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

STEPHANIE HEREDIA,
Plaintiff,
v.
EDDIE BAUER LLC,
Defendant.

Case No. [16-cv-06236-BLF](#)

**ORDER GRANTING DEFENDANT'S
MOTION FOR DECERTIFICATION;
TERMINATING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AGAINST THE
CERTIFIED CLASS AS MOOT;
DENYING PLAINTIFF'S MOTION TO
MODIFY CLASS DEFINITION**

[Re: ECF 60; 51; 71]

This matter is a wage and hour class action against the well-known outdoor lifestyle brand Eddie Bauer (“Defendant”), alleging that the company failed to compensate its hourly employees for time spent undergoing off-the-clock “exit inspections” of employees’ personal belongings before leaving the store. Plaintiff, Stephanie Heredia, worked as a sales associate at an Eddie Bauer retail store in Gilroy, California from November 2013 to March 2016. During that time, she alleges that she was required to undergo inspections of her personal belongings—otherwise known as “bag checks” or “security inspections”—whenever she left the store. On January 10, 2018, the Court certified a class of “[a]ll current and former non-exempt retail store employees who were employed by Defendant in the State of California at any time from September 28, 2012, through the present.” Order Granting Plaintiff’s Motion for Class Certification (“Cert. Order”) at 19, ECF 33.

Before the Court are three related motions: (1) Defendant’s Motion for Summary Judgment Against the Certified Class (ECF 51), (2) Defendant’s Motion for Decertification (ECF 60), and (3) Plaintiff’s Motion to Modify Class Definition (ECF 71). The Court heard oral arguments on Defendant’s Motion for Summary Judgment on September 12, 2019. The Court also held a hearing

1 on Defendant’s Motion for Decertification on December 5, 2019. The Court finds Plaintiff’s Motion
2 to Modify Class Definition appropriate for disposition without oral argument. *See* Civ. L.R. 7-1(b).
3 Accordingly, the hearing set for January 23, 2020 is VACATED.

4 For the reasons stated in Section II below, the Court GRANTS Defendant’s Motion for
5 Decertification. With the class decertified, Defendant’s Motion for Summary Judgment Against the
6 Certified Class is TERMINATED AS MOOT. Additionally, Plaintiff’s Motion to Modify Class
7 Definition is DENIED for the reasons stated in Section IV below.

8 **I. BACKGROUND**

9 Because Eddie Bauer’s retail stores carry a variety of merchandise that is susceptible to theft,
10 Eddie Bauer requires all of its retail employees to submit to a security inspection before exiting the
11 store, whether the employee’s departure is for a meal break, rest break, or to leave at the end of a
12 shift. *See* Keith Long Deposition (“Long Dep.”) 53:9-15, 55:18-56:2, 65:14-66:7, ECF 29-4, Exh.
13 4. At Eddie Bauer, this security inspection is known as “Personal Property Inspection Policy,” and
14 applies to all retail employees who carry a bag or container that could be used to conceal company
15 merchandise. *See* Long Dep. 55:18-56:2, 58:1-15; Exh. 7 (Store Associate Resource Guide, updated
16 August 2016); Exh. 8 (SOP regarding Package/Personal Property Checks, dated November 10,
17 2016), ECF 29-4. In relevant parts, the written policy provides:

18 All associates must have their handbags, packages, briefcases,
19 backpacks and other parcels, inspected by a member of store
20 management whenever they leave the store. Package checks are also
21 completed for breaks and meal periods, or whenever associates leave
22 the store for any reason.

23 Long Dep., Exh. 8. It is undisputed that Eddie Bauer’s written policies are silent on whether the
24 employees must clock out before or after undergoing the required security inspections. *See*
25 Defendant’s Motion for Decertification (“Decert. Mot.”) at 2, ECF 60-1; Opposition to Motion for
26 Decertification (“Decert. Opp’n”) at 1, ECF 65. The parties dispute, however, whether in practice,
27 Eddie Bauer employees undergo inspection while off the clock. *See* Decert. Mot. at 1-2; Decert.
28 Opp’n at 1-2.

At the time the Court certified the class, only two depositions had been conducted: (1)

1 Heredia and (2) Eddie Bauer’s FRCP 30(b)(6) witness, Keith Long, who was designated to testify
2 to topics related to Eddie Bauer’s security inspection policies. Cert. Order at 2. Evidence submitted
3 for the motion to certify the class showed that Heredia worked as a sales associate at Eddie Bauer’s
4 Gilroy store from November 2013 to March 26, 2016. *See* Declaration of Stephanie Heredia
5 (“Heredia Decl.”) ¶ 2, ECF 29-4, Exh. 5. During her deposition, Heredia explained that she always
6 clocked out before waiting for a manager to become available to perform the security check and
7 then undergoing the inspection. Heredia Deposition (“Heredia Dep.”) 74:19-22; 118:24-119:3, ECF
8 29-4, Exh. 3. According to Heredia, “[e]verybody waited until after they clocked out” to have their
9 bags checked. Heredia Dep. 46:19-22. Heredia testified that her managers instructed her to clock
10 out and wait at the front of the store before the manager would conduct a bag check. Heredia Decl.
11 ¶ 5; *see also* Heredia Dep. 55:11-17, 123:22-25, 126:6-13. On the other hand, Long testified during
12 his deposition that it is Eddie Bauer’s policy to train managers to conduct personal property checks
13 while employees are still clocked in. Long Dep. 77:14-20.

