

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

STEVEN GOODMAN, et. al.	:	
	:	
Plaintiffs,	:	Hon. Joseph H. Rodriguez
	:	
v.	:	Civil Action No. 11-4395 (JHR)
	:	
BURLINGTON COAT FACTORY, et. al.,	:	
	:	<u>OPINION</u>
Defendants.	:	
	:	

These matters come before the Court on Defendants' Motion [341] to Decertify the Class and Plaintiffs' Motion [348] to Certify the Class – Final Certification of Fair Labor Standards Act Collective Action. Recently, the Court filed an Opinion addressing Plaintiff's Motion [350] to Seal Exhibits Al-Ay of Plaintiffs' Motion for Final Certification of Fair Labor Standards Collective Action and Plaintiffs' Motion [338] to Preclude Testimony of Robert Crandall, Pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993). The Court reincorporates the relevant factual background set forth in the preliminary certification Opinion in Goodman v. Burlington Coat Factory, No. 11-CV-4395 (D.N.J. Nov. 20, 2012) and the Opinion addressing the admissibility of the testimony of Defendants' Expert, Mr. Crandall, set forth in Goodman v. Burlington Coat Factory, No. 11-CV-4395 (D.N.J. Sept. 19, 2019) for the benefit of the reader.

Over the course of four non-consecutive days, the Court conducted a Daubert hearing on the admissibility and reliability of the testimony of Defendants' expert,

Robert Crandall.¹ In addition, the Court heard argument on the competing motions to certify and decertify. The Court has considered the initial written submissions of the parties, the testimony and arguments presented at the hearings on December 8-9, 2015 and March 16-17, 2016, and the supplemental briefing submitted by the parties. For the reasons stated on the record as well as those that follow Defendants' Motion [341] To Decertify the Class is denied and Plaintiffs' Motion [348] To Certify the Class is granted.

I. Factual and Procedural History

The Court reincorporates the relevant factual background set forth in Goodman v. Burlington Coat Factory, No. 11-CV-4395 (D.N.J. Nov. 20, 2012) and Goodman v. Burlington Coat Factory, No. 11-CV-4395 (D.N.J. Sept. 19, 2019). Burlington is a nationwide retail department store chain that sells merchandise through 465 brick-and-mortar stores in 44 States across the United States. (Ansara Dep. Tr. 13). The named Plaintiff, Steven Goodman, worked as an operations manager at Burlington from approximately August 2005 until August 2009. (Goodman Dep. Tr. 911; 182:9). Mr. Goodman alleges that Burlington misclassified him and other assistant store managers (ASMs)² as exempt under the FLSA and failed to pay them for all hours worked as well

¹ Robert Crandall is a Partner at Resolution Economics, an organization that focuses on accounting and labor economics, workforce studying in both a non-litigation and litigation posture. Hearing Transcript, Dec. 9, 2015 72:10-19- 73:20-74:18. Crandall testified that the vast majority of his work involves "examining wage-and-hour issues." *Id.* at Dec. 8, 2015, 7:8-10. Crandall most often performs his services for the benefit of the defendant in FLSA litigation. *Id.* Plaintiffs do not challenge Crandall's qualifications as an expert in his field of economics and labor studies, per se. Plaintiffs contend that Crandall is precluded from opining on questions of law and general cultural behavior as predictive of intent in the employment setting. The attacks on Crandall do not necessitate a finding on his qualifications. Rather, as will be discussed *infra.*, the methodology employed to support his conclusion is the basis of Plaintiffs' Motion to Preclude.

² The collective action encompasses all "assistant store managers," which includes the two current positions known as "customer services logistics manager" and "merchandise manager." A fully-staffed management team at a Burlington store consists of one store manager, one customer service logistics manager, and two merchandise managers. (Ansara Dep. Tr. 74). Burlington created the "customer services logistics manager" position in May 2011, which combined two separate positions formerly called "operations manager" and "customer services

as overtime for hours worked above 40 in a workweek, in violation of the FLSA. (Am. Compl. ¶ 1).

Plaintiffs allege that Burlington's classification of the ASM position as "exempt" under the FLSA was wrongful, as ASMs perform non-managerial work "that requires little skill and no capital investment and their duties and responsibilities do not principally include any managerial responsibilities or the exercise of independent judgment" and ASMs "do not have the authority to hire or fire other employees, and they are not responsible for making hiring and firing recommendations." (Am. Compl. ¶ 29). Additionally, Plaintiffs claim that they spent the majority of their time performing work typically assigned to employees, such as working on the sales floor, opening boxes, ticketing merchandise, stocking shelves, cashiering, unloading trucks, and cleaning the bathrooms.³ Plaintiffs complain that they were required to work more

manager." According to the Plaintiffs' Amended Complaint, there are at least 250 potential members of the collective action class. (Am. Compl. ¶ 17).

³ Named Plaintiff Steven Goodman testified that he worked within the "guidelines" set by Burlington and could not independently make hiring decisions for the store, create a budget, order from outside vendors, make store repairs, approve overtime, fire employees, or select days for truck deliveries. (Goodman Dep. Tr. 115:14-14, 133:5-135:4; 213-215; 292:19-293:14; 291:1-5). Mr. Goodman testified that "corporate" selects the products for the store, sets prices, and selects product locations. (Goodman Dep. Tr. 290:6-291:7). Opt-in Plaintiff Donna Wilson testified that she was not responsible for developing strategies to increase revenue and cut costs, approving overtime, hiring or terminating employees, setting pay rates, setting the store hours of operation, determining product placement, determining product pricing and markdowns, hiring outside vendors, or setting the store temperature, as "corporate," the "store manager" or the "district manager" had authority over these tasks. (Wilson Dep. Tr. 172:6 - 176:23). Opt-in Plaintiff Edwin Murillo testified that while he worked as an ASM, Burlington "corporate" selected the products to be sold in the store, set the prices and markdowns of the products, decided where to display the products, developed strategies to cut costs and increase revenue, set the labor budget, decided the music to be played in the store, decided the temperature of the store, and that a "store manager" or "district manager" authorized associate overtime, hired and fired employees, set sales associates' pay rates, and store hours of operation. (Murillo Dep. Tr. 166:23-174:4). Additionally, opt-in Plaintiff Wanda West's declaration indicates that ASMs where she worked "had very little decision-making responsibility" and neither she nor opt-in Plaintiff Sharron Layne were responsible for decisions such as hiring or firing, setting store hours, setting product prices, setting the dress code, and could not independently discipline an employee. (West Dec. ¶¶15-22; Layne Dec. ¶¶ 16-19).

than 40 hours in a workweek⁴ and did not receive overtime compensation.⁵

Through the testimony of its Rule 30(b)(6) corporate representative, Burlington indicates that all ASMs are subject to the same policies and procedures. Burlington creates an employee handbook, system of core values, code of business conduct and ethics, and workplace rules and policies that apply to all Burlington employees regardless of the store's size, location, or geographic region in which they work. (Pls. Mot. Exs. A, L-R; Ansara Dep. Tr. 36-37, 42-47, 50-55). The same job descriptions apply to all ASM positions across the United States, regardless of the store's location, size, or hours of operation and only one job description is in effect at any given time. (Ansara Dep. Tr. 82-83, 89, 91-93). ASMs are subject to the same training requirements, as Burlington requires all new ASMs to attend a classroom-style training program, which is uniform throughout the country and taught by a Burlington Regional Human Resource Director. (Ansara Dep. Tr. 29-30). Burlington also requires ASMs to

⁴ Named Plaintiff Steven Goodman testified that "the company wanted 80 to 90 percent of the time to be doing floor work, not supervising." (Goodman Dep. Tr. 151:19-21). He also testified that "[w]e were told by corporate that if we were in the office more than 10 to 20 percent of the time, that we weren't doing our job." (Goodman Dep. Tr. 99:15-17). Mr. Goodman testified that he spent 80 to 90 percent of his day performing "hourly tasks" such as "receiving, opening up boxes, putting them on the floor, making sure they're priced, cleaning up the back, bringing the truck in, cashiering, sweeping, cleaning the bathrooms, cleaning the break room, [and] putting merchandise on the floor." (Goodman Dep. Tr. 234: 5-9, 15). Opt-in Plaintiff Donna Wilson testified that she spent 90 percent of her time performing tasks such as unpacking boxes, filling the racks on the sales floor, operating the register. (Wilson Dep. Tr. 69:16-22). Wilson testified that when she worked as a merchandising manager, "[m]y job description was to assist the store manager, hiring, recruiting the employee, training, coaching, analyzing the business.

⁵ Named Plaintiff Steven Goodman testified that he worked over 55 hours per week throughout his employment as an ASM and worked on average between 65 and 75 hours per week. (Goodman Dep. Tr. 14:1-4; 296:13) Opt-in Plaintiff Donna Wilson testified that she worked an average of 59-69 hours per week (Wilson Dep. Tr. 177:1-178:14) Opt-in Plaintiff Edwin Murillo testified that he worked "between 50, 58 hours, maybe more" per week. (Murillo Dep. Tr. 173:4). Additionally, the two opt-in Plaintiffs' declarations indicate that they worked over 40 hours per week and did not receive overtime compensation. (Layne Dec. ¶¶ 7, 8 (worked "on average, between 50-55 hours per week" and "was paid a set salary each week and did not receive overtime when I worked more than 40 hours in any workweek"); West Dec. ¶¶ 7, 8 ("I typically worked between 48-50 hours per week" and "I was paid a salary and was not paid any overtime if I worked more than 40 hours in a workweek.")).

complete computer-based e-learning modules and remain up to date through Burlington's internal intranet messaging system "portal.coat.net," the content of which is the same for all ASMs across the country. (Ansara Dep. Tr. 69-71; Pls. Mot. Ex. J (E-learning modules)).

Further, Burlington compensates all ASMs in the same manner and classifies all ASMs as exempt.⁶ Burlington's Salary Guidelines Brochure and Mr. Ansara's testimony both indicate that all ASMs are paid a fixed annual salary and they do not receive overtime compensation. (Pls. Mot. Ex. K (Burlington Salary Guidelines Brochure) at BCF 109-110; Ansara Dep. Tr. 99). Burlington classifies all ASMs as exempt from the overtime requirements of the FLSA, regardless of the individual ASM's tenure, the ASM's supervisor or manager, or the store's location, size, sales volume, hours of operation. (Ansara Dep. Tr. 99-102).

In 2010, prior to the filing of the present matter, Burlington commissioned a study to evaluate the daily responsibilities of the ASMs. This study, performed by the Axsium Group (hereinafter the "Axsium Study") generally concluded that the ASMs spent 21% of their time "managing and leading." (Armstrong Dep. (Ex. E) at 172-74, 278-80). As a result of the Axsium Study, Burlington's Director of Store Initiatives, David Armstrong, recommended a reduction in the task-oriented obligations in favor of a shift towards managerial work. *Id.* at 281. The record evidence suggests that

⁶ The FLSA regulates payment calculation for classes of employees. Pursuant to 29 U.S.C. § 207(a)(1), employers are required to pay an employee who works in excess of 40 per week at a rate of one and a half times their regular rate of pay for all hours. 29 U.S.C. § 207(a)(1). Certain classes of employees are classified as being "exempt" from overtime pay, such as those "employed in a bona fide executive, administrative, or professional capacity." *Id.* § 213(a)(1). The burden of proving that an employee is properly classified as exempt falls on the employer. *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 572 (E.D. La. 2008) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S. Ct. 2223, 41 L.Ed.2d 1 (1974)); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206, 86 S. Ct. 737, 15 L.Ed.2d 694 (1966); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1224 (5th Cir. 1990); *Kastor v. Sam's Wholesale Club*, 131 F.Supp.2d 862, 865 (N.D. Tex. 2001)).

