintiffs’ Claims**

6 Mr. Stiller and Mr. Moro are non-exempt, hourly employees of Costco who worked at
7 Costco warehouses between May 15, 2005 and October 1, 2009. As a matter of course,
8 throughout this period, Defendant required Plaintiffs and other Class Members to remain on the
9 premises after their shifts ended while warehouses were “locked down.” These regular
10 “Lockdowns” were conducted pursuant to companywide policies, and consistently lasted at
11 least ten to fifteen, and sometimes as long as forty-five, minutes.² While Costco concedes that
12 employees’ waiting time during Lockdowns qualified as “work” entitling them to
13 compensation³ — and, in October 2009, the company significantly revised its closing
14 procedures to allow employees either to leave promptly at the end of their shifts, or stay on the
15 clock — Costco’s compensation and timecard policies effectively prohibited payment for this
16 time. As a result, Plaintiffs and the Class were consistently and systematically denied
17 substantial wages.

18
19
20 ² See Declaration of David Sanford (“Sanford Decl.”) ¶¶ 3-14; Exh. A. Pytelewski Dep. at
21 129:1-8, 172:18-173:23; Exh. B. Carroll Dep. at 45:18-19:23-25-46:1; Exh. C. Moncauskas
22 Dep. at 29:4-7, 38:12-15; Exh. D. Moro Dep. at 70:11-3:19-21, 75:5:8:11:13; Exh. E. Stiller
23 Dep. at 83:9-13, 139:1:24-25, 140:9-10; Exh. F. Vrismo Dep. at 55:8-11, 56:17-18:21:23; Exh.
24 G. Cooper Dep. at 32:14-16; Exh. H. Clements Dep. at 39:8-14; Exh. I. Mendoza Dep. at
25 27:18-19:23, 34:4-5:7-8, 43:20-23; 44:3:6-7; Exh. J. Daniels Dep. at 59:23-60:2:25-61:5:12-17.
26 Exh. K. Mascarin Dep. at 36:13-19, 40:5-11, 75:18:22; Exh. L. Clarice Pytelewski Dep. at
27 38:15, 39:2:5:8.

28 ³ Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. at 133:12-135:11.

1 **B. Overview of Proposed Classes**

2 Plaintiffs propose two Classes. Class I, represented by Mr. Stiller, is an opt-in class
3 under the FLSA. It consists of:

4 All persons who worked for Costco Wholesale Corporation **in the United**
5 **States** as full-time, hourly, non-exempt employees subject to Costco’s
6 Lockdown procedures between April 8, 2007 and October 1, 2009.

6 Class II, represented by Mr. Moro, is an opt-out class bringing state claims. It consists of:

7 All persons who worked for Costco Wholesale Corporation **in California** as
8 hourly, **non-union**, non-exempt employees subject to Costco’s Lockdown
9 procedures between May 15, 2005 and October 1, 2009. The California Class is
10 further subdivided into two Subclasses, consisting of full-time (Subclass 1) and
11 part-time (Subclass 2) hourly, non-exempt employees, respectively.

10 A conservative estimate places the potential FLSA Class at 10,000 individuals, roughly 10
11 percent of Costco’s U.S. warehouse employees.⁴ Based on this estimate, Class II would
12 number roughly 2,000 people, since about a quarter of Costco’s U.S. warehouses are in
13 California, and about 80 percent of those are non-unionized.⁵

14 **C. Costco’s Centralized Corporate Structure**

15 Costco, a publicly traded corporation headquartered in Issaquah, Washington, operates
16 an international chain of retail “warehouses,” selling food and household goods to “members,”
17 who include both customers and employees.⁶ Costco operates more than 400 warehouses
18 throughout the United States, employing more than 100,000 people.⁷ As with most large retail
19 chains, Costco’s human resources function is highly centralized. Compensation, security, and

20 _____
21 ⁴ Costco’s document production suggests that “about 10% [of warehouse employees] have
22 schedules where they would leave the warehouse after closing.” The Investor Relations section
23 of Costco’s website lists its number of U.S. warehouse employees at 107,200. *See* Sanford
24 Decl. ¶¶ 16-17; Exh. N. *Castaneda v. Costco* Stinn Declaration, Bates No. C-PYT002392; Exh.
25 O. Costco Company Website, Investor Relations Section.

26 ⁵ Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. at 73:11-18.

27 ⁶ Sanford Decl. ¶ 17; Exh. O. Costco Company Website, Investor Relations Section.

28 ⁷ *Id.*; *see also* Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. at 73:10-15.

1 disciplinary policies and procedures are promulgated in manuals and “agreements” drafted at
2 headquarters and circulated to all warehouse employees.⁸

3 **D. Costco’s Centralized and Uniformly Applied Compensation Policies**

4 Costco’s compensation policies are set forth in an “Employee Agreement” written in the
5 corporate office.⁹ This Agreement covers Costco’s non-union employees, who make up the
6 “vast majority” of its hourly workers.¹⁰ Costco tracks the hours of hourly employees with an
7 automated timecard system (“ATS”)¹¹ in which employees record time by scanning or
8 “swiping” their company badges.¹² The Employee Agreement states that hourly employees
9 must record the “exact” hours worked, down to the minute (“Timecard Policy”).¹³ In
10 determining the compensation owed to an hourly employee, Costco relies on the ATS, which
11 calculates the hours worked up to the time the employee “swipes out” for the day
12 (“Compensation Policy”).¹⁴

13
14
15
16 ⁸ Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. at 42:1-12.

17 ⁹ *Id.* at 41:6-42:6; 125:11-15.

18 ¹⁰ *Id.* at 118:12-21.

19 ¹¹ Sanford Decl. ¶¶ 15, 18-19; Exh. M. Stalwick Dep. at 103:15-21; Exh. P. Ahmed Dep. at
20 32:8-14; Exh. Q. Mattis Dep. at 46:13-47:6.

21 ¹² Sanford Decl. ¶ 20; Exh. R. “Costco Wholesale Automated Timecard System Policies.”

22 ¹³ Sanford Decl. ¶¶ 15, 21-22; Exh. M. Stalwick Dep. at 136:14-137:16 (hourly employees
23 must “swipe” their time cards when they begin or end their shift, and when they take and return
24 from breaks); Exh. S. 2004 Costco Wholesale Employee Agreement at Section 11.9, C-
25 PYT000162; Exh. T. 2007 Costco Wholesale Employee Agreement at Section 11.10, C-
26 PYT000247 (requiring employees to record “exact[ly]” when they start and end their shift).

27 ¹⁴ Sanford Decl. ¶¶ 15, 19; Exh. M. Stalwick Dep. at 103:14-19; Exh. Q. Mattis Dep. at 46:13-
28 47:6.