14 Based on this limited record, in January 2018, the Court certified a class of “All current and
15 former non-exempt retail store employees who were employed by Defendant in the State of
16 California at any time from September 28, 2012, through the present.” Cert. Order at 19. The Court
17 found that at least two common questions exist: (1) whether Eddie Bauer’s policy and practice was
18 to mandate that security checks be performed off-the-clock; and, if so, (2) whether time spent by
19 employees off-the-clock for security checks should be deemed as hours worked and thus
20 compensated as wages. *Id.* at 10. The Court came to that conclusion because (1) the evidence
21 showed that Eddie Bauer’s written policy applies to all non-exempt employees, (2) Heredia
22 demonstrated the existence of a uniform policy applying to all employees in California, and (3)
23 Eddie Bauer offered no evidence regarding the actual practice at the various stores regarding on-
24 the-clock or off-the-clock bag checks. *Id.* at 12-14.

25 Shortly thereafter, Eddie Bauer filed a motion for reconsideration. ECF 36. The Court
26 denied the motion and rejected Eddie Bauer’s arguments that some class members did not share
27 Heredia’s injury because Eddie Bauer had presented the Court with “no evidence of any of these
28 ‘on-the-clock’ employees.” ECF 37 at 4, 7-8. The Court further noted that “[s]hould Eddie Bauer

1 acquire such evidence of class members who were subject to bag checks before they clocked out, it
2 could present their experiences to the Court in a motion to decertify the class.” *Id.* at 8.

3 The record has significantly developed since then. First, Eddie Bauer’s expert, Robert W.
4 Crandall, conducted a “time and motion” study that included video observation of store operations
5 for 114 full days, totaling over 1,482 hours in 7 Eddie Bauer California stores (50% of the Eddie
6 Bauer stores in California). Declaration of Robert W. Crandall Regarding “Time and Motion” Study
7 (“Crandall Decl.”) ¶¶ 90; 58, Dkt. No. 51-3. Of the 620 exits captured, 137 exits captured all aspects
8 of the exit inspection—waiting time, bag check, visual inspection, other time, and clocking out. *Id.*
9 ¶¶ 94-100. Of those 137 fully-observed exits, 80.3% were on the clock and 19.7% were off the
10 clock. *Id.* ¶¶ 95-96. Of the 620 exits captured by the Crandall Study, 273 exits captured some
11 aspects of the exit inspection. *Id.* ¶¶ 101-108. Based on the 273 exits where some aspects of the
12 exit inspection were observed in the study, 172 exits—or 63.0%—showed that the employees had
13 no waiting time, no bag check, and no visual inspection because the employee left the store without
14 carrying a bag or other item subject to inspection. *Id.* ¶ 106.

15 Second, the parties agreed on a procedure for selecting a representative sample of class
16 members. *See* ECF 41 § IV.A. The class members who were deposed include current or former
17 Eddie Bauer employees who worked for the company during every year of the certified class
18 period—2012, 2013, 2014, 2015, 2016, 2017, 2018, and 2019. Declaration of Michael Afar in
19 Support of Defendant’s Motion for Decertification (“Afar Decl.”) ¶ 8, ECF 60-2. Eddie Bauer’s
20 expert, Mr. Crandall, summarized the deponents’ testimony regarding on-the-clock/off-the-clock
21 inspections in a table reproduced below¹:

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¹ Heredia does not meaningfully dispute Mr. Crandall’s analysis and has reproduced and referenced Table 2 of his Supplemental Declaration in several of her briefs. *See e.g.*, Decert. Opp’n at 11; Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment Against the Certified Class at 16-17, ECF 54; Plaintiff’s Motion to Modify Class Definition at 3, ECF 71.

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TABLE 2		
Testimony Regarding Frequency Of Exit Inspections That Occurred On The Clock		
Class Member	On The Clock	Off The Clock
Katie Anderson	100%	0%
Ashley Beck	85%	15%
Christine Brown	25%	75%
Colleen Cash	10%	90%
Katie Cheetham	0%	100%
Teresa Kober (Ameluxen)	0%	100%
Elicia Maurer	85%	15%
Walter Montti	7.2%	92.8%
Joyce O'Brien	0%	100%
Marta Price	0%	100%
Michelle Pringle	99%	1%
Valerie Ragueneau	98.7%	1.3%
Jean-Jacques Reibel	100%	0%
Sheryl Saporantos	0%	100%

Supplemental Declaration of Robert W. Crandall Regarding Class Member Depositions (“Crandall Supp. Decl.”) ¶ 113, Table 2, ECF 51-4. Upon analyzing the deposition testimony, Mr. Crandall concluded that the weighted total of exit inspections conducted on the clock is 54.2% of all shifts. *Id.* ¶ 113.

Based on this new record, Eddie Bauer has challenged the certified class in two motions: (1) Motion for Summary Judgment Against the Certified Class and (2) Motion for Decertification. ECF 51; 60. Heredia opposes both motions and has filed her own motion seeking to modify the class definition. *See* ECF 54; 65; 71.

II. EDDIE BAUER’S MOTION FOR DECERTIFICATION

Eddie Bauer seeks to decertify the class because “the new evidence shows that there are no common questions or common answers” regarding off-the-clock security inspections at its stores. Decert. Mot. at 1. Eddie Bauer relies on its expert’s “time and motion study,” which shows that 80.3% of the observed exit inspections occur on the clock. *Id.* at 3-5. Eddie Bauer also relies on the outcome of the stipulated sample of class member depositions, which showed that 54.2% of the

1 weighted total of exit inspections occurred on the clock. *Id.* at 5-8.