Burlington did not immediately act on Armstrong's recommendation at that time. See, e.g. id. at 355-56 (Armstrong was unaware of Burlington implementing any changes as a result of the Axsium Study); Hubbard (Ex. D) at 293 (unaware of Burlington doing anything to verify that ASMs job performance matches their job descriptions); Hilton (Ex. F) at 101-102 (has never gone to any store or analyzed any documents to determine an ASM's primary duty).

After the present litigation commenced, Burlington commissioned an expert to evaluate the nature of the work that ASMs perform on a daily basis in order to prove that the ASMs are not misclassified as exempt under the FLSA and/or not similarly situated in a manner that compels class certification. Burlington's expert, Robert Crandall, is a frequent FLSA litigation expert who, *inter alia*, re-examines a company's qualitative data, including scheduling, timekeeping, customer flow, and payroll, and juxtaposes that data with employee job descriptions, performance evaluations and current employee declarations to formulate the likelihood of whether the company has misclassified certain employee positions. Crandall Curriculum Vitae, Crandall Report, Attachment A.

For the issues at hand, Crandall created and implemented a time and motion study to evaluate the daily tasks performed by randomly selected ASMs in various Burlington stores. The study observed sixty (60) ASMs who are not part of the opt-in Plaintiff group and did not include any discussions with or declarations from these workers.⁷ Crandall's findings are laid out in a statistical analysis report, replete with

⁷ Like Crandall, the Axsium study did not study any members of the opt-in Plaintiff group. The Axsium Study was also limited in scope and did not include a representative sample of Burlington stores or employees. Armstrong (Ex. E) at 110-19, 162, 203-12.

attachments and exhibits which graphically depict his findings. In addition to Crandall offering an expert report detailing his findings, Crandall testified at a Daubert hearing on December 8 and 9, 2015. Crandall issued a supplemental report to further support his testimony and validate his conclusions. Crandall's evidence is offered by Burlington as proof that the tasks performed by ASMs are not only primarily managerial but also demonstrate that the variance in the manner each ASM performs work significantly undercuts Plaintiffs' argument that they are similarly situated for class certification purposes.⁸

Crandall opines that his job was to study and make conclusions related to the following:

- 1) the amount of time Burlington ASMs spend performing managerial duties; 2) whether the data supports the theory that Burlington's policies, practices, procedures, training, and supervision resulted in ASMs spending uniform and consistent amounts of time on the various tasks they perform and managerial tasks in the aggregate, 3) what factors influence the tasks that ASMs perform; 4) how Burlington's business model influences the role of the ASMs; 5) whether data suggests that Burlington's expectations that the ASM position is managerial is reasonable; and, 6) how my findings impact the use of representative testimony and statistical extrapolation in connection with class or collective certification and making merits determinations.

Crandall. Dec. 1:12-26.

In general terms, Crandall concludes that the observed ASMs allocated more than 50% fifty percent of their work time to managerial duties, there is a wide variation in the

⁸ As will be discussed in further detail in the consideration of the parties competing motions for certification and de-certification, employees who are "similarly situated" may class certification under the FLSA. 29 U.S.C. § 216(b). The FLSA does not define the term "similarly situated" but several considerations inform the analysis, including "the extent to which any defenses that an employer might have to overtime or misclassification claims are common or individuated[.]" Big Lots Stores, Inc., 561 F. Supp. 2d at 573 (citation omitted).

percentage of time ASMs allocate to managerial/dual tasks on both a day-to-day and weekly basis, and that the different cultures, traffic, and other attributes in each Burlington store make it difficult to predict the amount of managerial time spent by the ASMs as a whole. *Id.* at 4:1-2; Crandall Report at 3-9. Burlington argues these findings preclude final certification of the class.

Plaintiffs moved to strike the testimony offered by Crandall. That motion was largely denied on September 19, 2019, but the Court struck Crandall's conclusions as set forth in Paragraph 96 and the underlined portions of Paragraphs 97 and 98 below as inadmissible because they are unreliable.

96. As discussed in detail above, the data shows that on average CSLMs and MMs spend more than half their time performing managerial duties. Thus, the observation study data suggests that Burlington's belief that CSLMs and MMs principally perform managerial work so as to be appropriately classified as exempt is reasonable.

97. The wide variation in the percentage of time allocated to various managerial, dual, and non-managerial tasks contradicts the contention that Burlington's policies, practices, procedures, training, and supervision resulted in ASMs spending uniform and consistent amounts of time on the various tasks they perform and managerial tasks in the aggregate.

98. Statistical analysis of the observation study data shows than known factors, such as store size, sales volume, and manager tenure are not correlated with the percentage of time spent on managerial duties. Thus, the data indicates that individualized factors such as personal preferences and managerial skill and style, as well as store specific factors such as labor volume drivers and employee productivity are the key factors that influence the tasks that ASMs perform and how much time they allocate to those tasks. The wide variation in experiences means that any attempt to extrapolate the experiences of individuals who have been studied in detail to "absent" ASMs is likely to result in significant error. Therefore, individualized inquiry would be required in order to make accurate determinations regarding the amounts of time "absent" ASMs allocate to specific tasks and managerial tasks overall.

Crandall is permitted to offer testimony as to the contours, methods and findings of his study. As such, Crandall is free to testify that such observations were made, where they were made, that they were coded as managerial, and the basis for that coding. He cannot, however, opine on the ultimate conclusions set forth in Paragraphs 96, 97, and 98 of his Report, as indicated, because such conclusions rest, in part, upon speculation and assumption related to activities ASMs are engaged in when they travel, attend meetings, and generally look out at the sales floor in an observational manner.

The ruling on Crandall's testimony, impacts the analysis currently before the Court as set forth in the competing motions of the parties: whether to decertify the conditional certification or grant final certification.

II. Standard of Review

In 1938, Congress enacted the Fair Labor Standards Act “to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.” Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 n.18 (1945). Section 216(b) of the FLSA provides a “collective action” mechanism that allows an employee alleging an FLSA violation to bring an action on behalf of himself “and other employees similarly situated.” 29 U.S.C. § 216(b). Unlike class actions under Rule 23, the FLSA “collective action” requires plaintiffs who desire to be included to affirmatively “opt in” to the litigation by filing a written consent with the court.⁹

⁹ Rule 23 establishes three types of class actions. Class actions under Rules 23(b)(1) and 23(b)(2) require participation from individuals who fall within the definition of the class. Fed. R. Civ. P. 23(b)(1); Fed. R. Civ. P. 23(b)(2). Under Rule 23(b)(3), a plaintiff must “opt out” if he or she does not wish to be bound by the judgment. Fed. R. Civ. P. 23(b)(3).

The United States Court of Appeals for the Third Circuit applies a two tiered analysis when deciding whether a suit under § 216(b) may move forward as a collective action. The Court has already completed the first phase by conditionally certifying this matter when it determined on November 20, 2012 that “the employees enumerated in the complaint can be provisionally categorized as similarly situated to the named plaintiff.” Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 192 (3d Cir. 2011) cert. granted on other grounds, 11-1059, 2012 WL 609478 (U.S. June 25, 2012). It is, however, possible for a conditionally certified putative class to fail in the secondary analysis. Aquilino v. Home Depot, U.S.A., Inc., No. CIV.A. 04-04100 PGS, 2011 WL 564039, at *5 (D.N.J. Feb. 15, 2011).

That is the issue here on the second tier of the analysis, the final certification of the class. Defendants have moved to “decertify” the collective action on the ground that the opt-in plaintiffs are not similarly situated. See Zavala v. Wal-Mart Stores, Inc., 691 F.3d 527 (3d Cir. 2012). The FLSA does not define the term “similarly situated” but several considerations inform the analysis, including “the extent to which any defenses that an employer might have to overtime or misclassification claims are common or individuated[.]” Big Lots Stores, Inc., 561 F. Supp. 2d at 573 (citation omitted); Manning v. Goldbelt Falcon, LLC, No. 08–3427, 2010 U.S. Dist. LEXIS 104029, *3, 2010 WL 3906735 (D.N.J. Sept. 29, 2010) (citing Kronick v. Bebe Stores, Inc., No. 07–4514, 2008 U.S. Dist. LEXIS 78502, 2008 WL 4546368 (D.N.J. Oct. 2, 2008)).

Plaintiffs move for final certification and the Court is tasked with revisiting its decision on conditional certification with “the benefit of a much thicker record than it had at the [conditional certification] stage, a court . . . then makes a conclusive

determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the named plaintiff.” Symczyk, 656 F.3d at 193.

The final certification phase of a § 216(b) collective action employs a rigid standard that requires Plaintiffs to prove by a preponderance of the evidence that members of a proposed collective action are similarly situated. Zavala, 691 F.3d at 537. Accordingly, unlike the first “conditional certification” stage which involves “determining whether similarly situated plaintiffs do in fact exist, . . . at the second stage, the District Court determines ‘whether the plaintiffs who have opted in are in fact similarly situated to the named plaintiffs.’” Id. at 536, n.4 (quoting Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010)).

III. Summary of the Parties’ Arguments

The class was conditionally certified on grounds that Plaintiff Goodman made a “modest factual showing” of a factual nexus between the manner in which Burlington’s alleged policy affected him and the manner in which it affected other Burlington ASMs. At that time, Goodman’s evidence included: the ASM job descriptions, which apply to all ASMs nationwide; several Burlington corporate policies and procedures, which include a uniform method of compensation and apply to all ASMs nationwide; Burlington’s Rule 30(b)(6) deponent’s testimony confirming the uniformity of Burlington’s corporate structure; a former District Manager’s testimony, and Goodman and two opt-ins’ deposition testimony, which indicate that the Plaintiffs spent a majority of their time performing non-exempt tasks, worked more than forty hours in a workweek, and that Plaintiffs did not receive overtime compensation. Goodman also submitted declarations from two opt-in Plaintiffs from Burlington stores in Kansas and Ohio; their statements

allege that they spent a majority of their time performing non-exempt tasks, worked more than forty hours in a workweek, and did not receive overtime compensation.

At the conditional certification stage, the Court's role is not to evaluate the merits of Plaintiffs' claim that Burlington misclassifies ASMs as "exempt"; rather, the Court's role is to determine whether Mr. Goodman has made a modest factual showing of the manner in which this allegedly unlawful policy affected him and the way it affected other Burlington ASMs.¹⁰ The Court noted that all Burlington ASMs nationwide are subject to the same uniform job descriptions, training procedures, work regulations, and compensation policies, including a uniform classification of all ASMs nationwide as "exempt" under the FLSA. Mr. Goodman's testimony and the testimony of the ASM opt-ins indicate that they performed the work of non-exempt hourly employees and worked over forty hours in a workweek without receiving overtime compensation.