1 **E. Costco’s Centralized and Uniformly Applied Lockdown Policy**

2 Costco’s policies are set forth in the Costco Loss Prevention Manual (“Manual”), which
3 is created by the corporate office and distributed to all U.S. warehouses.¹⁵ The 2004 Manual,
4 applicable throughout the Class Period, required warehouse managers to follow specific
5 opening and closing procedures. Managers were directed to lock the buildings to stop
6 employees from leaving while money from the registers was being collected and secured.¹⁶

7 After the last member has been served, *all perimeter alarms must be set*. One
8 door may be bypassed if a local audible alarm is installed and activated. This
9 door, used for employees to exit the building, should be opened only on a fixed
10 schedule (suggest 15 minute intervals). *No employees should be given access to*
11 *or allowed to exit the building while register tills are collected and secured in*
12 *the vault.*¹⁷

13 Compliance with the Lockdown Procedures during the Class Period was not voluntary.
14 Rather, Costco managers were expected to strictly enforce the Manual’s procedures:

15 Since the security of company assets, including employees buildings,
16 merchandise and cash, is a primary concern, *minimum security procedures have*
17 *been established for all locations*. These security procedures reinforce security
18 at opening and closing times which employees are most vulnerable as well as
19 addressing alarm response situations, holiday building checks and armored car
20 pickup procedures.¹⁸

21 ¹⁵ Sanford Decl. ¶¶ 15, 18; Exh. M. Stalwick Dep. at 41:6-42:12; Exh. P. Ahmed Dep. at 45:6-
22 17.

23 ¹⁶ Sanford Decl. ¶ 23; Exh. U. 2004 Member Service/Loss Prevention Manual at Section 6.5,
24 Opening/Closing Procedures, C-PYT000260- C-PYT000261.

25 ¹⁷ *Id.* at Section 6.8, C-PYT003394. Costco updated portions of its Loss Prevention
26 Procedures Manual from time to time, “as something [was] noticed basis.” The lockdown
27 procedures at issue in this case were set forth in Section 6 of the Manual entitled
28 “Opening/Closing Procedures,” and was in effect from October 4, 2004 through October 2009;
see also Sanford Decl. ¶¶ 15, 18; Exh. M. Stalwick Dep. at 77:5-19; Exh. P. Ahmed Dep. at
88:15-17; 96:16-23; 97:22-25.

¹⁸ Sanford Decl. ¶ 23; Exh. U. 2004 Member Service/Loss Prevention Manual at Section 6.10,
Opening/Closing Procedures, C-PYT003392.

1 Thus, while managers were permitted to be “more stringent” in applying the Lockdown
2 Procedures, they could not be *less* strict than the “minimum guidelines that must be followed to
3 protect all company assets.”¹⁹ A manager who allowed an employee to exit while register tills
4 were being pulled could be subject to disciplinary action.²⁰ Similarly, an employee who did not
5 follow the Lockdown Policy would have “trouble with the supervisor.”²¹

6 Consistent with Costco’s Lockdown policy, Plaintiffs and potential Class Members
7 were subject to unpaid Lockdowns on a regular basis throughout the Class Period. Mary
8 Pytelewski, the former Lead Plaintiff and an employee at the San Marcos, California Costco
9 warehouse, described waiting for managers during closing as a “regular, daily thing that we
10 did.”²² She testified: “I’ve only seen the door unlocked one time during a pull,” when a
11 manager flouted the guidelines to let another manager leave.²³ Named Plaintiff Eric Stiller
12 testified that at the Vista, California, warehouse he had to wait to leave “95% of the time.”²⁴

16 ¹⁹ *Id.* at Section 6.8 Opening/Closing Procedures, C-PYT003394 (emphasis added); *see also*
17 Sanford Decl. ¶ 18; Exh. P. Ahmed Dep. at 47:8 (confirming that the manual states that closing
18 procedure is “a minimum guideline that must be followed.”).

19 ²⁰ Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. 54:5-17.

20 ²¹ Sanford Decl. ¶¶ 3, 7, 8, 18; Exh. A. Pytelewski Dep. at 126:2-3:11-12 (stating that she got
21 “in trouble” for opening the alarmed door and “was told never to do that again”); Exh. E. Stiller
22 Dep. at 40:1-2:4-5 (“if you wanted to work tomorrow, you didn’t push that door...We were
23 told that we would be terminated if we opened an unauthorized door”); Exh. F. Vrismo Dep. at
24 77:5-6 (pushing open the door “would set off the alarms and we’d be in big trouble”); Exh. P.
25 Ahmed Dep. 37:19-38:1.

26 ²² Sanford Decl. ¶ 3; Exh. A. Pytelewski Dep. at 173:22-23.

27 ²³ *Id.* at 161:13-14.

28 ²⁴ Sanford Decl. ¶ 7; Exh. E. Stiller Dep. at 47:21-22.

1 Former plaintiffs, including Wireless Advocates employees,²⁵ many of whom worked at kiosks
2 in multiple Costco warehouses, confirmed in depositions that the Lockdown Policy was
3 systematically applied.²⁶

4 For example, Joshua Paul Mendoza was a Wireless employee who worked closing
5 shifts at Costco warehouses in Azusa, Alhambra, and La Habra, California.²⁷ He testified that,
6 after completing his closing duties and clocking out, he almost always had to wait at the exit
7 until a Costco manager released him.²⁸ The wait at Azusa and La Habra averaged from twenty-
8 five to forty-five minutes.²⁹ Costco managers told Mr. Mendoza that this uncompensated wait
9 time was due to “their policy” requiring that they release employees only after jewelry and
10 other high-value items were secured.³⁰ His manager explained to him that this was “standard
11 procedure” and “Costco safety protocol.”³¹ Plaintiff Eric Stiller similarly testified that the
12 closing procedures at the Carlsbad and Vista warehouses were “pretty much identical,” and that
13 “[p]rocedures in stores are sent down by corporate, and they do them in a certain way.”³²

14
15
16 ²⁵ Wireless Advocates, LLC is a third-party provider of wireless and related products and
17 services which operates kiosks at Costco warehouses. Wireless Advocates was originally a
18 defendant in this case and recently settled.

19 ²⁶ Sanford Decl. ¶¶ 10-14; Exh. H. Clements Dep. at 39:8-14; Exh. I. Mendoza Dep. at 27:18-
20 19:23, 34:4-5:7-8, 43:20-23; 44:3:6-7; Exh. J. Daniels Dep. at 59:23-60:2:25-61:5:12-17; Exh.
21 K. Mascarin Dep. at 36:13-19, 40:5-11, 75:18:22; Exh. L. Clarice Pytelewski Dep. at 38:15,
22 39:2:5:8.

23 ²⁷ Sanford Decl. ¶ 11; Exh. I. Mendoza Dep. at 15-16; 26.

24 ²⁸ *Id.* at 27:18-19:23:35-28:1, 34:4-5:7-8.

25 ²⁹ *Id.* at 43:20-23, 45:5-7, 84:10.

26 ³⁰ *Id.* at 39:17-21.

27 ³¹ *Id.* at 46:21-24, 47:7-8:10-12.

28 ³² Sanford Decl. ¶ 7; Exh E. Stiller Dep. at 32:11-15.

1 Declarant Kristen Nicolls, who worked as a front-end assistant at a Costco warehouse in
2 Burlington, Washington from October through December 2007, confirms that the Lockdown
3 Policy was applied in that Pacific Northwest location as well. Ms. Nicolls experienced regular,
4 unpaid Lockdowns lasting between ten and thirty minutes.³³

5 **F. Costco’s Centralized and Uniformly Applied Disciplinary Policy**

6 Costco’s Disciplinary Policy is set forth in the Employee Agreement. Under this Policy,
7 employees are disciplined according to the severity and regularity of a violation of company
8 policies.³⁵ Disciplinary actions range from “corrective consultations” to termination.³⁶ There
9 are “two paths” to termination: One is based on recurrent violations; the other, on a single
10 terminable event.³⁷ An employee’s failure to abide by Costco’s Timecard Policy may result in
11 disciplinary action. In fact, if an employee fails to record her “exact” time on three occasions,
12 she may be subject to immediate termination.³⁸

13 _____
14 ³³ Declaration of Kristen Nicolls (“Nicolls Decl.”) ¶¶ 2, 5.