2 Heredia provides no arguments as to why the class, as-certified, should be maintained. *See*
 3 *generally* Decert. Opp’n. Instead, Heredia proposes to modify and narrow the class period to end
 4 on December 31, 2016. Decert. Opp’n at 1. Heredia has also separately filed a motion to modify
 5 the class definition. Motion to Modify Class Definition (“Mot. to Modify”), ECF 71. Thus, Heredia
 6 has effectively conceded that based on the current record, the certified class cannot move forward
 7 to trial. The Court first decides whether the certified class should be decertified. The Court will
 8 then address Heredia’s proposed class definition in Section IV below.

9 **A. Legal Standard**

10 “Even after a certification order is entered, the [Court] remains free to modify it in the light
 11 of subsequent developments in the litigation.” *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160
 12 (1982); *see also* Fed. R. Civ. P. 23(c)(1)(C) (“An order that grants or denies class certification may
 13 be altered or amended before final judgment.”). “A district court may exercise its sound discretion
 14 to decertify a class.” *Ser Lao v. H&M Hennes & Mauritz, L.P.*, No. 5:16-CV-00333-EJD, 2019 WL
 15 7312623, at *2 (N.D. Cal. Dec. 30, 2019). “The standard used by the courts in reviewing a motion
 16 to decertify is the same as the standard when it considered Plaintiffs’ certification motions.” *Ries*
 17 *v. Ariz. Beverages USA LLC*, No. 10–01139 RS, 2013 WL 1287416, at *3 (N.D. Cal. Mar. 28, 2013).
 18 Certification orders, however, are not altered “‘except for good cause,’ such as ‘discovery of new
 19 facts or changes in the parties or in the substantive or procedural law.’” *Morales, et al. v. Kraft*
 20 *Foods Grp., Inc.*, 2017 WL 2598556, at *20 (C.D. Cal. June 9, 2017) (quoting *Ramirez v. Trans*
 21 *Union, LLC*, No. 12-CV-00632-JSC, 2016 WL 6070490, at *2 (N.D. Cal. Oct. 17, 2016)).

22 Rule 23(a) requires that (1) the members of the class must be so numerous that joinder is
 23 impracticable, (2) there must be questions of law or fact common to the class, (3) the representative’s
 24 claims and defenses must be typical of the class members’ claims and defenses, and (4) the
 25 representative must fairly and adequately protect the interests of the class. The class must also meet
 26 one of the requirements of Rule 23(b). Here, Heredia seeks to maintain the Class subject to Rule
 27 23(b)(3)’s requirements that “the questions of law or fact common to class members predominate
 28 over any questions affecting only individual members, and that a class action is superior to other

1 available methods for fairly and efficiently adjudicating the controversy.”

2 **B. Discussion**

3 The Court agrees with Eddie Bauer—and Heredia concedes—that the certified class cannot
4 be maintained based on the current record, because the class members did not experience a uniform
5 policy of off-the-clock exit inspections.

6 **1. No Uniform Policy to Undergo Exit Inspection Off the Clock**

7 Eddie Bauer argues that the class should be decertified because the now-available evidence
8 shows the company does not have a uniform policy or practice on whether exit inspections are to be
9 performed on or off the clock. Decert. Mot. at 11-12. The Court agrees. The Court certified the
10 class based on the premise (supported by the record at the time) that “Heredia’s claims are typical,
11 if not identical, to those of the class because they were all equally subject to the same uniform
12 security inspection policy.” Cert. Order at 15. That premise is no longer supported by the record.
13 It is undisputed that Eddie Bauer’s written security inspection policy, which applies to all non-
14 exempt employees, is silent on whether the exit inspections should be performed on the clock or off
15 the clock. See Decert. Mot. at 2; Decert. Opp’n at 1; Long Dep., Exh. 8. Thus, the Court must
16 consider whether, in practice, Eddie Bauer employees experienced a uniform policy across
17 California stores. The current record shows that the answer is: no.

18 The record now shows that some class members (the majority) experienced exit inspections
19 on the clock and some class members (the minority) experienced exit inspections off the clock. Mr.
20 Crandall’s “time and motion” study—not contradicted or disputed by Heredia—demonstrates that
21 over 80% of the fully-observed exit inspections (across 7 Eddie Bauer stores) were conducted on
22 the clock. Crandall Decl. ¶¶ 95-96. The deposition testimony of a mutually-selected group of Eddie
23 Bauer current and former employees also showed that over half of the exit inspections took place
24 while employees were still clocked in. Crandall Supp. Decl. ¶ 113. For example, Ashley Beck, the
25 Assistant Store Manager at the Fig Garden store, testified that “it’s Eddie Bauer’s policy to have
26 bag checks occur on the clock.” Beck Dep., 35:21-23; Afar Decl. ¶ 11, Exh. C. In practice, Ms.
27 Beck testified that 85% of her bag checks were on the clock. *Id.* 51:22-24. Michelle Pringle, an
28 Assistant Store Manager at Roseville, testified that “Eddie Bauer’s policy is that bag checks occur

1 on the clock” and “bag checks have been on the clock.” Pringle Dep., 20:12-13, 16- 17; Afar Decl.
2 ¶ 20, Exh. L. On the other hand, Joyce O’Brien, who worked in Sacramento, Citrus Heights, and
3 Roseville stores, testified that in her experience, all of bag checks were performed off the clock.
4 O’Brien Dep. 70:2-7; Afar Decl. ¶ 18, Exh. J.