¹⁰ Mr. Goodman provided the following Exhibits to support his Motion for Conditional Certification:

Exhibit A: Deposition Testimony of Burlington's Rule 30(b)(6) Deponent Louis Ansara;
 Exhibits B, C, D, E, F: Job Descriptions for the current and former ASM positions (Operations Manager, Operations Assist Store Manager, Customer Service / Logistics Manager, former Merchandise Assistant Store Manager, and the current Merchandise Assistant Store Manager position);
 Exhibit G: Deposition Testimony of opt in Plaintiff Edwin Murillo;
 Exhibit H: Deposition Testimony of opt in Plaintiff Donna Wilson;
 Exhibit I: Deposition Testimony of named Plaintiff Steven Goodman;
 Exhibit J: E-Learning Modules;
 Exhibit K: Burlington Salary Guidelines Brochure;
 Exhibit L: Burlington Coat Factory Employee Policy Handbook;
 Exhibit M: Burlington, The Heart of Success Core Values;
 Exhibit N: Burlington Coat Factory Warehouse Corporation Code of Business Conduct and Ethics;
 Exhibit O: Burlington Coat Factory, Standard Operating Procedure;
 Exhibit P: Burlington Coat Factory Store Guidelines;
 Exhibit Q: Burlington Coat Factory General Merchandising Guidelines;
 Exhibit R: Burlington Coat Factory Manager's Loss Prevention Guide, and
 Exhibit S: Testimony of former District Manager Claudia Gonzalez, who worked as an ASM from 1993-99.

Also, by way of informal letter dated October 19, 2012, Mr. Goodman submitted declarations of from the two most recent opt-in plaintiffs, Wanda West and Sharron Layne. (Dkt. No. 110).

On this basis, without weighing the merits of Plaintiffs' FLSA claims, the Court found that Goodman made a "modest factual showing" that to the extent that Burlington's allegedly unlawful misclassification affected Mr. Goodman, it affected other potential ASM collective action members. The evidence in support of conditional certification sufficiently demonstrated that "similarly situated plaintiffs do in fact exist." See Zavala, 691 F.3d at 536, n.4 (quoting Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010)).

On the present motions, the Court must determine "whether the plaintiffs who have opted in are in fact similarly situated to the named plaintiffs." Id.

A. Plaintiffs' Arguments in Favor of Final Certification

Plaintiffs make two chief arguments in favor of final certification: 1) Burlington operates pursuant to comprehensive corporate policies and procedures and 2) the testimony of the putative class members demonstrates that they are similarly situated. Plaintiffs argue that these factors, in addition to the limitations placed upon Burlington's expert Robert Crandall, merit certification.

Burlington agrees, in some measure, that its treatment of ASMs is uniform throughout its many stores in the country. Plaintiffs seize on this consistency to bolster its claim that the opt-in group of ASMs is similarly situated because, as to ASMs,

Burlington has uniform corporate policies, rules and job descriptions, and are evaluated and trained in the same manner.¹¹

In addition to the corporate structure argument, Plaintiffs claim that all ASMs have the same compensation schedule and are not paid overtime because they are all classified as “exempt” under the FLSA. According to Mr. Ansara, ASMs all receive a fixed salary with no overtime compensation and similar benefits packages regardless of variations in store performance, geographical location, and/or operating hours. Ansara

¹¹ Ansara (Ex. B) at 50-52; 70-73 (testifying that Burlington corporate sends uniform correspondence to their stores via the company intranet called “portal.coat.net” as well as through “store action planners”). Hubbard (Ex. D) at 189-90. Susan Hilton, vice president of store expense and scheduling, testified that she made the schedules for each store, using corporate workforce management system technology, and controlled the amount of hourly payroll that each store was allocated. Hilton (Ex. F) at 22-32. see, e.g., Ex. AV (Burlington Coat Factory, Standard Operating Procedures) at BCF000895, Ex. AW (Burlington Coat Factory Store Guidelines) at BCF002131 and Ex. AX (Burlington Coat Factory General Merchandising Guidelines) at BCF003406. ASMs undergo standardized training addressing a diverse range of issues. See Ansara (Ex. B) at 29-32, 57-58; see also various learning modules (Ex. AQ) addressing issues such as vacuuming schedules, ticketing, name badges, risk control, register coverage, and proper advertising placement. For instance, Burlington creates one employee handbook for ASMs nationwide. Ansara (Ex. B) at 36-37, 42-47; Ex. AS (Burlington Coat Factory Employee Policy Handbook). Burlington corporate headquarters also generates a system of core values (Ex. AT (Burlington, the Heart of Success Core Values)), and a code of business conduct and ethics (Ex. AU (Burlington Coat Factory Warehouse Corporation Code of Business Conduct and Ethics)) which together detail standards and principles to which all ASMs must adhere at all Burlington stores nationwide. Ansara (Ex. B) at 36-37, 42-47. See Ex. AL (Job Description for Operations Manager); Ex. AM (Job Description for Operations Assistant Store Manager); Ex. AN (Job Description for Customer Service Logistics Manager); Ex. AO (Former Merchandise Assistant Store Manager Job Description); Ex. AP (Current Merchandise Assistant Store Manager Job Description); Ansara (Ex. B) at 83, 85-89, 91, 93 (confirming description applies to all ASMs regardless of location). Louis Ansara, the designated Rule 30(b)(6) corporate representative, confirmed that every ASM across the United States receives the same uniform job description outlining their alleged essential duties and responsibilities in all retail locations. Ansara (Ex. B) at 93. Burlington’s corporate headquarters generates one set of uniform training materials for all ASMs nationwide. Ansara (Ex. B) at 28-29, 37, 39. Burlington’s Learning and Organizational team developed a two-to-four week program of “e-learning” modules that all new ASMs are required to complete. Ansara (Ex. B) at 60, 69-71; see also, Ex. AQ (e-learning modules). All ASMs are able to access these standardized training tools (described by Mr. Ansara as Burlington’s “primary company communication document”) through any Burlington computer terminal, regardless of the location in which they work. Id. Burlington classifies all ASMs as exempt without taking into account (1) store size, (2) store sales volume, (3) store location, (4) the ASMs’ tenure with Burlington, (5) the ASMs’ experience, (6) the hours of operation, or (7) the Store Manager (“SM”) that supervises the ASM. Id. The classification policy is a unitary one. There are no exceptions based on the duties ASMs actually may (or what Burlington believes they) perform. The full record now supports Burlington’s corporate representative’s testimony that the duties and responsibilities of all ASMs are materially the same throughout the company.

(Ex. B) at 17, 99-102; Ex. AS (Burlington Coat Factory Employee Policy Handbook) at BCF10; Ex. AR (Burlington Salary Guidelines Brochure).

Plaintiffs argue that Burlington's comprehensive corporate structuring of ASM duties, compensation schedule, and applicable policies and rules is compelling evidence in favor of certification and generally accepted by courts as indicative of a similarly situated class. Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 160-61 (S.D.N.Y. 2008) ("[E]vidence that the duties of the job are largely defined by comprehensive corporate procedures and policies, district courts have routinely certified classes of employees challenging their classification as exempt, despite arguments about "individualized" differences in job responsibilities.") (citing Krzesniak v. Cendant Corp., No. C 05-05156, 2007 WL 1795703, at *3 (N.D. Cal. June 20, 2007) (improper classification of branch managers at car rental chain); Alba v. Papa John's USA, Inc., No. CV 05-7487, 2007 WL 953849, at *1 (C.D. Cal. Feb. 7, 2007) (improper classification of store managers at pizza delivery chain); Torres v. Gristede's Operating Corp., No. 04 Civ. 3316, 2006 WL 2819730, at *2 (S.D.N.Y. Sept. 29, 2006) (improper classification of store co-managers and department managers at supermarket chain); Whiteway v. FedEx Kinko's Office and Print Services, Inc., No. C 05-2320, 2006 WL 2642528, at *1 (N.D. Cal. Sept. 14, 2006) (improper classification of "center managers" at shipping and print services retail chain); Tierno v. Rite Aid Corp., No. C 05-02520, 2006 WL 2535056, at *1 (N.D. Cal. Aug. 31, 2006) (improper classification of store managers at drug store chain); Goldman v. Radioshack Corp., No. Civ. A. 03-0032, 2005 WL 1124172, at *4 (E.D. Pa. May 9, 2005) (improper classification of store managers at electronics chain).

In addition, the evidence of similarity of the class predicated upon the uniform corporate governance of ASMs is substantially bolstered by the testimony of the opt-in members of the class. The testimony demonstrates that the opt-in Plaintiffs spend the majority of their time on non-exempt tasks within the confines the Burlington's policies and procedures. Plaintiffs' identify testimony to support the conclusion that they primarily perform non-exempt labor such as stocking and fronting and recovering

merchandise;¹² cashiering;¹³ engaging in customer service;¹⁴ unloading trucks;¹⁵
cleaning the stores;¹⁶ and taking out trash.¹⁷

¹² Anneau (Ex. H) at 105, 163, 246, 247 (stocked and put merchandise on floor); Ball (Ex. I) at 37-38, 64-66, 170, 172-73 (moves merchandise from back to front and puts on displays); Casey (Ex. J) at 199; Chimezie (Ex. K) at 52, 53, 126, 150, 154-57, 164 (builds displays, stocks shelves, and stacks merchandise); Currie (Ex. L) at 73, 75, 110, 136, 145, 185, 214, 215, 217-20 (would bring rolling racks out to floor and stack racks); Dant (Ex. M) at 202; Ebbs (Ex. N) at 58, 59, 76, 93, 127-29, 108-109, 120-23, 161-62 (moving fixtures, making moves, taking down walls, performing recovery); Fortenberry (Ex. O) at 114; Goodman (Ex. P) at 296; Harris (Ex. Q) at 148; Harrison (Ex. R) at 39, 42, 84, 85, 133-35 (moving walls and setting up areas to be re-merchandised); Haynes (Ex. S) at 156; Johnson (Ex. T) at 22, 94, 131, 158 (tagged and put sensors on clothing); Kawa (Ex. U) at 73; Knight (Ex. V) at 182, 183; Koleva (Ex. W) at 17, 109, 110, 131 (spends 15-30 hours per week stocking merchandise); LaMaster (Ex. X) at 30, 32, 182, 183; Layne (Ex. Y) at 247; Le (Ex. Z) at 167; Melendez (Ex. AA) 37, 68, 69, 72-75, 78-80, 216, 301-303 (spent 4-5 hours every morning merchandizing the floor); Murillo (Ex. AB) at 155-56; Sadauskas (Ex. AC) at 80, 83, 187, 188, 196 (unpack, sensor and hang clothes, stocking shelves, sorted merchandise); Sandhu (Ex. AD) at 31, 145 (pushed merchandise out to floor and put it on the racks); Schmiersal (Ex. AE) at 144; Singson (Ex. AF) at 138-42; Steinfeld (Ex. AG) at 30-32, 57, 96, 97, 122, 123, 183-87, 189, 190, 194, 195 (putting stock away, pulling merchandise out of the back, colorizing and sizing); Taylor (Ex. AH) at 34, 148-50; Tucker (Ex. AI) at 61, 111-14; Young (Ex. AJ) at 40, 87, 134, 135; Wilson (Ex. AK) at 69.