15 ³⁵ Sanford Decl. ¶¶ 21-22; Exh. S. 2004 Employee Agreement at Section 11.1-11.5, C-
16 PYT000157-000161; Exh. T. 2007 Employee Agreement at Section 11.1-11.4, C-PYT000236-
17 C-PYT000242.

18 ³⁶ Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. at 93:6-16:22-94:2.

19 ³⁷ *Id.*

20 ³⁸ Sanford Decl. ¶¶ 15, 21-22; Exh. M. Stalwick Dep. at 95:4-15; Exh. S. 2004 Employee
21 Agreement at Section 11.2-11.3, C-PYT000159-C-PYT000160; Exh. T. 2007 Employee
22 Agreement at Section 11.3, C-PYT000237-C-PYT000238 (listing “excessive policy
23 violations,” including as grounds for “immediate termination”) *and* at Section 11.4, C-
24 PYT000242 (“[t]hree separate failures to swipe consistently or accurately in a 30-day period is
25 considered “excessive”).

1 Likewise, Costco's Tardiness Policy tracks employee tardiness to the minute. An
2 employee who is four minutes late to work is considered "tardy" and in violation of company
3 policy.³⁹ Moreover, as Costco's Director of Human Resources testified, an employee who
4 regularly clocks out one minute after his or her scheduled shift ends may be subject to
5 disciplinary action.⁴⁰ Being "tardy" on three separate occasions is grounds for a corrective
6 consultation, and three corrective such consultations are grounds for termination.⁴¹ Costco
7 strictly enforces both its Timecard and Tardiness Policies, as evidenced by the fact that
8 Costco's personnel files are littered with notes of corrective consultations for minor timecard
9 violations.⁴²

10 Although Costco's Rule 30(b)(6) designee asserted that employees should note time
11 discrepancies in the "Exception Log,"⁴³ Costco actively discouraged employees from doing so
12 during the Class Period.⁴⁴ Indeed, Costco employees faced discipline for "excessive" use of the
13

14 ³⁹ Sanford Decl. ¶¶ 21-22; Exh. S. 2004 Employee Agreement at Section 11.4, C-PYT000160;
15 Exh. T. 2007 Employee Agreement at Section 11.3, C-PYT000240.

16 ⁴⁰ Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. at 140:6-8 ("It's not about" what they could have
17 done "or the minutes. It's about whether you [are] there after your scheduled shift").

18 ⁴¹ *Id.* at 95:4-15.

19 ⁴² Sanford Decl. ¶¶ 7, 8, 24; Exh. E. Stiller Dep. at 87:14-19; Exh. F. Vrismo Dep. at 104:6-13;
20 Exh. V. Eric Stiller Corrective Consultations.

21 ⁴³ Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. at 97:11-24.

22 ⁴⁴ *Id.* at 100:16-21 (Stalwick recited from Exhibit 1, "The ATS Time Card Except Log (revised
23 October 2007) may not be manually revised or altered at the locations. Use as little as possible,
24 have a manager and employee approve discrepancies as they occur."); *see also* Sanford Decl. ¶
25 25; Exh. W. Expert Report of Brian T. Farrington at 25-26 (noting that employees either were
26 not permitted or did not believe they were permitted to note Lockdown time in the Exception
27 Log and that, "[i]f the time was . . . worked, it was the employer's responsibility to see that it
28 was recorded . . .").

1 Exception Log, as well as for working unapproved overtime.⁴⁵ Costco considered the use of
2 the Log an ATS “swipe error,” three of which were grounds for a disciplinary consultation.⁴⁶
3 Thus, warehouse employees who worked closing shifts faced a choice of evils: work without
4 pay during Lockdowns or face disciplinary action for violating companywide policies.

5 In October 2009, to its credit, Costco thoroughly revised the closing procedures set
6 forth in its Manual.⁴⁷ Warehouse managers are now instructed to prioritize allowing employees
7 who have completed their shifts to exit as soon as possible. During the cash register and
8 jewelry pulls, a manager stands at the door to let employees leave. “Whe[n] safety or security
9 concerns require delays in employees exiting,” managers should permit clocked-out employees
10 to either clock back in and work, “or [to] use the exception log to claim compensation for
11 delays.”⁴⁸ While laudable, Costco’s belated alteration of its closing policies and practices also
12 underscores the fact that the unpaid Lockdown time that warehouse employees experienced
13 during the Class Period resulted directly from Costco’s centralized guidelines in the Manual.

14 **III. ARGUMENT**

15 **A. The Court Should Conditionally Certify Class I**

16 **1. The Standard for Certification of an FLSA Collective Action Is** 17 **Lenient, and Courts Routinely Grant Conditional Certification**

18 For cases such as this, where multiple employees share a common cause of action
19 against their employer under the FLSA, Congress authorized collective actions on behalf of
20 “similarly situated employees”:
21
22

23 ⁴⁵ Sanford Decl. ¶ 15; Exh. M. Stalwick Dep. at 113:23-114:8.

24 ⁴⁶ *Id.*; *see also* Sanford Decl. ¶¶ 21-22; Exh. S. 2004 Employee Agreement at Section 11.3, C-
25 PYT000160; Exh. T. 2007 Employee Agreement at Section 11.4, C-PYT000242.

26 ⁴⁷ Sanford Decl. ¶ 18; Exh. P. Ahmed Dep. at 91:13-16.

27 ⁴⁸ Sanford Decl. ¶ 23; Exh. U. Exh. U. 2004 Member Service/Loss Prevention Manual at
28 Section 7.34, Supervisor Responsibilities, C-PYT003386.

1 [A]n action may be maintained against any employer in any federal or state
2 court . . . by any one or more employees for and in behalf of himself and other
3 similarly situated employees. No employee shall be a party plaintiff to any
such action unless he gives his consent in writing to become such a party and
such consent is filed in the court in which such action is brought.

4 29 U.S.C. § 216(b); *see also Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 167-68 (1989)
5 (citing same). The opt-in collective action procedure under § 216(b) allows workers to more
6 effectively “vindicate rights by the pooling of resources,” while, at the same time, “[t]he
7 judicial system benefits by efficient resolution in one proceeding of common issues of law and
8 fact arising from the same alleged . . . [unlawful] activity.” *Id.* at 170. The class action
9 standards of Rule 23 do not apply to FLSA collective actions. *See* Fed. R. Civ. P. 23 advisory
10 committee note (1996 amendments).