5 This record supports decertification. “It is doubtful that the Court would have certified the
6 class [when it did] had it understood that [Eddie Bauer] did not have a single uniform policy in
7 place” because “[i]t is no longer accurate to say that this case involves ‘a uniform policy consistently
8 applied’ throughout the class period.” *In re Autozone, Inc. Wage and Hour Employment Practices*
9 *Litig.*, 2016 WL 4208200 at *10 (N.D. Cal. Aug. 10, 2016) (decertifying a class because there was
10 no common policy in place during the class period); *see also Hubbs v. Big Lots Stores, Inc.*, 2017
11 WL 2304754 at *9 (C.D. Cal. May 23, 2017) (denying class certification where plaintiffs failed to
12 present “sufficient evidence to show that there was a common and consistent policy among
13 Defendants to subject all employees at all of their stores to off-the-clock bag checks”).

14 **2. The Class Is Not Ascertainable**

15 Eddie Bauer also argues that in the absence of a uniform policy, the certified class is not
16 ascertainable. Decert. Mot. at 12. The Court agrees. A class is ascertainable if it is
17 “administratively feasible for the court to ascertain whether an individual is a member” by reference
18 to “objective criteria.” Cert. Order at 8 (citing *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115, 122
19 (N.D. Cal. 2014)). In its certification order, the Court found that the class was ascertainable because
20 all 1,086 non-exempt retail store employees, identified through Eddie Bauer’s employee record,
21 were subject to the Personal Property Inspection Policy. Cert. Order at 9. Based on the current
22 record, however, even though all employees are subject to the same written policy, it is clear that,
23 in practice, they undergo exit inspections differently – most on the clock and some off the clock.
24 Thus, it is impossible to know, without individualized inquiries, which employees have undergone
25 exit inspections off the clock and were subjected to uncompensated time. *See Hovsepian v. Apple,*
26 *Inc.*, No. 08-5788 JF (PVT), 2009 WL 5069144, at *6 (N.D. Cal. Dec. 17, 2009) (finding a class not
27 ascertainable because it included members who had “no injury and no standing to sue”); *In re*
28 *AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 545 (N.D. Cal. 2012)

1 (finding a class definition that included employees who were not injured and had “no standing to
2 sue” overbroad and thus, not ascertainable).

3 **3. No Common Injury**

4 Next, Eddie Bauer argues that decertification is warranted because claims of class members
5 cannot be resolved “in one stroke” and the class includes employees who did not suffer any harm or
6 injury. Decert. Mot. at 13-17. “[C]ommonality requires that the class members’ claims depend
7 upon a common contention such that determination of its truth or falsity will resolve an issue that is
8 central to the validity of each claim in one stroke.” *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161,
9 1165 (9th Cir. 2014) (citations and internal quotation marks omitted). In other words, “the key
10 inquiry is not whether the plaintiffs have raised common questions, ‘even in droves,’ but rather
11 whether class treatment will ‘generate common answers apt to drive the resolution of the litigation.’”
12 *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Wal-Mart Stores,*
13 *Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

14 In its certification order, the Court found that two common questions existed: (1) whether
15 Eddie Bauer’s policy and practice was to mandate that security checks be performed off-the-clock;
16 and, if so, (2) whether time spent by employees off-the-clock for security checks should be deemed
17 as hours worked and thus compensated as wages. Cert. Order at 10. Under the current record,
18 however, individualized inquiries are required to answer the first certified question because, as
19 discussed, the employees’ experience with exit inspections varied significantly. Thus, the question
20 of whether all class members were subject to off-the-clock exit inspections resulting in
21 uncompensated time cannot be resolved in one stroke.

22 Employee depositions support this conclusion. For example, Ms. Beck testified that to
23 determine whether bag checks are conducted on or off the clock, one must ask each employee
24 individually. Beck Dep., 54:5-9; Afar Decl. ¶ 11, Exh. C. Christine Brown testified that her choice
25 of whether to go through bag inspection before or after clocking out was based on the particular
26 day’s circumstances (*i.e.*, the time of day, where she was, and where her manager was). Brown
27 Dep., 54:25-55:4; Afar Decl. ¶ 12, Exh. D. When, as here, an inquiry into each employee’s
28 experience is necessary, class certification is improper. *See Koike v. Starbucks Corp.*, 378 F. App’x

1 659, 661 (9th Cir. 2010) (“The district court did not abuse its discretion in finding that individualized
2 factual determinations are required to determine whether class members did in fact engage in off-
3 the-clock work[.]”).

4 Heredia cites several retail “bag check” cases and argues that a “substantial majority of cases
5 support certification.” Decert. Opp’n at 14-19. However, all the “bag check” cases Heredia cites
6 are distinguishable because, unlike here, in those cases either the company policy required off-the-
7 clock inspections or the available evidence showed that, in practice, most (if not all) employees
8 experienced off-the-clock inspections. For example, in *Rodriguez v. Nike Retail Servs., Inc.*, the
9 company had a uniform policy that required its employees “to clock out before they go to the store
10 exit to get checked and leave.” 2016 WL 8729923, *5 (N.D. Cal. Aug. 19, 2016). Or, in *Chavez v.*
11 *Converse, Inc.*, the court found that that plaintiff had demonstrated that “most, if not all, Converse
12 stores are set up such that an employee would necessarily be off-the-clock when a bag check
13 occurs.” Case No. 15-cv-03746-NC, Dkt. No. 89, at p. 3 (N.D. Cal. Sep. 22, 2016). Similarly, in
14 *Frlekin v. Apple Inc.*, “[b]ecause the employee time-keeping systems were generally kept within the
15 store, employees had to clock out prior to undergoing a search,” and thus “as a rule, employees
16 received no compensation for the time involved in the searches.” 309 F.R.D. 518, 521 (N.D. Cal.
17 2015).