¹³ Anneau (Ex. H) at 109-13, 224, 247; Ball (Ex. I) at 170; Casey (Ex. J) at 179, 200; Chimezie (Ex. K) at 154, 155; Currie (Ex. L) at 213; Dant (Ex. M) at 148, 202; Ebbs (Ex. N) at 115, 120, 121, 160; Fortenberry (Ex. O) at 113; Goodman (Ex. P) at 146; Harris (Ex. Q) at 101, 148, 149; Harrison (Ex. R) at 58, 59, 133; Haynes (Ex. S) at 155; Johnson (Ex. T) at 159; Kawa (Ex. U) at 73, 146; Knight (Ex. V) at 182; Koleva (Ex. W) at 17, 104, 131; LaMaster (Ex. X) at 181; Layne (Ex. Y) at 186, 252; Le (Ex. Z) at 96, 167; Melendez (Ex. AA) 37, 144, 145, 149, 301; Sadauskas (Ex. AC) at 187; Sandhu (Ex. AD) at 145; Schmiersal (Ex. AE) at 120, 142; Singson (Ex. AF) at 138-42; Steinfeld (Ex. AG) at 171, 172; Taylor (Ex. AH) at 34, 148; Tucker (Ex. AI) at 110, 111; Young (Ex. AJ) at 134.

¹⁴ Anneau (Ex. H) at 162, 228, 246; Ball (Ex. I) at 37, 38; Casey (Ex. J) at 199; Chimezie (Ex. K) at 150; Currie (Ex. L) at 213; Ebbs (Ex. N) at 93, 108, 109, 120, 121, 135, 161; Fortenberry (Ex. O) at 113; Goodman (Ex. P) at 148; Harris (Ex. Q) at 148; Harrison (Ex. R) at 134; Haynes (Ex. S) at 22, 140; Johnson (Ex. T) at 88, 143, 158; Knight (Ex. V) at 182; Koleva (Ex. W) at 105, 131; LaMaster (Ex. X) at 181; Le (Ex. Z) at 167; Melendez (Ex. AA) 180; Sadauskas (Ex. AC) at 187; Sandhu (Ex. AD) at 100, 145; Singson (Ex. AF) at 138-42; Steinfeld (Ex. AG) at 30, 96, 97, 122, 123, 132, 171, 172, 183, 184, 194, 195; Taylor (Ex. AH) at 148; Tucker (Ex. AI) at 111; Young (Ex. AJ) at 40, 134; Wilson (Ex. AK) at 93, 94.

¹⁵ Anneau (Ex. H) at 99, 100, 102-104 (had to process new freight and unload for 50-70% of the day when a truck came in); Ball (Ex. I) at 173 (unloaded boxes from trucks onto conveyor belts 4-5 times per week); Casey (Ex. J) at 179, 200; Chimezie (Ex. K) at 132, 155 (pulled racks for unloading); Currie (Ex. L) at 75, 185, 213 (unloaded trucks in the morning); Ebbs (Ex. N) at 161; Fortenberry (Ex. O) at 113; Goodman (Ex. P) at 154, 155, 297; Harris (Ex. Q) at 101, 148, 149; Harrison (Ex. R) at 134; Haynes (Ex. S) at 60, 93, 144, 155, 168; Johnson (Ex. T) at 22, 60, 159 (had to unload trucks 2-3 times per week); Kawa (Ex. U) at 73, 146; Knight (Ex. V) at 183; LaMaster (Ex. X) at 30, 181, 182; Layne (Ex. Y) at 119, 186, 247; Le (Ex. Z) at 146, 167; Melendez (Ex. AA) 37, 222, 224, 302 (5-10 hours per week unpacking boxes off of trucks); Sadauskas (Ex. AC) at 187; Sandhu (Ex. AD) at 32, 146 (pushed out new freight from the tucks and processed it); Schmiersal (Ex. AE) at 144; Singson (Ex. AF) at 138-42; Taylor (Ex. AH) at 69, 149; Tucker (Ex. AI) at 111; Young (Ex. AJ) at 40, 113, 134; Wilson (Ex. AK) at 179.

¹⁶ Anneau (Ex. H) at 113, 247; Ball (Ex. I) at 65, 66, 172 (cleans sales floor, sweeps inside and outside, cleans break rooms, vacuums, cleans mirrors, cleans front doors); Casey (Ex. J) at 200; Chimezie (Ex. K) at 154, 155; Currie (Ex. L) at 73, 110 (cleans up store and break rooms as part of closing); Ebbs (Ex. N) at 120, 134, 135, 142, 161 (sweeps the floor, cleans fitting room, cleans up messes on the floor); Fortenberry (Ex. O) at 114; Goodman (Ex. P) at 150, 296; Harris (Ex. Q) at 149; Harrison (Ex. R) at 82, 85, 134, 135; Haynes (Ex. S) at 156 (cleaned the store); Johnson (Ex. T) at 144, 158 (cleaned floors when there was a

The record contains numerous examples of how the opt-in Plaintiffs spend the majority of their time at work accomplishing non-managerial tasks which should qualify them as “non-exempt” under the FLSA. 29 C.F.R. §§ 541.100, 541.700. See, e.g., Steinfeld (Ex. AG) at 95, 187 (I personally did the tasks in the departments that had to be done to comply with the Task Manager deadline . . . based on the fact that there were not enough employees in that department to do it.”), Ball (Ex. I) at 65, 66, 137-38, 143, 169-71, 183 (A shortage of staffing at her store forced her to work primarily on non-managerial tasks.) Plaintiffs cite to testimony which demonstrates that most of the opt-ins claim that they spent at least 75% of their time on task related work.

In addition to performing tasks, the opt-in group complains of limited input on traditional managerial functions, such as the approval of vacation or overtime for hourly employees,¹⁸ the ability to administer discipline,¹⁹ conducting training sessions,²⁰ hiring

spill, including vomit, cleaned bathrooms, dusted fixtures); Knight (Ex. V) at 183; Koleva (Ex. W) at 107, 133 (cleaned bathrooms and swept floors); LaMaster (Ex. X) at 68, 182; Layne (Ex. Y) at 247; Le (Ex. Z) at 168, 176 (swept floors); Melendez (Ex. AA) 76, 153, 222, 223, 302 (spent about 10 hours per week cleaning store); Murillo (Ex. AB) at 159; Sadauskas (Ex. AC) at 188; Sandhu (Ex. AD) at 31, 146 (got on knees to clean fixtures, cleaned bathrooms); Schmiersal (Ex. AE) at 144 (cleaned the store); Singson (Ex. AF) at 138-42; Steinfeld (Ex. AG) at 56, 133, 171; Taylor (Ex. AH) at 34, 149; Tucker (Ex. AI) at 112, 116; Young (Ex. AJ) at 135; Wilson (Ex. AK) at 96, 97.

¹⁷ Anneau (Ex. H) at 122, 133 (spends up to 2 hours per week taking out the trash); Ball (Ex. I) at 65, 66, 170, (takes out trash as part of opening); Casey (Ex. J) at 199; Currie (Ex. L) at 185, 213, 215, 216; Goodman (Ex. P) at 298; Harris (Ex. Q) at 148; Johnson (Ex. T) at 161, 162; Layne (Ex. Y) at 247; Le (Ex. Z) at 167; Melendez (Ex. AA) 225, 226; Murillo (Ex. AB) at 158; Wilson (Ex. AK) at 179.

¹⁸ See, e.g., Melendez (Ex. AA) at 204; Murillo (Ex. AB) at 65, 169; Sadauskas (Ex. AC) at 97, 98; Schmiersal (Ex. AE) at 88; Singson (Ex. AF) at 92; Steinfeld (Ex. AG) at 119, 120; Tucker (Ex. AI) at 72, 73; Wilson (Ex. AK) at 173.

¹⁹ See, e.g., Goodman (Ex. P) at 288, 289; Harris (Ex. Q) at 98, 99 (all discipline, even verbal warnings, had to be approved by the SM); Harrison (Ex. R) at 58, 118 (all discipline had to go through the SM); Haynes (Ex. S) at 22, 116 (could not write employees up without approval); Johnson (Ex. T) at 70, 71, 112 SM would tell her what to put in all write-ups).

²⁰ See, e.g., Casey (Ex. J) at 62 (“seldomly” trained associates); Chimezie (Ex. K) at 65, 66, 142, 143 (never conducted orientation and only “rarely” trained associates); Currie (Ex. L) at 211 (most training done through computers).

and firing hourly employees,²¹ unilaterally schedule hourly employees,²² dress code enforcement,²³ store closing in inclement weather,²⁴ music selection played in store or temperature in the store,²⁵ product offerings in the store,²⁶ store budget considerations,²⁷ payrate for hourly associates,²⁸ store signage considerations,²⁹ performance reviews of hourly employees,³⁰ and prices to charge for products sold in the stores.³¹

Plaintiffs also highlight the corroborating testimony of Burlington's designated corporate representative, Lisa Chambrelli-Hine.³² Chambrelli-Hine agrees that ASMs

²¹ Melendez (Ex. AA) at 90-92 ("I never had a say-so as far as who got hired."); Murillo (Ex. AB) at 104 (SM would tell him who to hire); Sadauskas (Ex. AC) at 112; Schmiersal (Ex. AE) at 33 (hiring was the SM's decision); Singson (Ex. AF) at 36, 60 (same); Ball (Ex. I) at 124 (cannot fire); Chimezie (Ex. K) at 117, 118 (has not terminated any employees); Currie (Ex. L) at 175, 176 (sometimes sat in on termination meetings but had no other role); Ebbs (Ex. N) at 101 (cannot fire).

²² See, e.g., Chimezie (Ex. K) at 105, 106 (schedule "depends on the direction" she gets from the SM or corporate); Currie (Ex. L) at 020, 203 (computer would automatically generate the schedules and the SM would "tweak" them from there); Dant (Ex. M) at 111, 119 (SM does the schedule).

²³ See, e.g., Steinfeld (Ex. AG) at 175 (dress code was set out in the employee handbook); Young (Ex. AJ) at 45 (dress code explained in employee handbook).

²⁴ See, e.g., Ball (Ex. I) at 175; Sandhu (Ex. AD) at 148.

²⁵ See, e.g., Goodman (Ex. P) at 294; Murillo (Ex. AB) at 170, 171; Sandhu (Ex. AD) at 148; Wilson (Ex. AK) at 175.

²⁶ See, e.g., Schmiersal (Ex. AE) at 127, 145, 146; Steinfeld (Ex. AG) at 191; Tucker (Ex. AI) at 113; Young (Ex. AJ) at 136; Wilson (Ex. AK) at 172.

²⁷ See, e.g., Ball (Ex. I) at 108, 109; Casey (Ex. J) at 57, 58; Chimezie (Ex. K) at 107; Currie (Ex. L) at 206, 208; Fortenberry (Ex. O) at 27; Goodman (Ex. P) at 293; Harris (Ex. Q) at 93.

²⁸ See, e.g., Goodman (Ex. P) at 293; Johnson (Ex. T) at 36; Melendez (Ex. AA) at 100; Murillo (Ex. AB) at 46; Sandhu (Ex. AD) at 61; Wilson (Ex. AK) at 174.

²⁹ See, e.g., Johnson (Ex. T) at 164; Knight (Ex. V) at 185; LaMaster (Ex. X) at 184; Layne (Ex. Y) at 307; Le (Ex. Z) at 170; Melendez (Ex. AA) 303, 304; Sadauskas (Ex. AC) at 190; Sandhu (Ex. AD) at 148; Schmiersal (Ex. AE) at 146; Singson (Ex. AF) at 142.