11 Most trial courts in this Circuit apply a two-step approach to determine whether the
12 members of a proposed FLSA class are “similarly situated.” *See, e.g., Murillo v. Pacific Gas &*
13 *Elec. Co.*, 266 F.R.D. 468, 470-71 (E.D. Cal. 2010); *Kress v. PricewaterhouseCoopers, LLP*,
14 263 F.R.D. 623, 627-628 (E.D. Cal. 2009); *Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530,
15 536 (N.D. Cal. 2007); *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 466-467 (N.D. Cal.
16 2004). The first step, known as the “notice stage,” occurs early in the case, when the court
17 decides, based on the pleadings and submitted evidence, whether the class members are
18 sufficiently alike that they should be notified of the action and given the opportunity to opt in.
19 *See Murillo*, 266 F.R.D. at 470-71; *Kress*, 263 F.R.D. at 627-28. After “conditional
20 certification” and discovery regarding the claims of opt-in class members, a court may revisit
21 the “similarly situated” inquiry at the second step, the “merits phase,” if the defendant moves to
22 decertify the class. *See, e.g., Leuthold*, 224 F.R.D. at 467; *Murillo*, 266 F.R.D. at 471.

23 A plaintiff’s burden at the instant, first stage is “a lenient one.” *Lewis v. Wells Fargo &*
24 *Co.*, 669 F. Supp. 2d 1124, 1128 (N.D. Cal. 2009); *see also Adams*, 242 F.R.D. at 563 (noting
25 that, under the “lenient standard,” the “usual result is conditional certification”). To obtain
26 conditional certification and notice, one need only show that the proposed class members’
27 claims share “some identifiable factual or legal nexus,” such that collective treatment promotes
28 judicial efficiency and comports with the broad remedial policies underlying the FLSA.” *Hill*

1 v. *R+L Carriers, Inc.*, 690 F. Supp. 2d 1001, 1009 (N.D. Cal. 2010) (internal quotation
2 omitted); *Lewis*, 669 F. Supp. 2d at 1127 (same). This requirement is typically met where, as
3 here, the “plaintiffs make substantial allegations that the putative class members were subject
4 to a single illegal policy, plan, or decision.” *Murillo*, 266 F.R.D. at 471 (quoting *Adams*, 242
5 F.R.D. at 536) (emphasis added); *accord Hill*, 690 F. Supp. 2d at 1009.

6 Moreover, given such substantial allegations, “it is inappropriate for the court to
7 entertain an inquiry on the merits. The fact that such an inquiry will be necessary in the future
8 [after further discovery] does not constitute a sufficient ground to prevent putative class
9 members from receiving notice.” *Mowdy v. Beneto Bulk Transport*, No. C 06-056982, 2008
10 U.S. Dist. LEXIS 26233, at *19 (N.D. Cal. Mar. 31, 2008) (Patel, J.); see *Adams*, 242 F.R.D. at
11 535, 539.

12 2. The Class I Members Are Similarly Situated

13 The evidence summarized above demonstrates that Mr. Stiller and the proposed FSLA
14 Class Members — full-time, non-exempt hourly warehouse employees in the United States
15 who experienced Lockdowns during the Class Period — are similarly situated, in that they
16 were subject to a single illegal policy that deprived them of wages. This evidence of common
17 on-the-job experiences resulting from centralized instructions readily satisfies the lenient
18 standard for conditional certification of Class I. *Cf. Harris v. Vector Mktg. Corp.*, No. C-08-
19 5198, 2010 U.S. Dist. LEXIS 56110 (N.D. Cal. May 18, 2010) (Chen, J.) (conditionally
20 certifying statewide collective action where plaintiff relied on just four declarations showing
21 that employees were not paid for initial training); *Hill*, 690 F. Supp. 2d at 1009-10
22 (conditionally certifying nationwide collective action based on deposition testimony,
23 defendant’s operating manual, and job advertisements); *Kress*, 263 F.R.D. at 630-31
24 (conditionally certifying nationwide collective action for overtime for training, where plaintiffs
25 proffered declarations and documentation to show that putative class members were similarly
26 trained and subject to supervision).

27 Plaintiff expects Costco to argue that a collective action is unsuited to “off-the-clock”
28 claims. Specifically, Costco may claim that, despite the unambiguous and mandatory wording

1 of the companywide Lockdown Policy, (1) not every warehouse manager followed this Policy,
2 and (2) the circumstances of every Lockdown experienced by every Class Member would
3 require individualized inquiries at trial. Courts have properly rejected such broad-brush attacks,
4 however, on the grounds that, at the notice stage, plaintiffs need not show “that every facility
5 relevant to the proposed class maintains an illegal policy,” or that all potential plaintiffs were
6 harmed to an “identical or even similar” extent. *Adams*, 242 F.R.D. at 537 (“[t]herefore,
7 actions with off-the-clock allegations are suitable for collective action certification.”); *see also*
8 *Lopez v. G.A.T. Airline Ground Support, Inc.*, No. 09-cv-2268, 2010 U.S. Dist. LEXIS 95636,
9 at *15-16, *36 (S.D. Cal. Sept. 13, 2010) (Gonzalez J.) (conditionally certifying FLSA class
10 based on alleged failure to pay for travel time, despite factual disparities among work sites,
11 because “[t]he legal issue of whether [defendant] should compensate employees for this
12 commuting time is common to all class members”); *Gilbert v. Citigroup, Inc.*, No. 08-0385,
13 2009 U.S. Dist. LEXIS 18981 (N.D. Cal. Feb. 18, 2009) (Conti, J.) (conditionally certifying
14 nationwide collective action for off-the-clock claims based on five declarations from within
15 California and company documents showing uniform transfer and compensation policies
16 toward employees in plaintiff’s position); *Wren v. RGIS Inventory Specialists*, No. C 06-05778,
17 2007 U.S. Dist. LEXIS 95439, at *19-27 (N.D. Cal. Dec. 1, 2007) (Spero, M.J.) (conditionally
18 certifying two nationwide FLSA subclasses for off-the-clock claims where plaintiffs submitted
19 declarations attesting to practices matching written company policies).

20 Costco’s abstract arguments about alleged dissimilarities among claims are more
21 properly addressed *after* potential Class I Members are given notice and an opportunity to opt
22 in, and the parties and the Court can determine exactly what, and how diverse, those claims
23 actually are. *See, e.g., Hill*, 690 F. Supp. 2d at 1009 & n.16 (noting that “the disparate factual
24 and employment settings of the individual plaintiffs [and] various defenses available to the
25 defendant which appear to be individual to each plaintiff” are evaluated during second stage);
26 *Lewis*, 669 F. Supp. 2d at 1128 (“[a]fter discovery is complete, Defendant can move for
27 decertification, and the Court will then apply the heightened second-tier review.”).

28

1 **3. The Court Should Order *Hoffman-La Roche* Notice**

2 Upon conditional certification, potential FLSA Class Members are entitled to “accurate
3 and timely notice concerning the pendency of the collective action, so that they can make
4 informed decisions as to whether to participate.” *Hoffman-La Roche*, 493 U.S. at 170.
5 Mr. Stiller therefore requests that the Court order the parties to confer and cooperate to draft an
6 opt-in notice to potential members of Class I, combined with an opt-out notice, pursuant to
7 Rule 23(c)(2)(B), for Class II. *See Adams*, 242 F.R.D. at 532, 539; *Cervantez v. Celesica Corp.*,
8 253 F.R.D. 562, 577 (C.D. Cal. 2008).

9 **B. The Court Should Certify Class II Under Rule 23(b)(3)**

10 Plaintiff Joseph Moro seeks certification of the California Class under Rule 23(b)(3) of
11 the Federal Rules of Civil Procedure for Costco’s violations of California wage and hour laws.