18 At the December 5, 2019 hearing, counsel for Heredia identified *Moore v. Ulta Salon*
19 *Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590 (C.D. Cal. 2015) as the most analogues “bag check”
20 case to the facts present in this matter and argued that it supports maintaining certification. ECF 76,
21 20:3-21:25. The Court disagrees. First, the Court notes that *Moore* is not binding on this Court and
22 more importantly, does not address the issue presented in Eddie Bauer’s motion for decertification
23 – whether a class certification should be maintained when there is significant evidence that most
24 class members did not experience off-the-clock bag checks. Second, *Moore* is factually
25 distinguishable because, unlike here, “the most reasonable reading of [Ulta’s] written exit inspection
26 policy indicate[d] that the employee must clock out before his or her bag is checked.” *Moore*, 311
27 F.R.D. at 613; *see also id.* at 595-96 (the New Hire Orientation manual listing “End of Shift Routine”
28 tasks, with “clock out” coming *before* bag checks), 599 (A “Key Corporate Communication”

1 directing company managers to “After everyone has punched out, proceed to the front door,
2 complete Exit Inspections in an expeditious manner and leave for the night.”). Here, the written
3 policy is undisputedly silent on the issue of on or off the clock inspections. Moreover, although
4 Ulta pointed to variances in the manner exit inspections were conducted across Ulta stores, the
5 evidence provided by both sides indicated that “exit inspections regularly occurred off the clock”
6 and as for the exit inspections as the end of closing shifts, “Defendant’s declarants who discussed
7 exit procedures stated, uniformly and without exception, that the inspections occur after the
8 employees have clocked out.” *Id.* at 610-11. In this case, the current record shows that most bag
9 checks were conducted on the clock.

10 Recently, Heredia filed a Notice of New Authority in support of her opposition to Eddie
11 Bauer’s motion for decertification. ECF 77. The Court is not persuaded that this new decision
12 supports Heredia’s position. In *Ser Lao*, unlike here, there was no dispute that those employees who
13 brought bags to work were inspected off the clock – but the issue was whether those employees
14 *without* bags were subject to uncompensated time for inspections. 2019 WL 7312623, at *2 (“These
15 checks occur after the employees are off the clock.”).

16 Eddie Bauer also argues that (1) “**all** class members must ‘have suffered the same injury’”
17 and (2) a viable class action “cannot include individuals who have suffered no harm or injury.”
18 Decert. Mot. at 13, 15-16. Although the Court disagrees with such broad conclusions, it need not
19 decide this issue because based on the current record (1) this case does not present a close call where
20 the majority of the class members are not harmed and (2) Heredia concedes that the class, as
21 certified, cannot be maintained. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir.
22 2016) (“[E]ven a well-defined class may inevitably contain some individuals who have suffered no
23 harm as a result of a defendant’s unlawful conduct.”)

24 **4. Conflicting Evidence and Individualized Inquiries**

25 Finally, Eddie Bauer argues that the conflicting evidence regarding on and off the clock exit
26 inspections warrants decertification. The Court agrees because the now-available record shows that
27 the exit inspections were conducted both on and off the clock throughout the class period – with
28 most inspections taking place on the clock. *See Garcia v. Sun Pac. Farming Co-op, Inc.*, 359 F.

1 App’x 724, 726 (9th Cir. 2009) (affirming denial of class certification where “the record evidence—
2 in particular, the conflicting employee declarations submitted by each party—does not establish
3 common wage and hour practices at [the company], but rather the inconsistent application of the
4 wage and hour laws between and among the various work Crews.”) (alterations omitted); *see also*
5 *Hubbs*, 2017 WL 2304754 at *8 (denying class certification where the parties submitted conflicting
6 declarations as to whether bag checks were on or off the clock).

7 Based on the current record, at trial, the jury would necessarily have to decide whether each
8 employee experienced uncompensated exit inspections. Class actions are not appropriate where the
9 resolution of the case would require numerous mini trials. *See, e.g., Soares v. Flowers Foods, Inc.*,
10 320 F.R.D. 464, 484 (N.D. Cal. 2017) (“Put simply, [i]f each class member has to litigate numerous
11 and substantial separate issues to establish his or her right to recover individually, a class action is
12 not ‘superior.’”).

13 **C. Conclusion**

14 For the foregoing reasons, the Court finds that based on the current record, the class as
15 certified does not satisfy the Rule 23 requirements. Thus, Defendant’s Motion for Decertification
16 is GRANTED.

17 **D. Plaintiff’s Motion to Strike Reply Evidence**

18 At the December 5, 2019 hearing, Heredia moved the Court to strike the evidence submitted
19 in Eddie Bauer’s reply in support of its Motion for Decertification, namely the Supplemental
20 Declaration of Mike Barnes (ECF 66-2). ECF 76, 4:18-5:20. The Court has not considered or relied
21 on Mr. Barnes’ declaration and thus TERMINATES Plaintiff’s motion to strike as MOOT.