³⁰ See, e.g., Ebbs (Ex. N) at 99, 100 (she would do an initial draft but the SM made final decisions); Fortenberry (Ex. O) at 56, 57, 59 (reviews were more of a "cut and paste thing" and had to be approved by the SM); Goodman (Ex. P) at 210, 211 (district manager had final approval); Harris (Ex. Q) at 80-83 SM and HR would change reviews); Haynes (Ex. S) at 153 (SM or district HR could change reviews); Johnson (Ex. T) at 62-66 (store manager frequently made changes that she disagreed with); Kawa (Ex. U) at 63 SM had final say).

³¹ See, e.g., Fortenberry (Ex. O) at 115; Goodman (Ex. P) at 290; Harris (Ex. Q) at 150; Harrison (Ex. R) at 136; Haynes (Ex. S) at 157; Johnson (Ex. T) at 163; Kawa (Ex. U) at 154; Knight (Ex. V) at 185; LaMaster (Ex. X) at 184; Le (Ex. Z) at 169; Melendez (Ex. AA) at 303; Murillo (Ex. AB) at 167; Sadauskas (Ex. AC) at 189.

³² See, e.g., Chambrelli-Hine (Ex. C) at 171 (do not plan, control, or set store labor budgets), 172 (do not set the rate of pay for hourly associates), 173 (do not set the dress code), 174 (cannot close the store in bad weather), 175 (cannot decide what music to play in the stores), 177 (cannot decide the merchandise to be

cannot unilaterally independently hire, fire, or discipline or otherwise participate in interviews, with the limited exception of prescreening potential hires. Chambrelli-Hine (Ex. C) at 170-72; 234-35; 265-66. Only the store manager had authority to act in these areas.³³

When an ASM, in the rare instance, performed management tasks, the ASMs actions were defined by corporate policies under the direct supervision of the store manager. *Id.* at 234, 293 (must perform tasks in accordance with corporate policies and cannot deviate therefrom); Ball (Ex. I) at 126, 175 (“We all had to follow the same rules,” and could not deviate from them); Harrison (Ex. R) at 47 (“we received direction on pretty much everything”). Plaintiffs claim that as ASMs, they had little to no authority over the non-exempt employees in their stores and, because the stores are often short-staffed, the ASMs had little time to engage in management tasks.³⁴

The insufficient staffing model forces ASMs to primarily engage in non-exempt tasks so that the store can function. Burlington corporate designates confirm that insufficient staffing is a common complaint among its workforce. Hubbard (Ex. D) at

sold or set prices), 234 (tasks must be performed according to company policy), 293 (cannot deviate from corporate policy).

³³ See, e.g., Currie (Ex. L) at 135, 164, 205 (“stuff would have to go through HR to determine our actions”); Ebbs (Ex. N) at 113-14 (received directions from the store manager even when he was not there); Harrison (Ex. R) at 51- 53 (“anything we would do, I would have to get authorization from the store manager”); Saudauskas (Ex. AC) at 99-100 (when store manager was not there, he would leave a list of tasks to be performed in his absence), 194-95 (associates reported to the store manager even when he was not there); Haynes (Ex. S) at 69 (SM was “very controlling to the point where she would call in on her days off . . . so my decisions were based on what she would prefer me to do”); Melendez (Ex. AA) at 54 (“always new directives . . . coming from corporate. And if the new directive showed you had to do something a certain way, then you need to go do it”); Steinfeld (Ex. AG) at 137-38 (SOPs existed for everything).

³⁴ See, e.g., Ball (Ex. I) at 38 (“rarely” supervised associates), 66, 67 (associates “rarely” take direction from her); Chimezie (Ex. K) at 138 (needs permission from the SM to reassign an employee); Ebbs (Ex. N) at 125 (had no associates to delegate to); Harrison (Ex. R) at 141 (did not have anyone to delegate to); Johnson (Ex. T) at 70, 134, 138 (associates did not take direction from her); Kawa (Ex. U) at 144, 145 (didn’t supervise associates); Koleva (Ex. W) at 69 (did not supervise).

197, 300 (hears this complaint about once a month); Escoto-Reyes (Ex. G) at 79-81 (receives calls from ASMs about once per quarter complaining about staffing). Plaintiffs allege that Burlington's business practice is to purposely understaff its stores to avoid having to pay overtime. Specifically, Plaintiffs claim that Burlington relies on ASMs to fill in for hourly employees and perform non-exempt tasks so Burlington can avoid paying for overtime.³⁵

In sum, Plaintiffs allege that their testimony in addition to Burlington's witnesses is overwhelming evidence to support a finding that they labor pursuant to a comprehensive set of rules and procedures that are identical across the country, they perform primarily non-exempt tasks, that their job duties do not fall under the executive or administrative exceptions, and they are, therefore, similarly situated for class certification under the FLSA.³⁶

B. Defendants' Arguments in Favor of Decertification

³⁵ See, e.g., Ball (Ex. I) at 177-78 (testified that because there are no people . . . to delegate to, you have to do it yourself. You are doing the work that an hourly person would do."); Melendez (Ex. AA) at 39 ("You were supposed to be delegating. You were supposed to be a manager. I was never given the opportunity to be a manager."); Chimezie (Ex. K) at 144 (no time to coach employees because of her daily hourly tasks); Goodman (Ex. P) at 226, 227 (could not manage effectively and do the tasks they expected); Koleva (Ex. W) at 69, 128 (no time to oversee employees because of her hourly work); Sadauskas (Ex. AC) at 190, 191 ("I worked mainly as an hourly associate"); Steinfeld (Ex. AG) at 95 ("I personally did the tasks . . . based on the fact that there were not enough employees in that department to do it"); Young (Ex. AJ) at 39 ("We did not have an opportunity to truly manager the store or to truly engage in the training that these people were entitled to."); Wilson (Ex. AK) at 24, 25 (worked long hours doing associate's tasks); Anneau (Ex. H) at 160 (performed hourly tasks when not enough staff); Ball (Ex. I) at 71-74 ("generally there is no one to give tasks to"); Casey (Ex. J) at 183, 184 (store was understaffed); Currie (Ex. L) at 99 (store was understaffed and had to do the tasks himself); Goodman (Ex. P) at 233, 234 (needed more hourly employees).

³⁶ Anneau (Ex. H) at 228 (observed other ASMs perform customer service); Ball (Ex. I) at 91 (other ASMs in her store do hourly work); Currie (Ex. L) at 213 (other ASMs did hourly work); Goodman (Ex. P) at 101 (ASMs all do the same thing); Harris (Ex. Q) at 141 (same); LaMaster (Ex. X) at 173-75 (observed other ASMs doing the same things she did); Chambrelli-Hine (Ex. C) at 224-25 (ASMs do the same things).

Burlington makes several arguments against certification and in favor of decertification of the conditional class. First, that the executive exemption requires examination of the duties performed pursuant to 29 C.F.R. § 541.100(a)(1)-(4)3. Second, that the evidence as set forth in the Crandall Study, Plaintiffs' deposition testimony, and the Burlington managers' testimony reveals significant variation in plaintiffs' management duties. Finally, that the evidence reveals significant variation in the importance of plaintiffs' managerial duties and their freedom from direct supervision.

An employee qualifies for the executive exemption if they:

- (a) are compensated on a salary basis at a rate of not less than \$455 per week;
- (b) have the primary duty of management of the enterprise or a customarily recognized subdivision thereof;
- (c) customarily and regularly direct the work of two or more employees; and
- (d) have the authority to hire or fire other employees or make recommendations as to the hiring, firing, advancement, promotion or any other change of employee status that are given "particular weight."

See 29 C.F.R. § 541.100(a)(1)-(4)3.³⁷ Burlington claims that the "primary duty" of the ASMs is managerial. "Primary duty" is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). The primary duty analysis considers qualitative, not quantitative, evidence of whether an employee is a bona fide executive. Soehnle v. Hess Corp., 399 F. App'x 749, 751 (3d Cir. 2010).³⁸

³⁷ Burlington argues that the first prong of the executive exemption is not in dispute because ASMs are compensated at a rate greater than \$455 per week.

³⁸ Considerations related to the determination of an employee's "primary duty" include: (1) interviewing, selecting and training; (ii) setting and adjusting pay rates and work hours; (iii) directing the work of subordinates; (iv) maintaining and using sales and production records; (v) appraising employee performance; (vi) addressing grievances; (vii) disciplining employees; (viii) determining work techniques;

However, an employee's "primary duty" does not always reflect the most time-consuming task but instead refers to the "principal, main, major or most important" duty performed by the employee, regardless of how much time she devotes to it. Id. (citing 29 C.F.R. § 541.700(a)). Thus, considerations include the relative importance of the work to the function of the entity, the amount of time dedicated to the task, the autonomy exercised in that performance, and the pay rate as compared to subordinates performing similar tasks. 29 C.F.R. § 541.700(a).

Burlington argues for decertification because of the individualized inquiry required by the executive exemptions as to the opt-in class. See, Knott v. Dollar Tree Stores, Inc., 897 F. Supp. 2d 1230, 1241 (N.D. Ala. 2012) ("While the executive-exemption defense is common among all Plaintiffs, there is an abundance of evidence concerning their differences ... [which] directly affect an assessment of the executive-exemption for each individual Plaintiff"); Smith v. Heartland Automotive Servs., Inc. ("Jiffy Lube"), 404 F. Supp. 2d 1144, 1150-54 (D. Minn. 2005) (decertifying class of managers where discovery showed "significant ... discrepancies" with respect to day-to-day responsibilities, including performance of management tasks, independence from district manager, control over hiring, firing and discipline, and exercise of discretion); Big Lots Stores, Inc., 561 F. Supp. 2d at 586 (decertifying because determining whether plaintiffs were exempt would necessitate individualized inquiries); Morisky v. Public Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 499 (D.N.J. 2000); Holt v. Rite Aid Corp., 333 F. Supp. 2d 1265, 1271 (M.D. Ala. 2004)(exemption required "fact-intensive

(ix) planning and apportioning work among the employees; (x) deciding how much product to order and stock; (xi) providing for the safety and security of employees, customers and the stores; (xii) controlling budgets; and (xiii) ensuring legal compliance. 29 C.F.R. § 541.102.

determination" and examination of day-to-day tasks). As a result, Burlington rejects the ASMs' evidence of commonality as warranting certification.

Burlington also claims that the record evidence reveals significant variation in the manner in which the opt-ins accomplish their duties which precludes certification. This argument relies primarily on the evidence collected and extrapolated by Robert Crandall, Burlington's expert. In addition, Burlington highlights differences in the testimony of the opt-ins as evidence that there is no similarity in their primary duties. This argument takes two forms: that the ASMs do not perform primarily non-managerial work and, even if they do, they do not do so in a similar manner. Thus Burlington seeks to pierce the findings by the Court on conditional certification.