12 **1. The Rule 23 Standard**

13 Mr. Moro must show, first, that Class II meets the four prerequisites set forth in Rule
14 23(a): (1) Class II is so numerous that joinder of all members is impracticable; (2) there are
15 questions of law or fact common to the Class; (3) Mr. Moro’s claims are typical of those of the
16 Class; and (4) he will fairly and adequately represent the Class’s interests. Additionally, courts
17 have construed Rule 23(a) to require that a class be ascertainable by objective criteria. *See*,
18 *e.g., Schwartz v Upper Deck Co.*, 183 FRD 672, 679-80 (S.D. Cal. 1999). After meeting the
19 Rule 23(a) requirements, Plaintiff must show that Class II fits within one of the three
20 subdivisions of Rule 23(b), in this case, subpart (b)(3). *See Fed. R. Civ. P. 23(a)-(b)*.

21 The question at this stage “is not whether the plaintiff or plaintiffs have stated a cause of
22 action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.”
23 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (internal citation omitted). In
24 evaluating the evidence, the Court “take[s] the substantive allegations of the complaint as true
25 so long as those allegations are sufficiently specific to permit an informed assessment as to
26 whether the requirements of Rule 23 have been satisfied.” *In re Wells Fargo Home Mortg.*
27 *Overtime Pay Litig.*, No. C 06-01770, 2010 U.S. Dist. LEXIS 3132, *14-15 (N.D. Cal. Jan. 12,
28 2010) (Patel, J.) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975)).

1 **2. Class II Satisfies Rule 23(a)**

2 **a. Class II Is Readily Ascertainable**

3 The proposed Class is sufficiently ascertainable to qualify for certification. Class II
4 consists of all non-union, non-exempt hourly Costco employees who worked in California and
5 who were subject to Lockdowns between May 15, 2005 and October 1, 2009. Because
6 potential Class Members can identify themselves by objective criteria (*e.g.*, whether they were
7 subject to Lockdowns), rather than subjective ones (*e.g.*, whether they were illegally denied
8 wages), the ascertainability requirement is met. *See, e.g., Cervantez*, 253 F.R.D. at 568-69
9 (certifying class of current and former non-exempt employees who “were not provided a meal
10 or rest period to which they were entitled”); *Jankowski v. Castaldi*, No. 01-cv-0164, 2006 U.S.
11 Dist. LEXIS 4237, at *14-15 (E.D.N.Y. Jan. 11, 2006) (Feuerstein, J.) (finding proposed class
12 of employees who were denied overtime pay ascertainable because “whether an individual
13 worked overtime for which they were not paid overtime wages requires no subjective
14 determination”); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 341-42 (S.D.N.Y. 2004)
15 (rejecting defendant’s argument that proposed class of “all non-exempt employees who were
16 not paid overtime compensation for each hour worked in excess of forty hours per week . . . is
17 not defined by the characteristics of an identifiable group”).

18 **b. Class II Is Numerous**

19 Mr. Moro must also show that Class II “is so numerous that joinder of all members is
20 impracticable.” Fed. R. Civ. P. 23(a)(1). “Where the exact size of the class is unknown but
21 general knowledge and common sense indicate that it is large, the numerosity requirement is
22 satisfied.” *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982). As noted
23 above, Costco employs over 100,000 employees and a reasonable estimate indicates that Class
24 II may number as many as 2,000 people.⁴⁹ Joinder on that scale is plainly impracticable. *See*,

25 _____
26 ⁴⁹ Sanford Decl ¶¶ 15-17; Exh. M. Stalwick Dep. at 73:11-18; Exh. N. *Castaneda v. Costco*
27 Stinn Declaration, Bates No. C-PYT002392; Exh. O. Costco Company Website, Investor
28 Relations Section.

1 *e.g.*, *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 632 (N.D. Cal. 2010) (finding numerosity
2 for proposed class of “well over three hundred”); *Robidoux v. Celani*, 987 F.2d 931, 936 (2d
3 Cir. 1993) (“the difficulty in joining as few as 40 class members should raise a presumption
4 that joinder is impracticable.”) (citing 1 Herbert B. Newberg, *Newberg on Class Actions* § 3.05,
5 at 139 (2d ed. 1985)). In addition, Defendant has agreed that the numerosity requirement is met
6 in this case.⁵⁰

7 **c. There Are Common Questions of Law and Fact**

8 Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” As
9 the Ninth Circuit has explained, “Rule 23(a)(2) has been construed permissively. All questions
10 of fact and law need not be common to satisfy the rule. The existence of shared legal issues
11 with divergent factual predicates is sufficient, as is a common core of salient facts coupled with
12 disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th
13 Cir. 1998). Moreover, “[t]he commonality test is ‘qualitative rather than quantitative’— one
14 significant issue common to the class may be sufficient to warrant certification.” *Dukes v. Wal-*
15 *mart Stores, Inc.*, 603 F.3d 571, 599-600 (9th Cir. 2010) (en banc) (affirming trial court’s
16 finding that plaintiffs exceeded the permissive commonality burden by providing evidence of
17 “company-wide corporate practices and policies”). Even “the fact that class members must
18 individually demonstrate their right to recovery, or that they may suffer varying degrees of
19 injury, will not bar a class action.” *Feret v. Corestates Fin. Corp.*, No. 97-6759, 1998, U.S.
20 Dist. LEXIS 12734, at *23 (E.D. Pa. Aug. 18, 1998) (Yohn, J.) (citing 1 Herbert B. Newberg *et*
21 *al.*, *Newberg on Class Actions* § 3.10, at 3-69 (3d ed. 1992)). “Nor is a class action precluded
22 by the presence of individual defenses against class plaintiffs.” *Id.*

23
24
25 ⁵⁰ Sanford Decl. ¶ 26; Exh. X. Excerpts from Defendant’s Response to Plaintiffs’
26 Interrogatories (stated that “enough non-exempt Costco employees have worked closing shift at
27 Costco’s warehouses in California during the Class Period to satisfy the numerosity
28 requirement of Rule 23”).

1 Costco has acknowledged that its 2004 Loss Prevention Procedures Manual, which set
2 forth the minimum guidelines for closing procedures, including Lockdowns, applied to all of its
3 United States warehouses.⁵¹ Likewise, Costco’s Compensation and Timecard Policies —
4 which effectively prohibited employees from recording the time spent waiting during
5 Lockdowns — applied to all Class Members.⁵³ The testimony by deposition and declaration of
6 Plaintiffs, former plaintiffs, a non-plaintiff Costco warehouse employee, and Costco executives,
7 together with Costco documents, confirm the broad applicability of the relevant policies.⁵⁴

8 Thus, the claims of the proposed Class II Members share several common questions,
9 each of which independently satisfies Rule 23(a)(2). Common *factual* issues include whether
10 the Costco policies described above forced Class Members to spend unpaid time in Lockdowns,
11 and whether those policies gave Costco an unfair advantage over competing businesses.
12 Common questions of *law* include whether Costco violated California’s labor and competition
13 laws by requiring Mr. Moro and the Class to remain at work without pay after clocking out for
14 the day; whether Mr. Moro and the Class are entitled to “straight time” back pay for non-
15 overtime hours spent in Lockdowns; and whether Mr. Moro and the Class are entitled to

16
17
18
19
20 _____
21 ⁵¹ Sanford Decl. ¶¶ 15, 18; Exh. M. Stalwick Dep. at 67:1-13; Exh. P. Ahmed Dep. at 45:8-9.