22 **E. Plaintiff’s Request for Judicial Notice**

23 In connection with her opposition to Eddie Bauer’s Motion for Decertification, Heredia filed
24 a request for judicial notice of (1) Magistrate Judge Nathanael M. Cousins’ Order Granting Plaintiff
25 Eric Chavez’s Motion for Class Certification in *Chavez v. Converse, Inc.*, 15-cv-03746-NC, Dkt.
26 No. 89 (N.D. Cal. Sept. 22, 2016) and (2) The Order After Hearing on March 18, 2016 in the matter
27 of *Diller v. Under Armour Retail, Inc. et al.*, Santa Clara County Superior Court Case No. 1-14-CV-
28 265729. ECF 65-1. Eddie Bauer does not oppose Heredia’s request for judicial notice. Courts may

1 properly take judicial notice of “matters of public record” that are not “subject to reasonable
2 dispute.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). The requested documents
3 are properly subject to judicial notice. *See Akaosugi v. Benihana Nat. Corp.*, 282 F.R.D. 241, 259
4 (N.D. Cal. 2012). Heredia’s request for judicial notice of the above-stated documents is
5 GRANTED.

6 **III. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AGAINST THE**
7 **CERTIFIED CLASS**

8 In its Motion for Summary Judgment Against the Certified Class, Eddie Bauer relied on Mr.
9 Crandall’s “time and motion” study and class member depositions to argue that “the certified class
10 cannot meet its burden to show that all class members were subject to exit inspections off the clock.”
11 Defendant’s Motion for Summary Judgment Against the Certified Class at 1, 12-16, ECF 51-1.
12 Eddie Bauer further argued that the “the time spent off the clock was not ‘regular’ because the
13 majority of exit inspections occurred while still on the clock, and the minority of exit inspections
14 off the clock were still merely seconds of time” – which, according to Eddie Bauer, is not
15 compensable under California Supreme Court’s decision in *Troester v. Starbucks Corp.*, 5 Cal. 5th
16 829 (2018), *as modified on denial of reh’g* (Aug. 29, 2018). *Id.* at 1, 17-21.

17 The certified class against which Eddie Bauer sought summary judgment is now decertified
18 as discussed in Section II of this Order. Thus, all issues presented in Eddie Bauer’s motion for
19 summary judgment are resolved and the motion is TERMINATED AS MOOT.²

20 **IV. PLAINTIFF’S MOTION TO MODIFY CLASS DEFINITION**

21 Heredia seeks to modify the class definition (1) in her opposition to Eddie Bauer’s Motion
22 for Decertification (ECF 65) and (2) in a Motion to Modify Class Definition (ECF 71). Heredia
23 proposes to redefine the class period to end on December 31, 2016 (instead of through the present).
24 *See* Mot. to Modify at 1. Heredia’s proposal is premised on her allegation that “around the beginning
25 of 2017” and in response to the filing of this lawsuit in September 2016, Eddie Bauer changed its

26 ² The Court notes that Eddie Bauer’s motion for summary judgment was filed before the Ninth
27 Circuit decision in *Rodriguez v. Nike Retail Servs., Inc.*, 928 F.3d 810 (9th Cir. 2019), clarifying the
28 application of *Troester*, was issued. To be clear, because the Court has decertified the class, it does
not make any findings as to Eddie Bauer’s arguments regarding the application of *Troester* to the
facts of this case.

1 practice (but not its written policy) to require bag checks to be conducted on the clock. *See id.* at 1-
2 2; 5.

3 Heredia does not offer any direct evidence of this alleged change in practice but instead
4 relies on certain deposition testimony and two emails from an Eddie Bauer executive (emphasizing
5 that bag checks must be done on the clock) to argue that a change may be inferred. *See Mot. to*
6 *Modify* at 3-6. For the purposes of deciding Plaintiff’s Motion to Modify Class Definition, the
7 Court need not (and does not) decide whether, in fact, Eddie Bauer’s practice regarding exit
8 inspection changed. This is because even if Eddie Bauer’s bag check practices changed as Heredia
9 suggests, Heredia’s proposed redefined class period suffers from the same deficiencies, albeit to a
10 lesser degree, as the class originally certified.

11 **A. No Uniform Policy to Undergo Exit Inspection Off the Clock, even before 2017**

12 Eddie Bauer’s policy was far from “uniform” even before January 2017. The Court
13 recognizes that the post-certification deposition testimony of former and current Eddie Bauer
14 employees shows that the off-the-clock exit inspections occurred more frequently before 2017. To
15 demonstrate, the Court has reproduced Table 2 in Mr. Crandall’s report identifying only those
16 individuals who worked for Eddie Bauer during Heredia’s proposed pre-2017 class period.³