Conditional certification may only be converted into a final certification where Plaintiffs prove they "were performing the same or at least substantially similar job duties" and that their duties rendered them non-exempt under the FLSA. Aquilino, 2011 WL 564029, at *6; see Zavala v. Wal-Mart Stores, Inc., 2010 WL 2652510, *3 (D.N.J. June 25, 2010), aff'd sub nom. 691 F.3d 527 (3d Cir. 2012) (the "similarities necessary to maintain a collective action under § 216(b) must extend beyond the mere facts of job duties and pay provisions"). Burlington argues that the individualized nature of Plaintiffs' claims thwart collective treatment. Zavala, 691 F.3d at 537-38 (affirming decertification where "significant differences in the factual and employment settings of the individual claimants" and different defenses were available); Karlo v. Pittsburgh Glass Works, LLC, 2014 WL 1317595, *19 (W.D. Pa. Mar. 31, 2014) (substantial variances among day-to-day duties and employment settings, and individualized defenses and procedural concerns, weighed in favor of decertification); Martin v.

Citizens Fin. Group, Inc., 2013 WL 1234081, *6 (E.D. Pa. Mar. 27, 2013) (plaintiffs not similarly situated "due to the unresolved differences in the factual and employment setting of the various Plaintiffs").

The Court found that Crandall's conclusions set forth in Paragraphs 96, 97, and 98 of his report, which state in general terms that the ASMs spend more than half their time performing managerial duties and that the nature of the tasks performed in that time is too variant to permit class certification, lacks foundation and is an impermissible legal conclusion. Nonetheless, the Crandall Report demonstrates that there is variation in the percentage of time ASMs allocate to managerial/dual tasks during the week. Burlington argues that the employees Crandall observed spent approximately 30% to 85% of their time on managerial/dual tasks. Crandall Rep., Exs. 4, 5. The range of time differed between employees, the stores they staffed and other individualized factors, such as performance, leadership style, and employee quality. These factors change daily and when coupled with the dual nature of certain tasks present a challenge to certification because the trier of fact would need to examine how each ASM spent time on a daily basis.³⁹

Burlington argues that the variation itself is the only similarity enjoyed by the group as further evidenced by the testimony of the opt-in Plaintiffs and the managers.

³⁹ "[A]ssistant manager in a retail establishment may perform work such as serving customers, ... stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves." 29 C.F.R. § 541.106; see also Donovan v. Burger King Corp., 675 F.2d 516, 521 (2d Cir. 1982) (although plaintiff performed nonexempt tasks more than 50% of time, management primary duty, in part because "much of the oversight of the operation can be carried out simultaneously with the performance of non-exempt work").

Put differently, the observations catalogued in the Crandall Report are bolstered by the deposition testimony of the Plaintiffs and confirms that the time spent on duties performed on a daily and weekly basis vary significantly. Several examples highlight Burlington's argument. First, ASMs spend anywhere from 21.9% to 85% of their work time on the sales floor/front end which equates to one ASM spending 9.4 hours on the sales floor/front end, while another spent 36.6 hours there during the week. Crandall Report at i. Likewise, the observed ASM group is further distinguished by the CLSM and MM titles with each group averaging different time spent on the sales floor.

The same can be said for the amount of time ASMs spend directing the work of subordinates,⁴⁰ time spent as Manager on Duty ("MOD"),⁴¹ training and coaching

⁴⁰ For example, there is variation in the type of responsibility each ASM shouldered. See Ebbs 51:24-52:25, 55:5-11, 62:19-63:2 (supervised 8-29 direct reports, ensuring they complied with BCF's policies through coaching, training, hands on working side-by-side and teaching); Melendez 128:21-129:16 (supervised 67-130 employees); Singson 67:11-22 (13 direct reports as MM; responsible for training, supervising, and developing them); Haynes, 138:14-24 (6-10 associates on daily basis); Harris 56:5-24 (supervised half of the 30-40 store associates); Anneau 117:13-23 (did not know how many reported to her, only that it was probably more than 20); Taylor 24:10-21 (delegated tasks and monitored associates' performance); Young 61:6-63:10 (assigned tasks; number of tasks varied); Dant 135:3-136:1, 143:10-144:9 (reassigned cashiers to recover sales floor; delegated work from task manager); Harris 49:2-50:5 (decided who would complete tasks); Wilson 83:7-15 (never assigned employees to do anything as ASM); Layne 191:2-23 (never directed associate to do something without SM direction).

⁴¹ MODs are responsible for everything that happens within the store and Burlington argues that the testimony reveals that the MOD responsibilities and the amount of time spent as MOD varied by ASM, store and over time. Gonzalez 138:17-24 (DM: ASM responsible for running store when highest level manager there); McCouch 6 (SM: MOD in charge of entire store regardless of whether another manager in the store); Casey 90:24-91:6 (MOD responsible for whole store); Ebbs 105:18-106:6, 108:16-109:1, 114:13-17 ("I'm responsible for all four walls during my MOD."); Ebbs 117:19-118:17 (MOD 16-40 hours/week) and Singson 58:25-59:8 (MOD 15-20 hours/week); see also McCouch 6 (Singson takes more MOD shifts than other ASMs; other managers take more MOD shifts if manager on vacation); Johnson 51:14-22, 52:24-53:11 (only MOD about 6 hours/week, while OM MOD 80% of the time); Young 107:5-13 (MOD hours depended on week and whether something more pressing to address; ranged from 0-15 hours); Dant 71:11-73:7 (MOD 10-16 hours/week depending on if scheduled on Sunday). Anneau 96:10-24 (only manager in store 2-5 hours per shift); Chimezie 56:2-60:5 (MOD shifts vary from 2-7 hours).

employees,⁴² scheduling and payroll responsibilities,⁴³ operational responsibilities,⁴⁴ and merchandising responsibilities.⁴⁵

⁴² The testimony reveals variation in whether ASMs were tasked with training and the manner in which they delivered training. Sandhu 67:15-68:24, 112:25-114:7 (claimed not to provide any training to associates, but did admit to mentoring associates when they asked for advice); Murillo 41:25-42:14 (claimed no role in training because department managers trained associates and SM trained department managers); McCouch 11 (SM: ASMs very involved in coaching and training); Young 78:11-20 (ASM: responsible for ensuring associates properly trained on all tasks they needed to perform); Goodman 37:1-13, 55:9-22, 266:14-267:18 (conducted orientation for new employees; trained on loss prevention); Haynes 59:21-60:10, 108:22-111:21 ("directly responsible" for training hires in his areas and seasonal hires; onboarded 30-40 associates); Young 36:12-20, 92:2-93:21 (cross-trained associates to work in different departments and on fitting room procedures) Melendez 65:10-22, 156:24-157:15, 183:23-184:19 (conducted orientations until delegated it to accounting); Casey 62:2-4 (has associates train by working together on the registers); Fortenberry 39:13-40:8 (paired new hires with associates for shadowing, but instructed them on what to show new hires); Sadauskas 81:6-19; 108:11-16 (trained on merchandising by leading by example when worked with associates); Knight 82:2-25 (gave coaching and guidance to help strengthen departments).

⁴³ The testimony is mixed regarding ASM involvement in scheduling and payroll, with some intimately involved, others peripherally, and some having no responsibility. Young 63:14-65:12, 69:1-70:2 (scheduled direct reports using BEST scheduling program, made changes to schedule based on day-off requests, granted days off, called in associates to cover call-outs, and decided which associates to remove from schedule to stay within payroll budget); Goodman 33:12-34:21, 85:12-87:20, 149:7-9 (wrote weekly schedule based on store's budget and reviewed schedules created by department managers); McCouch, r13 (Singson spends 4-5 hours/week executing and editing schedule; makes decisions to ensure store hitting targeted hours and meeting payroll); Murillo 62:25-63:5 (claimed department managers handled all staffing and scheduling); Wilson 52:4-5, 151:16-152:23 (claimed not to write schedules, but later contradicted testimony when admitted writing department managers' schedule); Johnson 35:16-23 (SM did not permit her to touch schedule; all changes made by SM/OM); Knight 74:16-22 (never made edits to schedules); Sadauskas 77:4-12 (only adjusted schedule if only manager in the store); Taylor 71:17-72:4, 145:8-14 (5-7 hours/week reviewing and editing schedule and payroll report when SM on leave; otherwise not involved).

⁴⁴ Melendez 155:23-156:6, 209:20-210:11 (2-3 hours/day on operational duties, including making sure everything was safe and everyone was doing work correctly, checking up with front end and back of house, reviewing email, ordering supplies and delegating tasks); LaMaster 71:19-72:21 (reviewed records to ensure adherence to policies and monitored accuracy of receiving transfers, debits, damages, returns to vendor, and chargebacks); Harris 43:3-12 (responsible for overall daily operations); Dant 75:11-76:19 (as MM only assists in operations when she is only manager in store); Ebbs 85:14-25 (stepped in to help manage operations when needed); Sandhu 87:24-88:21 (Milpitas MM; turned off the alarm, counted safe and put money out when opened); Kaleva 98:1-99:24 (also Milpitas MM; let in associates, took phone calls and asked associates to complete tasks when opening); Murillo 69:19-70:11 (programmed alarm, participated in call with DM, reviewed emails, counted money into registers, provided instructions to department managers, made sure registers working, and called SM); Johnson 57:1-15 (opening duties took 30 minutes and only did them when another manager on vacation); Le 147:1-151:6 (opening duties took 3.5 hours); Taylor 106:22-107:13 (amount of time to open store depends on how well-versed manager is on opening process).

⁴⁵ There are variations in the quality of responsibilities of the ASMs regarding merchandising. See, e.g., Young 80:7-13 (suggestions to deviate from guidelines); Dant 183:22-184:14 (recommendations to coat buyers on what was/was not selling); Sadauskas 110:12-111:11 (recommendations to address sales opportunities); Schmorsal 127:15-22 (suggestions on how to execute merchandise plans); Dant 74:9-75:6 (recommended changes to guidelines rejected); Wilson 103:22-104:2 (although MM, incredulously claimed not to execute merchandise plans).

Based upon the forgoing, Burlington argues that an individualized inquiry into the work experience of each Plaintiff is required to measure both liability and damages. Burlington sets forth additional evidence suggesting that ASMs' supervisory responsibilities vary for a number of reasons, including the time of year, job position, store, shift, and other factors, which requires the Court to look at supervisory responsibilities on a daily or weekly basis. Each store differs as to staff causing variations in the number of subordinates ASMs supervise. See Layne 306:13-21 (8 to 10 associates as a CSLM in Columbus; 4 to 5 associates as a MM in Lancaster); Knight 41:11-17, 126:7-12 (15 employees directly reported to ASMs, but as only manager in the store she supervised 50+ employees); Johnson 141:13-23 (4-5 associates on sales floor during week, 8-10 during weekends because busiest time); Young 35:11-39:7; 123:14-18 (40+ employees during first year, but only 11-26 when payroll dropped).

In addition, Burlington argues that ASMs were told to delegate more work to subordinates a fact which supports its position that Burlington expected ASMs to manage.⁴⁶

Finally, in support of the Executive Exemption defense, Burlington claims that the weight of the ASMs' authority and responsibility in certain areas of management warrant application of the executive exemption. 29 C.F.R. § 541.100 (a)(4). To determine the value or weight of an activity, several factors are considered, including

⁴⁶ See, Singson 66:24-67:4, 105:7-10, 123:13-20 (received feedback to empower others, push tasks down, better delegate responsibility and distribute the workload appropriately); Melendez 248:7-249:20, 277:10- 278:20 (encouraged to delegate and manage more); Le 161:13-19 (told to hold team accountable and reinforce processes through delegation and validation as opposed to doing tasks himself); Sadauskas 140:8-142:5 (received final written warning for failing "to react and give direction to the employees that report directly to her and indirectly"); McCouch 16 (SM: communicated importance of delegation to ASMs so they focus on management responsibilities).

whether it is part of the employee's duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the suggestions and recommendations are relied upon. An employee's suggestions and recommendations may be ascribed a "particular weight" even if the task is only undertaken in an advisory capacity. See 29 C.F.R. § 541.105.