22 ⁵³ Sanford Decl. ¶¶ 15, 22; Exh. M. Stalwick Dep. at 41:11-14, 42:1-12; Exh. T. 2007 Costco
23 Wholesale Employee Agreement at Section 11.10, C-PYT000247.

24 ⁵⁴ See Footnote 2; see also Sanford Decl. ¶¶ 15, 18, 21, 22; Exh. M. Stalwick Dep. at 67:1-13;
25 Exh. P. Ahmed Dep. at 45:8-9; Exh. S. 2004 Costco Wholesale Employee Agreement C-
26 PYT000157-C-PYT000162; Exh. T. 2007 Costco Wholesale Employee Agreement C-
27 PYT000236-C-PYT000247; Nicolls Declaration.

1 overtime pay to the extent Lockdowns caused them to work overtime. These common questions
2 form the core of the Class claims and satisfy the minimal commonality requirement.⁵⁵

3 **d. Mr. Moro’s Claims Are Typical of the Class II Claims**

4 Rule 23(a)(3) requires that the claims of a representative plaintiff be “typical” of those
5 of the class he or she seeks to represent. As the Ninth Circuit explained in *Hanlon*, “[u]nder the
6 rule’s permissive standards, representative claims are ‘typical’ if they are reasonably
7 coextensive with those of absent class members; they need not be substantially identical.” 150
8 F.3d at 1020; *see also Dukes*, 509 F.3d at 1184 (same). As long as class members have been
9 affected in the “same general fashion,” factual variations among claims do not defeat typicality.
10 *Robidoux*, 987 F.2d at 936-37. Nor do disparities in degrees of injury among class members.
11 *See, e.g., Lymburner v. U.S. Fin. Funds, Inc.*, 263 F.R.D. 534, 540 (N.D. Cal. 2010) (citing
12 William W. Schwarzer, *et al.*, *Federal Civil Procedure Before Trial* § 10:293 (Rutter Group
13 2009)); *Trautz v. Weisman*, 846 F. Supp. 1160, 1167 (S.D.N.Y. 1994) (finding typicality among
14 claims of former adult care facility residents suing the facility for dangerous conditions, even
15 though “the damage calculation may prove to be difficult”).

16 Here, the Named Plaintiff’s claims are typical of those of the proposed Class II because
17 all of the claims arise from the same general course of events, namely, the companywide
18 enforcement of Costco’s Lockdown, Timecard, and Compensation Policies. *See, e.g., General*
19 *Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (named plaintiff’s claims are
20 generally typical under Rule 23(a)(3) if he or she is a member of the proposed class).

21
22
23
24 ⁵⁵ In *Castaneda v. Costco*, the Superior Court apparently found insufficient commonality with
25 respect to a proposed class of all California warehouse employees, with claims relating both to
26 Lockdowns and bag checks during business hours. *See Castaneda* Tr. 8-9 (Feb. 1, 2010) (Dkt.
27 79-13). As Plaintiffs previously briefed and argued, the narrowing of the proposed California
28 Class and its claims here renders the *Castaneda* court’s commonality reasoning inapplicable.

1 **e. Mr. Moro and Counsel Will Adequately Represent the Class**

2 Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect
3 the interests of the class.” This requires showings that (1) Mr. Moro has no conflicts of interest
4 with the proposed Class II, and (2) he and the proposed Class are represented by qualified and
5 competent counsel. *See Hanlon*, 150 F.3d at 1020. Both components of adequacy are satisfied
6 here. Mr. Moro and other hourly, non-union, non-exempt California Costco warehouse
7 employees who were unlawfully detained in Lockdowns share the same claims and the same
8 interest in obtaining relief. Moreover, Sanford, Wittels & Heisler, LLP (“SWH”) and Chapin
9 Fitzgerald Sullivan, LLP (“Chapin Firm”) are experienced in employment and wage-and-hour
10 class action litigation. SWH has served and is currently serving as Lead Counsel in over 50
11 class action wage and hour and Title VII matters throughout the United States. SWH has
12 recently resolved successfully a number of class action matters (e.g., Novartis Title VII
13 nationwide class action certified, tried and won, and recently settled on a class basis for
14 \$175,000,000.00; sanofi Title VII nationwide class action settled on a class basis for over
15 \$14,000,000.00; C&S nationwide class action settled on a class basis; Smith & Nephew Title
16 VII class action settled on a class basis). The Chapin Firm has served as class counsel in
17 approximately seven cases. The Court should thus find that Mr. Moro and his counsel will
18 adequately represent the California Class, and that all of the prerequisites of Rule 23(a) are met.

19 **3. Class II Is Maintainable Under Rule 23(b)(3)**

20 A class that satisfies Rule 23(a) may be certified under Rule 23(b)(3) provided “the
21 court finds that questions of law or fact common to class members predominate over any
22 questions affecting only individual members, and that a class action is superior to other
23 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.
24 23(b)(3). “The common issues must only predominate; they do not have to be dispositive of
25 the litigation.” *Sullivan v. Kelly Servs., Inc.*, 268 F.R.D. 356, 364 (N.D. Cal. 2010) (citing *In*
26 *re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29 (D.D.C. 2001)).

27 Further, “some variation among the individual [class members], as well as some
28 potential difficulty in proof,” including as to damages, does not defeat predominance. *Local*

1 *Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152,
2 1163 (9th Cir. 2001); *see also Blackie* 524 F.2d at 905 (“The amount of damages is invariably
3 an individual question and does not defeat class action treatment.”); *Farmer v. Directsat USA,*
4 *LLC*, No. 08 C 3962, 2010 U.S. Dist. LEXIS 105738, at *67-68 (N.D. Ill. Oct. 4, 2010) (St.
5 Eve, J.) (rejecting defendant’s claim that factual differences, including deviations from
6 company policy and variations in hours worked, defeated class certification, noting that
7 predominance inquiry “focus[es] on questions of liability, not damages”); *Velez v. Majik*
8 *Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2005 U.S. Dist. LEXIS 709, at *18 (S.D.N.Y. Jan. 18,
9 2005) (Scheidlin, J.) (granting Rule 23(b)(3) certification for liability purposes to employees
10 with overtime claims because, “[a]lthough the amount of damages for each class member will
11 necessarily differ, common liability issues otherwise predominate [in that defendant’s alleged]
12 breach of its statutory duties to pay overtime and spread-of-hours compensation at statutorily
13 required rates is the most significant issue in this litigation”); *Jankowski*, 2006 U.S. Dist.
14 LEXIS 4237, at *12 (“It is well-established that individualized defenses or differing amounts of
15 damages do not necessarily defeat predominance.”); *see also* 5 James Wm. Moore *et al.*,
16 *Moore's Federal Practice* §§ 23.21[4], 23.46[2][a] (3d ed. 2003) (“If common questions
17 predominate over individual questions as to liability, courts generally find the predominance
18 standard of Rule 23(b)(3) to be satisfied even if individual damages issues remain.”). The
19 Court should permit the California Class to proceed under Rule 23(b)(3) on the grounds of
20 predominance and superiority.