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20 ³ Christine Brown worked for Eddie Bauer’s Novato (Vintage Oaks) store from July 2011 to 2013.
21 Brown Dep. 8:24-9:16, ECF 71-1, Exh. H. Colleen Cash worked at Eddie Bauer’s Viejas store from
22 May 2014 to November 2017. Cash Dep. 11:1-10, 15:8-21, ECF 71-1, Exh. E. Katie Cheetham
23 worked for Eddie Bauer from September 16, 2013 to July 18, 2014 in the Novato store. Cheetham
24 Dep. 7:1-6, 1:16-2:3, ECF 71-1, Exh. A. Ms. Cheetham was again hired by Eddie Bauer on August
25 14, 2016 and worked at the Novato store until October 11, 2016. *Id.* 9:1-5, 9:22-23. Ms. Cheetham
26 also worked for a week at the Santa Rosa store and received a 7-day training at the Vacaville store.
27 *Id.* 104:13-105:4. Teresa Kober (Ameluxen) worked at Eddie Bauer’s Cabazon store around 2012
28 (or 2013) to 2014. Ameluxen Dep. 11:1-12:1, ECF 54-1, Exh. C. Elicia Maurer has worked for
Eddie Bauer’s Shasta store since 2010. Maurer Dep. 11:1-18, ECF 72-1, Exh. F. Joyce O’Brien
worked for Eddie Bauer from 2007 to 2017 at three stores: Sacramento, Citrus Heights and
Roseville. O’Brien Dep. 11:1-21. ECF 71-1, Exh. B. Martha Price worked at Eddie Bauer’s Gilroy
store from 2013 to October 2014. Price Dep. 14:1-10, 52:7-22, 57:15-20, ECF 71-1, Exh. D. Jean-
Jacques Reibel has worked at Eddie Bauer’s Corte Madera store in two stints: (1) November 2014
to January 2016 and (2) June 2017 to present. Reibel Dep. 13:17-14:11, ECF 72-1, Exh. H. Sheryl
Saporsantos worked at Eddie Bauer’s San Francisco store from October 2014 to August 2016.
Saporsantos Dep. 14:17-15:8, ECF 77-1, Exh. J.

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TABLE 2		
Testimony Regarding Frequency Of Exit Inspections That Occurred On The Clock		
Class Member	On The Clock	Off The Clock
Christine Brown	25%	75%
Colleen Cash	10%	90%
Katie Cheetham	0%	100%
Teresa Kober (Ameluxen)	0%	100%
Elicia Maurer	85%	15%
Joyce O'Brien	0%	100%
Marta Price	0%	100%
Jean-Jacques Reibel	100%	0%
Sheryl Saporsantos	0%	100%

Crandall Supp. Report ¶ 113, Table 2 (redacted to show only those employees who worked for Eddie Bauer during the pre-2017 period). It is undisputed that five pre-2017 employees (Cheetham, Kober, O'Brien, Price, and Saporsantos) testified that, in their experience, all exit inspections occurred off the clock. *See id.* However, several other employees testified that bag checks were conducted on the clock even before 2017. Setting aside Ms. Cash's experience⁴, three of the nine pre-2017 deponents (Brown, Maurer, and Reibel), who worked at different California stores, testified that all or a significant portion of the exit inspections were done on the clock.

Christine Brown worked for Eddie Bauer's in Novato (Vintage Oaks) store from July 2011 to 2013 – well before 2017. Brown Dep. 8:24-9:16, ECF 72-1, Exh. D. Ms. Brown testified that the “choice of whether it was done on the clock or off the clock was based on the particular day's circumstances of where you were and the time of day and where the manager was.” *Id.* 54:25-55:4. Accordingly, Ms. Brown explained: “If I was with the manager and we were clocking out, and we

⁴ Ms. Cash testified that her exit inspections were “usually” off the clock and estimated that 90% of the time they were off the clock. Cash Dep., 25:21-26:10, ECF 71-1, Exh. E.

1 were both standing at the door and she was ready to set the alarm, then she would look in my bag,
2 I'd clock out, and then we would both walk out together when she set the alarm." *Id.* 53:19-23.
3 Ms. Brown estimated that 75% of exit inspections were off the clock. Brown Dep. 24:1-7, ECF 71-
4 1, Exhibit H.

5 Elicia Maurer is a current Eddie Bauer employee and has worked at the Shasta store since
6 2010. Maurer Dep. 11:1-18, ECF 72-1, Exh. F. Ms. Maurer started as a Sales Associate and was
7 promoted to an Assistant Store Manager in the summer of 2014 and then Store Manager in July
8 2015. *Id.* 11:1-15. Ms. Maurer testified that from 2010 to 2015, there were no bag checks at all at
9 the Shasta store. *Id.* 21:15-22:9. In the 2015 to 2017 timeframe, Ms. Maurer chose to show her bag
10 for inspection 75% of the time. Maurer Dep. 89:3-8, ECF 54-1, Exh. K. In those occasions where
11 her bags were inspected, approximately 15% were off the clock. *Id.* 89:10-13. Since October 2017,
12 all of Ms. Maurer's bag checks have been on the clock. Maurer Dep. 119:13-16, ECF 51-4.

13 Jean-Jacques Reibel was an Assistant Manager at Eddie Bauer's Corte Madera store from
14 November 2014 to January 2016, left the company, and was rehired in June 2017. Reibel Dep.
15 13:17-14:11, ECF 72-1, Exh. H. Mr. Reibel testified: "I always got my bag checked before I clock
16 out, and I always check employees' bags before they clock out; otherwise, I will refuse to check
17 their bags." *Id.* 26:21-27:7. Specifically addressing his first (pre-2017) stint at Eddie Bauer, Mr.
18 Reibel testified:

19 Q. So even though you never saw a bag-check policy in 2014 or 2015
20 or even 2016, your first stint with Eddie Bauer, you still during that
21 entire period of time were doing bag-checks on the clock, right?

22 A. I guess just by default. Because associates, if they are still having
23 to stay in the store, they want to get paid, so they just don't clock off.

24 *Id.* 128:8-18.