Burlington argues that the ASMs' authority to hire or fire employees or make recommendations as to hiring, firing, advancement, promotion, or any other change of status of other employees weigh heavily in favor of the executive exemption. In addition, because the testimony related to this consideration, an individualized inquiry is required to evaluate each Plaintiff's authority to hire or fire employees, or make recommendations regarding changes in status, and the frequency with which they make recommendations. For this reason, Burlington claims collective treatment is not appropriate.

Burlington highlights the testimony germane to the determination of whether the executive exemption is warranted. First, with respect to interviewing and hiring, firing and performance evaluations, Burlington argues there is significant variation in Plaintiffs' testimony with respect to participation in the hiring process, with some having limited authority, none at all, and only advisory authority.⁴⁷ Another variation is

⁴⁷ Compare Melendez 62:18-65:9, 90:24-96:8, 97:4-100:3, 156:7-23 (interviewed 800 applicants and hired 130 employees when store opened, throughout employment recruited 20-30 employees, reviewed applications, decided who to bring in for interviews, conducted at least one interview/month, and made hiring recommendations to SM which were usually followed); Young 46:20-49:20 (decided how to conduct interviews, varied questions depending on position, awarded score based on her assessment, and only forwarded candidates to SM if she felt they merited second interview); Steinfeld 111:7-113:9, 128:2-25 (attended job fairs and interviewed 50-60 candidates and made hiring recommendations to HR;

evident in the amount of time dedicated to the hiring process each week, given seasonal and holiday reinforcement of the store associates.⁴⁸ The same arguments relate to the amount of time and authority enjoyed with respect hiring and termination processes,⁴⁹ to performance appraisals, and discipline.⁵⁰ Burlington also offers the conclusions of The Crandall Report as indicative of the fact that ASMs spent 1.8%-13.1% of their weekly time on reviews. Crandall Dec. Exs. 74, 76.

conducted initial hiring interviews in store) with See Wilson 54:10-13, 107:13-14 (claims never assisted in hiring in any way); Fortenberry 30:24-31:16 (claims only interviewed 2 applicants because SM and CLSM do interviewing); Taylor 78:18-21 (claims MMs don't interview: "They should but they don't. They gave it all to me to do."); Murillo 42:15-43:3 (sat in on interviews, but never conducted one by himself). Even ASMs in the same store in the same title had varying roles in hiring; and Harrison 60:22- 61:10 (hired hundreds of people; final authority to hire); McCouch 17, 8 (SM: Singson made hiring decisions; trusts her to make right decision); Dant 29:12-35:11, 37:10-20, 40:25-41:19, 119:22-120:9 (interviews -40 people/year and SM adopted recommendations); Fortenberry 92:13-93:11 (gives opinion on seasonal associates to retain); Steinfeld 111:7-113:9 (SM took recommendations into account).

⁴⁸ Crandall Dec. 158; see also Layne 68:1-6 (more interviews during holiday season); Dant 198:18-22 (75% of interviewing is seasonal); Taylor 70:22-71:16, 74:10-22 (more responsibility for interviewing when SM on leave); Schmiersal 41:9-22 (-50 interviews per year, mostly during holiday season); Le 106:22-107:19 (time on hiring varied; when high turnover interviewed 1-2 people/week, up to an hour interviewing); Kaleva 80:9-82:24 (up to 2.5 hours/ week); Ebbs 88:10-90:16, 91:7-93:3 (time varies, but typically less than 1 hour/week); Young 47:18-48:1 (conducted 20 interviews, each lasting 15-30 minutes); Johnson 31:2-33:23 (4 interviews in 18 months); Sadauskas 112:18- 113:23 (claimed no time interviewing because SM did it all); Crandall Dec. 158, Ex. 29 (ASMs spent 7.1% of weekly time interviewing and hiring).

⁴⁹ See, e.g., Young 107:14-111:16 (evaluated direct reports based on observations, shared appraisal with associates, discussed comments and answered questions; 2-4 hours to write one appraisal); Harris 79:12-22, 83:15-84:2, 84:19-85:7 (did appraisals for half associates in store; met with associates to administer reviews); Ebbs 99:22-100:18 (prepared and administered appraisals for direct reports); Taylor 119:6-120:23 (reviewed associates 4 times based on memory and notes he takes throughout year); see also, Wilson 17:21-18:15 (completed reviews under the direction of DM); Knight 166:12-167:12 (evaluated staff at SM's direction); Fortenberry 55:11-61:20 (provides input on reviews using best judgment, but SM decides ratings).

⁵⁰ Compare Ebbs 97:23-99:21, 160:3-12 (recommended discipline, prepared write-ups and administered discipline; authorized to write up employees without SM approval); Melendez 195:5-196:15, 205:22-206:3, 291:15-292:6 (disciplined on as needed basis, sometimes on his own and sometimes after recommendation to SM); Young 54:6-56:4, 58:5-59:3 (issued discipline for performance, attendance and policy violations before initiating performance improvement plan; never told not to go through with counseling, discipline or performance improvement plan she recommended); with Johnson 122:4-10 (did not make decision/recommendation to terminate); Taylor 118:1- 11 (only witnessed terminations); Le 142:13-18 (never recommended termination because no one he wanted to terminate); Goodman 32:21-33:11 (does not remember anyone being terminated); Murillo 178:12-23 (could have recommended termination but situation never arose).

Finally, Burlington argues that the variation in the amount of managerial autonomy in addition to the weight of Plaintiffs' exempt duties as compared to other store duties suggests that even where less time is spent on exempt obligations, the primary duty is management.⁵¹ See 29 C.F.R. § 541.700(a). Burlington argues the conflicting testimony on the substance of the work warrants decertification on its own and because each opt-in Plaintiff's potential damages resulting from the type of work they performed requires a highly individualized inquiry antithetical to a collective action. Green v. Harbor Freight Tools USA, Inc., 888 F. Supp. 2d 1088, 1099 (D. Kan. 2012) ("[M]erely classifying a group of employees as exempt does not automatically qualify them as similarly situated, nor eliminate the need to make a factual determination as to whether class members are actually performing similar duties.").

⁵¹ The amount of authority and time spent varies. See, e.g., Melendez 189:16-19 ("I'm the assistant store manager. I'm the store manager when the store manager is not there. I have to be aware of everything. Was I aware of everything? Yes."); Singson 104:13-22 (most of time with head down doing task); Wilson 80:20-24 (I was stocking, cashiering, cleaning, unloading trucks); 13 Plaintiffs were often the highest level managers in the store, which necessarily impacts their freedom from supervision. Melendez 168:2-17 (40-50% of time); Casey 189:11-17 (40% of time); Goodman 121:18-123:10 ("quite a bit"); Ellington 4 (Ebbs: 20-40 hours/week); Miletic (25% of time when 3 ASMs, 33% of time when 2 ASMs); Haynes 76:13-24 (3-4 times/week for at least 4 hours); Layne 306:7-12 (1/3 of time); Fortenberry 65:24-66:13 (-10 hours/week).

IV. Analysis

The Court finds that the Plaintiffs have proven that they are similarly situated for the purposes of final certification under the FLSA by a preponderance of the evidence. Zavala, 691 F.3d at 537. After consideration of the voluminous record, the robust briefing, and the related arguments made during the hearings on March 8 and 9, 2016, the Court finds that the similarities are substantial and more than sufficient to overcome the slight variations in the degree to which the ASMs perform their responsibilities. For the reasons that follow, Plaintiffs' motion for final certification is granted and Defendants' motion for decertification is denied. The class is certified.

As the Court found on conditional certification, Mr. Goodman has demonstrated a factual nexus between the manner in which Burlington's alleged policy affected him and the manner in which it affected other Burlington ASMs. Specifically, the record evidence demonstrates that the ASMs all labored under uniform job descriptions, corporate policies and procedures, which include a uniform method of compensation and apply to all ASMs nationwide as set forth in Burlington's Rule 30(b)(6) designee's deposition.⁵² The Plaintiffs spent a majority of their time performing non-exempt tasks, worked more than forty hours in a workweek, and did not receive overtime compensation.

The fact that all of the ASMs operated under the same corporate policies and procedures is a critical, but not dispositive, starting point in final certification of the

⁵² See, Ansara (Ex. B) at 36-37, 42-47; Ex. AS (Burlington Coat Factory Employee Policy Handbook). Burlington advances a common system of core values (Ex. AT (Burlington, the Heart of Success Core Values)), and a code of business conduct and ethics (Ex. AU (Burlington Coat Factory Warehouse Corporation Code of Business Conduct and Ethics)). Ansara (Ex. B) at 36-37, 42-47.

class. Rivet v. Office Depot, Inc., 207 F. Supp. 3d 417, 424 (D.N.J. 2016) comparing Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 160 (S.D.N.Y. 2008) (employees are more likely to have similar job functions where their roles “are largely defined by comprehensive corporate procedures and policies...” (citing cases), with Alakozai v. Chase Investment Services Corp., Civ. No. 11–09178, 2014 WL 5660697, *7 (C.D. Cal. Oct. 6, 2014) (citing Rosenberg v. Renal Advantage, Inc., Civ. No. 11–2152, 2013 WL 3205426, *8 (S.D. Cal. June 24, 2013)). The Court, as it did on conditional certification and in consideration of the Daubert motion, finds that the national governance operational standards promulgated by Burlington factors in favor of certification. (Pls. Mot. Exs. A, L-R; Ansara Dep. Tr. 36-37, 42-47, 50-55, 82-83, 89, 91 93).

Likewise, the Court finds that the similarities in the ASMs responsibilities in supervisory and managerial roles, authority to train discipline and review, and role in hiring, *inter alia*, favors certification. As the testimony and record reflect, the time spent on these roles is less, both quantitatively and qualitatively, than the time spent on hourly “non-exempt” tasks as highlighted in an organizational chart on page two of Plaintiffs’ Opposition Brief to Defendants’ Motion to Decertify. The chart, while not evidence, represents an accurate compilation of the testimony of the opt-in Plaintiffs and depicts that the percentage of time spent on hourly, non-exempt tasks averages in excess of 81%.⁵³

As set forth supra, the authority vested in the opt-in Plaintiff’s groups to train, discipline, and give a performance review is minimal, if such power exists at all. See, supra, notes 18-31. The record also reflects that the opt-in Plaintiffs lacked the outright

⁵³ The task groups measured in the chart are: “stock, front, and recover merchandise”; “run a cash register”; “engage in customer service”; “clean stores”; and “unload trucks.” All Plaintiffs, with the exception of four, performed all of the tasks identified in the chart.

authority to hire, and were also constrained in their ability to pursue shoplifters, or even make decisions related to store set up. Id.; see also, Ex. AY (Burlington Coat Factory Manager's Loss Prevention Guide) at BCF1050 ("Store associates or manager are not authorized to contact police or local law enforcement agencies about suspected shoplifting incidents without first consulting with Loss Prevention."); Ex. AV (Burlington Coat Factory, Standard Operating Procedures) at BCF1050 (ASMs cannot decide on the location of hand sanitizer machines in their stores.). All of these facts favor certification. Rivet, 207 F. Supp. 3d at 425-7.