21 **a. Costco’s Centralized Policies Create Predominant Common**
22 **Issues**

23 The existence of centralized Lockdown, pay, and disciplinary policies at Costco is
24 highly probative of the existence of common issues susceptible to unified proof. In *Mevorah v.*
25 *Wells Fargo Home Mortgage Co.*, 571 F.3d 953 (9th Cir. 2009), the Ninth Circuit Court of
26 Appeals considered whether Rule 23(b)(3) certification was appropriate where the plaintiffs
27 relied largely on the defendant-employer’s policy of treating its employees as exempt from
28 overtime laws. The court observed that “comprehensive uniform policies detailing the job

1 duties and responsibilities of employees carry great weight” in both predominance and
2 superiority determinations. *Id.* at 958-59 (citing *Damassia v. Duane Reade, Inc.*, 250 F.R.D.
3 152, 160 (S.D.N.Y. 2008) (“[w]here . . . there is evidence that the duties of the job are largely
4 defined by comprehensive corporate procedures and policies, district courts have routinely
5 certified classes of employees challenging their classification as exempt, despite arguments
6 about ‘individualized’ differences in job responsibilities.”)).⁵⁶

7 Subsequently, in *Sullivan v. Kelly Services*, the District Court for the Northern District
8 of California considered whether a proposed class of employees of a temporary staffing agency
9 who were denied wages for time spent interviewing with customers satisfied the requirements
10 of Rule 23(b)(3). The agency argued that common issues did not predominate because there
11 was a need for fact-specific inquiries into the degree of control the defendant had over each
12 employee’s time during the interviews. Relying heavily on *Wells Fargo*, the court rejected that
13 argument. Noting that the need for “a fact-specific inquiry does not necessarily prevent
14 common issues from predominating,” the court concluded that the defendant’s “uniform
15 corporate practices and policies” satisfied the predominance requirement. 268 F.R.D. at 363.

16 The *Sullivan* court explained that, in contrast with the general exemption policy at issue
17 in *Wells Fargo*, the common interview procedures in *Sullivan* gave rise to common issues:

18 Defendant relies on inapposite overtime cases in which an employer’s liability
19 was based upon whether class members engaged in duties during the work day
20 that would make them exempt from overtime pay. *See In re Wells Fargo Home*
21 *Mortg. Overtime Pay Litig. (Wells II)*, 571 F.3d 953, 959 (9th Cir. 2009). . . . In
22 these cases, the courts held that predominance cannot be based solely on an
23 employer’s blanket exemption policy but that other uniform corporate policies

23 ⁵⁶ Ultimately, the *Wells Fargo* court decided that the overtime exemption policies did not fit
24 into the category of “centralized work policies,” as the question of whether employees fit
25 within the statutory exemption required individualized inquiries into “where the individual
26 employees actually spent their time.” *Id.* at 959. Here, in contrast, there is no question that
27 Costco’s Lockdown and Compensation Policies applied to all Class Members. *See* Sanford
28 Decl. ¶¶ 15, 18; Exh. M. Stalwick Dep. at 41:11-14; Exh. P. Ahmed Dep. at 45:8-9.

1 could satisfy Rule 23(b)(3). Here, Defendant’s liability is based on its uniform
2 corporate practices and policies regarding the interview process, which
subjected temporary employees to Defendant’s control during the interviews.

3 *Id.* at 364.

4 The facts at issue here are akin to those relied upon by the *Sullivan* court in finding that
5 common issues predominated. Here, as in *Sullivan*, the employer’s failure to compensate
6 employees for time spent working under its control emanated from a central policy raising
7 liability issues common to the Class. As described above, the combination of Costco’s
8 Lockdown, Compensation, and Timecard Policies created a regime that regularly forced Class
9 II Members to work without pay after their closing shifts, in violation of California’s labor
10 laws. The companywide enforcement of these policies and practices gives rise to “a
11 uniformity” of issues “susceptible to common proof” on behalf of Class II. *Wells Fargo*, 571
12 F.3d at 958; *see also, e.g., Noble*, 224 F.R.D. at 345 (finding that common issues predominated
13 regardless of need for individualized determinations regarding damages, exempt status, and
14 labor agreements because, “to prevail on the merits of this claim, plaintiffs must produce
15 evidence that defendants implemented an illegal policy with respect to overtime pay”).

16 Plaintiff anticipates that Costco will challenge predominance on the grounds that its
17 warehouse managers did not always follow the Lockdown Policy required by the 2004 Manual.
18 The argument is “misguided,” as the court described a similar argument in *Sullivan*, because it
19 “attack[s] whether an individual could be a class member, not whether common issues
20 predominate.” 268 F.R.D at 365 n.7. Here, as in *Sullivan*, any employees who were not subject
21 to the unlawful centralized policies simply cannot join the class action. *See id.* If certain Costco
22 employees did not experience Lockdowns at their warehouses, or were not materially affected
23 by them, this would not defeat class certification. *Cf. Ansoumana v. Gristede's Opg. Corp.*, 201
24 F.R.D. 81, 89 (S.D.N.Y. 2001) (“This single issue [of whether the plaintiffs were employees]
25 predominates over all other factual and legal issues presented, because each proposed Plaintiff
26 class member did substantially the same type of work, for the same type of employer, and was
27 assigned in the same sort of way”). Rather, those employees simply would not, by
28 definition, be members of Class II. With regard to the claims of *other* hourly, non-exempt,

1 non-union Costco employees in California who *were* regularly confined at work without pay,
2 Class II clearly satisfies the predominance requirement of Rule 23(b)(3).⁵⁷

3 **b. A Class Action Is Superior to Individual Suits**

4 Plaintiffs satisfy Rule 23(b)(3)'s superiority requirement when they show that "class-
5 wide litigation of common issues will reduce litigation costs and promote greater efficiency,"
6 or that "no reasonable alternative exists." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227,
7 1234-35 (9th Cir. 1996). "Typically, a class action is superior if the case presents a large
8 volume of individual claims that could strain judicial resources if tried separately and if each
9 potential plaintiff[s] recovery may not justify the cost of litigation." *Alba v. Papa John's USA,*
10 *Inc.*, No. C 05-7487, 2007 U.S. Dist. LEXIS 28079, *44 (C.D. Cal. Feb. 7, 2007) (Feess, J.).
11 This standard is met here since the maintenance of individual suits in this case would be
12 unmanageable, costly, and an inefficient use of judicial resources.

13 1. *Interest in individual control.* Rule 23(b)(3) sets out four factors pertinent to a
14 finding of superiority. The first factor is "the class members' interests in individually

15 _____
16 ⁵⁷ While a full analysis of the issue is inappropriate here, Costco's contention that some
17 employees who experienced Lockdowns cannot recover because their unpaid work was *de*
18 *minimis* is primarily a damages issue. *See Kurihara v. Best Buy Co.*, No. C 06-01884, 2007
19 U.S. Dist. LEXIS 64224 at *24-31 (N.D. Cal. Aug. 30, 2007) (Patel, J.). To the extent it bears
20 on liability, however, the issue is amenable to common proof. The relevant factors are the
21 administrative difficulty of recording the time, the aggregate amount of time, and its regularity.
22 *See Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). Costco's 2009 change in
23 policy shows that it is administratively feasible to minimize employees' time in Lockdowns
24 and ensure fair compensation. *See* Sanford Decl. ¶ 25; Exh. W. Expert Report of Brian T.
25 Farrington at 27. And the aggregate amount of unpaid time, and the degree of regularity, that
26 must be shown to make a claim non-*de minimis* can be decided on a Class-wide basis. *See,*
27 *e.g., Wren*, 256 F.R.D. at 206 (concluding that "both the commonality . . . and predominance
28 requirement are met" despite *de minimis* defense).