25 In sum, the record shows that in at least three of the thirteen⁵ Eddie Bauer California stores,
26 employees were undergoing the inspections on the clock (or no inspections at all), even before 2017.
27 Although Heredia need not show 100% uniformity of experience across the entire class, the disparity

28 ⁵ Heredia informs the Court that there are 13 Eddie Bauer stores in California. ECF 74 at 5, n. 1. Eddie Bauer's expert notes that there are 14. Crandall Decl. ¶ 55.

1 here is simply too significant to allow the narrowed class to proceed. The Court disregarded the
2 modest portion of on-the-clock bag checks reported by Ms. Cash (10%), but the Court is persuaded
3 that the far more significant disparity reported by Ms. Maurer (85% on the clock), Mr. Reibel (100%
4 on the clock), and Ms. Brown (25% on the clock) tip the balance against class certification.
5 “[E]xistence of large numbers of class members who were never *exposed* to the challenged conduct
6 to begin with” defeats predominance. *Torres*, 835 F.3d at 1136 (citing *Mazza v. Am. Honda Motor*
7 *Co.*, 666 F.3d 581, 596 (9th Cir. 2012)); *see also In re: Autozone, Inc.*, 2016 WL 4208200 at *10
8 (decertifying a class where it was “no longer accurate to say that this case involves ‘a uniform policy
9 consistently applied’ throughout the class period”).

10 For the same reasons discussed in Section II of this Order, Heredia’s proposed class cannot
11 be certified because Eddie Bauer’s exit inspection practice across its California stores was not
12 uniform prior to January 2017.

13 **B. Prejudice to Eddie Bauer**

14 Heredia argues that narrowing the class as she proposed would not prejudice Eddie Bauer
15 because (1) the issues for trial will be the same as have been litigated to date and (2) the class will
16 also necessarily include a smaller subset of Eddie Bauer’s employees therefore further limiting its
17 liability. Mot. to Modify at 7. Eddie Bauer responds that it has, and will continue to be, prejudiced
18 if the class period is modified because (1) Eddie Bauer conducted fact and expert discovery based
19 on the certified (and broader) class and (2) with the trial only four months away, Eddie Bauer may
20 not file any more dispositive motions challenging the modified class. *See* ECF 72 at 9-13. The
21 Court agrees with Eddie Bauer.

22 As discussed at the December 5, 2019 hearing, because a class was certified in this case
23 Eddie Bauer, unlike Heredia, has been prohibited from contacting the class members to conduct
24 further discovery—creating an unbalanced access to discovery. ECF 76, 10:19-11:12; *see also* ECF
25 72 at 13. Moreover, this Court permits only one motion for summary judgment per party, which
26 Eddie Bauer filed based on the now-decertified class. ECF 51. In the remaining four months before
27 trial, the Court will not be able to hear another motion for decertification. If the class is modified at
28 this late stage in the case, Eddie Bauer would be prejudiced. *See In re TFT-LCD (Flat Panel)*

1 *Antitrust Litig.*, 267 F.R.D. 583, 591 (N.D. Cal. 2010), *amended in part*, No. M 07-1827 SI, 2011
2 WL 3268649 (N.D. Cal. July 28, 2011) (considering class modification where “the proposed
3 modifications are minor, require no additional discovery, and cause no prejudice to defendants).

4 **C. Rule 23 Requirements**

5 Finally, Eddie Bauer points out that Heredia’s Motion to Modify Class Definition should be
6 denied because she has not satisfied the requirements of Federal Rule of Civil Procedure 23. It is
7 true that “[a]n order that grants or denies class certification may be altered or amended before final
8 judgment.” Fed.R.Civ.P. 23(c)(1)(C). However, while “a district court may revisit a class
9 certification order ‘in the light of subsequent developments in the litigation,’ any amendment thereto
10 must satisfy the requirements of Rule 23.” *Plascencia v. Lending 1st Mortg.*, 2012 WL 253319, at
11 *3 (N.D. Cal. Jan. 26, 2012); *see also Lyon v. U.S. Immigration & Customs Enf’t*, 308 F.R.D. 203,
12 211 (N.D. Cal. 2015) (“In order for the Court to modify the Class Certification Order, the modified
13 class must meet the numerosity, commonality, typicality, and adequacy requirements of Rule
14 23(a)[.]”).

15 Heredia’s motion does not address any of the Rule 23 factors as they apply to her proposed
16 redefined class. *See generally* Mot. to Modify. Instead, she presumes that based on the evidence
17 collected after certification, the Court should simply “modify the class definition for trial.” *Id.* at 1.
18 In response to Eddie Bauer’s criticism, Heredia argues that she “addressed the factors appropriately
19 in her original certification motion, and also in her Opposition to Defendant’s Motion for
20 Decertification.” ECF 74 at 7. Even if the Court were to accept Heredia’s argument, her proposed
21 modified class fails because the record does not support her claim of a uniform bag check policy
22 prior to 2017. Thus, the Court need not address Eddie Bauer’s Rule 23 argument.

23 **D. Conclusion**

24 For the foregoing reasons, Plaintiff’s Motion to Modify Class Definition is DENIED.

25 **V. ORDER**

26 (1) Defendant’s Motion for Summary Judgment Against the Certified Class (ECF 51) is
27 TERMINATED AS MOOT.

28 (2) Defendant’s Motion for Decertification (ECF 60) is GRANTED.

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(3) Plaintiff's Motion to Modify Class Definition (ECF 71) is DENIED.

IT IS SO ORDERED.

Dated: January 10, 2020



BETH LABSON FREEMAN
United States District Judge