1 controlling the prosecution or defense of separate actions....” Fed R. Civ. P. 23(b)(3)(A).
2 “This factor is most relevant where each class member has suffered sizeable damages or has an
3 emotional stake in the litigation.” *Alba*, 2007 U.S. Dist. LEXIS 28079, at *45.⁵⁸ “Where
4 damages suffered by each putative class member are not large, this factor weighs in favor of
5 certifying a class action.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir.
6 2001) (citing *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 856
7 (9th Cir. 1982)). Although Costco’s failure to pay off-the-clock wages has caused substantial
8 Class-wide injury, individual Class Members will recover relatively small amounts and are
9 unlikely to be emotionally invested in the case. Moreover, given that no proposed Class
10 Member has filed an individual claim, there is reason to believe Class Members may lack
11 familiarity with the legal system and/or have been discouraged from pursuing individual
12 claims. *See, e.g., Velez*, 2005 U.S. Dist. LEXIS 709, at *19 & n.45.

13 2. *Other litigation.* The second factor is “the extent and nature of any litigation
14 concerning the controversy already begun by or against class members[.]” Fed R. Civ. P.
15 23(b)(3)(B). “This factor is intended to serve the purpose of assuring judicial economy and
16 reducing the possibility of multiple lawsuits.” Charles Alan Wright, *et al.*, *Federal Practice*
17 *and Procedure* § 1780, at 568-70 (2d ed. 1986), *quoted in Zinser*, 253 F.3d at 1191. Although
18 similar (not identical) suits have been brought against Costco in the past, they have all been
19 resolved without trial, to undersigned counsel’s knowledge. Therefore, there is no risk of either
20 multiplicity of suits or inconsistent adjudication, and this factor weighs in favor of certification.

21 3. *Forum.* The third factor relevant to superiority is “the desirability or undesirability
22 of concentrating the litigation of the claims in the particular forum.” Fed R. Civ. P.
23 23(b)(3)(C). In *Haley v. Medtronic, Inc.*, 169 F.R.D. 643 (N.D. Cal. 1996), the court ruled
24 against the plaintiffs on this factor, finding that “where the potential plaintiffs are located
25 across the country and where the witnesses and the particular evidence will also be found

26
27 ⁵⁸ The *Alba* court and others attribute the quoted sentence to the Ninth Circuit’s *Zinser*
28 decision, but those exact words do not appear in *Zinser*.

1 across the country, plaintiffs have failed to establish any particular reason why it would be
2 especially efficient for this Court to hear such a massive class action lawsuit.” *Id.* at 653.
3 Here, the forum is appropriate because virtually all Class II Members presumably reside in
4 California, and the forum is not unduly inconvenient for Costco, which is based outside of
5 Seattle, Washington, and whose counsel is located in Los Angeles, California. Certification
6 should not be denied based on this factor.

7 4. *Other difficulties.* The fourth and last superiority factor addresses “the likely
8 difficulties in managing a class action.” Fed R. Civ. P. 23(b)(3)(D). The Ninth Circuit has
9 established that the trial court should weigh anticipated difficulties against the benefits of a
10 class action. *See Zinser*, 253 F.3d at 1192. In *Zinser*, the Court of Appeals endorsed the
11 reasoning of the trial court in *Haley*, a case that, like *Zinser*, involved allegedly defective
12 pacemaker parts. *See id.* The *Haley* court denied certification in part because

13 the allegedly negligent pacemaker leads were implanted in different individuals
14 in different states by different doctors. As a result, the causes of plaintiffs'
15 injuries are not entirely the same, since the injuries did not occur at the same
16 time, place or under the same conditions. Given the fact that approximately
17 66,000 individuals had these leads implanted, there are potentially 66,000
18 different instances that the Court would have to examine to determine if
19 defendant's conduct was the real cause of injury for each potential plaintiff.

20 169 F.R.D. at 653, *quoted in Zinser*, 253 F.3d at 1192. The instant case differs significantly
21 from *Zinser* and *Haley*, however. As demonstrated above, Costco’s threshold liability to Class
22 II is subject to common proof regarding the enforcement of companywide policies. Since
23 individualized inquiries are unnecessary except as to damages, the proposed class action
24 presents no unusual difficulties or complexity that weigh against certification of Class II.

25 **IV. CONCLUSION**

26 For the foregoing reasons, Plaintiffs respectfully request that the Court:
27 (1) conditionally certify Class I as a nationwide FLSA collective action pursuant to 29 U.S.C.
28 § 216(b); (2) certify Class II, the California Class, under Rule 23(b)(3); and (3) order the parties
to confer and submit a proposed notice to the Classes within fourteen days of the Court’s
certification order. If the parties cannot agree, each side should file its own proposed notice.

1 DATED: November 12, 2010

Respectfully submitted,

2 s/ David W. Sanford

3 David W. Sanford, DC Bar No. 457933
4 Felicia M. Medina, CA Bar No. 255804
5 Kyle Chadwick, DC Bar No. 453003
6 **SANFORD, WITTELS & HEISLER, LLP**
7 1666 Connecticut Ave., NW, Suite 310
8 Washington, DC 20009
9 Telephone: (202) 742-7780
10 Facsimile: (202) 742-7776

11 Steven Wittels, NY Bar No. 2004635
12 Jeremy Heisler, NY Bar No. 1653484
13 Janette Wipper, DC Bar No. 467313
14 **SANFORD, WITTELS & HEISLER, LLP**
15 1350 Avenue of the Americas, Suite 3100
16 New York, NY 10019
17 Telephone: (646) 723-2947
18 Facsimile: (646) 723-2948

19 Edward D. Chapin, CA Bar No. 053287
20 Jill M. Sullivan, CA Bar No. 185757
21 **OF COUNSEL**
22 **SANFORD, WITTELS & HEISLER, LLP**
23 550 West "C" Street, Suite 2000
24 San Diego, CA 92101
25 Tel: (619) 241-4810
26 Fax: (619) 955-5318

27 Michael Ram, CA Bar No. 104805
28 Karl Olson, CA Bar No. 104760
29 **OF COUNSEL**
30 **SANFORD, WITTELS & HEISLER, LLP**
31 639 Front Street, Fourth Floor
32 San Francisco, CA 94111
33 Telephone: (415) 433-4949
34 Facsimile: (415) 433-7311

35 Marc Litton, CA Bar No. 119985
36 **SANFORD, WITTELS & HEISLER, LLP**
37 100 Montgomery Street, Suite 1600
38 San Francisco, CA 94104
39 Telephone: (415) 391-6900
40 Facsimile: (415) 391-6901

Attorneys for the Plaintiffs and the Plaintiff Class