Other considerations also merit certification, including "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [Burlington] which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations." Ruffin v. Avis Budget Car Rental, LLC, 2014 WL 294675, at *3 (D.N.J. Jan. 27, 2014); Lusardi v. Xerox Corp., 118 F.R.D. 351, 359 (D.N.J. 1987). While the disparate settings and locations and fairness considerations do not undermine certification,⁵⁴ the Court will examine whether Burlington has defenses that are individual to each plaintiff and whether the Executive exemption frustrates final certification.

At the outset, the Court notes that Burlington argues that the manner in which the opt in plaintiffs perform their duties varies to a degree which precludes class treatment of the issues. Burlington cites both the deposition testimony of the opt-in group as well as the detailed findings of Mr. Crandall in support of its arguments that the variation and the weight of importance inherent to the managerial tasks renders

⁵⁴ The Court finds that the size of the class is manageable and that proceeding in a collective action would not injure or prejudice Defendant.

class treatment improper. The Court has considered the testimony detailed in Burlington's argument in favor of decertification, outlined supra., and finds that the "differences are not sufficiently material to preclude final certification." Rivet, 207 F. Supp. 3d at 427; see also Stillman v. Staples, Inc., No. CIV.A.07-849, 2009 WL 1437817, at *18 (D.N.J. May 15, 2009) (stating that "dissimilarities between the descriptions the representative plaintiffs . . . does not preclude the admissibility of such testimony") (citations omitted).

In addition, the findings by Mr. Crandall have been limited in a manner which precludes a challenge to the opt-in based solely upon the fact that there is a potential degree of variance in the manner in which they perform their duties throughout any given day, week, and or pay period. First, Crandall himself admits that his findings as to the sample population may not necessarily inform the experience of the opt-ins.

Q. Are [the opt-ins] the exception to the rule and how many might fall in one category versus the other as you use the terms "rule" and "exception."

A. I can't give you an estimate of how many would fall into any category at this point because I do not have a listing of all their claimed experiences and how they estimated their time. I've not evaluated whether or not they have provided reliable estimates. And if I had such information, I would then statistically compare their claims to the distribution of outcomes and from there I can make a determination.

Crandall Dep. 526:6-531:7.

Crandall also agrees that he lacks data on opt-ins to make a comparison to the sample population of ASMs:

Q. With respect to Exhibit 2 [relating to one of the two constituent groups of ASMs] –

A. Yes.

Q. – which you did open to, have you conducted any tests to determine whether if you sampled the opt-in ASMs, you would get 53.8 percent managerial in your determination?

...

Q. But would you expect to see the number – the number of 53.8 managerial?

A. I wouldn't be surprised to see that number.

Q. Have you tested to see whether that would be the case?

A. Are you asking have I connected [sic] a study of opt-ins? I haven't conducted a study of opt-ins.

...

Q. So you did not conduct any tests that would determine whether you would get a similar chart to Exhibit 2 or whether the numbers might look wildly different?

A. I would be surprised if the numbers are wildly different. This is on the course of looking at, for example, Exhibit 2, 1000 – looks like 271 hours without my glasses on. It's pretty close to that. You know, that's a lot of time and that's a lot of people that went into this. And so I think this is certainly representative of the diversities of experience you would expect to see and I would expect these numbers to be that way, yes.

Q. That is your expectation. My question was have you run any tests.

A. Have I compared two data sets?

Q. Correct.

A. There is no opt-in data set to compare it to.

...

Q. You do not have the data set available to conduct that test, correct?

A. I have not – I could have conducted any data set of opt-in differences. I have not conducted those.

Crandall Dep. 224:5-227:5.

As the Court previously found, Crandall's attempt to extrapolate conclusions based upon a sample population of ASMs who chose not to opt-in to inform the expected behavior of the opt-in class is admissible, useful, and reliable. However, the conclusions are subject to scrutiny because, as the Court found in Goodman v.

Burlington Coat Factory, No. 11-CV-4395 (D.N.J. Sept. 19, 2019), Crandall's conclusions require a level of speculation. That analysis bears repeating here to illustrate the fact that the variation identified by Crandall is predicated upon imperfect data.

In all of the examples used by Crandall, his data shows where the only the physical location of the ASM and then uses that data to identify variations in the manner in which the ASM spends time.⁵⁵ The statistical leap occurs when Crandall surmises that the ASM is acting in managerial capacity when, for example, she works alongside a nonexempt associate on a non-managerial task. Without talking to the ASM or obtaining declarations, there is no way, other than to guess, what the purpose of the ASM's activities are; they could be passively managing by setting the example or they could just be accomplishing restocking the shelves.

One reason for this gap is that Crandall's observation teams purposefully avoided communicating with the ASM, did not inquire as to why the ASM was performing the task, and did not review any declarations from the observed ASM. Hearing Tr. Dec. 8, 2015 77:21-25. This sets the present case apart from other studies executed by Crandall where he had employee input to give context to the data.

THE COURT: See, let me see if I could understand and you could clarify this, if I'm wrong, the essence of the discussion. By what you're indicating

⁵⁵ Several examples highlight the tension in Crandall's Report, as detailed in the Court's opinion in Goodman v. Burlington Coat Factory, No. 11-CV-4395 (D.N.J. Sept. 19, 2019), and repeated here for the benefit of the reader. First, Crandall's task labeled "Monitor/supervise while stationary and while moving," was used to designate approximately 338 hours of ASM time as "managerial" for observations of ASMs either walking or standing idle. Crandall Dep. at 509:11-510:3; 58:7-59:4; 72:8-73:5; 493:13-495:4; 508:1-509:9. A second example considers purpose of the movement of the accidentally-observed opt-in Plaintiff Daniels. Id. at 493:13-494:21. Because the observers on Crandall's team did not record additional indicia of the task, Crandall was forced to admit that he lacked data to explain Daniels' intent, purpose, or thought process as she walked from place to place in the store or were simply stationary. Finally, another example given by Crandall is an observation of an ASM stocking merchandise alongside an associate coded as managerial because of the potential that the ASM was training the associate, rather than merely helping to accomplish the task. Hearing Trs. Dec. 8, 2019, 124:11-125:11, Dec. 9, 2015, 101:7-103:25. Crandall speculates that the ASMs' intent could be to train the associate (managerial), it could be to coach or motivate the associate to work at a faster pace (managerial), or it could be that the ASMs intent is simply to stock (non-managerial). Id.

is that in order to conduct your study, that people are to be observing others in their activities and be close enough to be able to monitor their activities. All right. Now, that's what the policy appears to be. Is it in your training that you tell them to be close enough to actually hear the conversations to make sure the conversations are in keeping with their work assignments?

THE WITNESS: That's correct, Your Honor, we train them on that.

THE COURT: All right. But it's not contained verbally in the policy, part of the training?

THE WITNESS: Well, we do multiple training. We do onsite training where we're actually doing the observations during the pretest, and part of that is how far away do you have to be, for example, if someone goes in the office, you're probably going to be a lot closer because the proximity is much smaller, to be able to see what they're doing. If you're 10 or 15 feet away on the sales floor, for example, I don't have to stand right next to you to hear you talking to a customer. But if you come up to the somebody, I've got to be close enough to hear the conversation because I have to code it as an activity, is it business related or nonbusiness related.

THE COURT: So you have to be close enough to be able to understand what they're saying to see whether it's business related, but not so close as to be intrusive?

THE WITNESS: Exactly, Your Honor.

Id. 87:16-25- 88:25.

In short, Crandall's conclusions require a level of assumption and speculation. In this regard, the observers collected insufficient information to make the conclusion that the acts were in fact "primarily managerial." Crandall can say what was observed, and how much time was spent on each observation. The gap in observation and unsupported speculation is too great to lend reliability to Crandall's conclusions. Id. Thus, while Crandall may say what he observed and where he observed it or how much time was spent in a particular working posture and physical location, he cannot opine on the mere possibility that "managerial" activity is presents during task working. Id.

The federal regulations implementing the FLSA define “management” to include activities such as:

[I]nterviewing, selecting, and training of employees . . . directing the work of employees; . . . appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; disciplining employees; . . . apportioning the work among the employees; . . . [and] providing for the safety and security of the employees or the property . . .[.]

29 C.F.R. § 541.102. Itterly v. Family Dollar Stores, Inc., 606 F. App'x 643, 645–46 (3d Cir. 2015). An employee need not spend the majority of his work time doing managerial tasks to be properly considered a manager under the FLSA. Id. Thus, time spent “performing nonexempt tasks such as unloading freight, stocking shelves, and ringing a register” can outweigh daily “managerial” tasks without undermining management as the employee’s “primary duty.” Id.; see also, Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141 (3d Cir. 1983) (holding that foremen who spent no more than 44% of their time performing managerial work were exempt executives under the FLSA).

Section 541.700(b) of the C.F.R. states that “time [allocation] alone . . . is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work.” Id. The executive exemption standard considers the importance of the managerial function as compared to employee’s other nonexempt duties. Thus, the test is “whether the management activities are critical to the successful operation of the enterprise.” Guthrie, 722 F.2d at 1145 (citing Donovan v. Burger King Corp., 675 F.2d 516, 521 (2d Cir. 1982)).

The Court finds that Burlington’s motion for decertification fails because the variation identified by Crandall is “not sufficiently material to preclude final certification.” Rivet, 207 F. Supp .3d at 427. Crandall’s conclusion that the acts of the

observed ASMs are “primarily managerial” has been struck as unreliable, which has the impact of undermining Burlington’s argument on this motion that the opt-in ASMs perform mostly managerial work. In addition, the limitations on Crandall’s Report also informs the Court’s finding that the executive exemption does not preclude class certification at this time. In so far as Burlington argues that application of the executive exemption requires an individualized inquiry, such a determination can be made against the class as a whole because, as set forth in Plaintiffs’ arguments, the testimony reflects a pattern of understaffing the stores which requires ASMs to perform hourly type tasks so the store can operate. See Stillman, 2009 WL 1437817, *18. “Once the pattern is established, the burden shifts to the employer to rebut the existence of the violations [] or to prove that individual employees are excepted from the pattern or practice.” Martin v. Selker Bros., 949 F.2d 1286, 1298 (3d Cir. 1991).

Finally, the Court finds that the Plaintiffs have put forth sufficient evidence in support of their argument that the opt-in ASMs spend the majority of their time performing substantially similar non-exempt tasks. The evidence shows that the stores were staffed in a manner that necessitated ASMs to perform associate level tasks in order to ensure the operation of the store and in a manner which trumps the executive functions of an ASM and that the importance of their efforts in managerial roles does not frustrate the Court’s finding that the opt-in ASMs are similarly situated.⁵⁶

⁵⁶ See Sadauskas (Ex. AC) at 190-91 (“I worked mostly as an hourly associate doing tasks that were –that associates should have been doing but it was considered my job.”); Steinfeld (Ex. AG) at 122-23 (“Once again, the reality of the floor in the Burlington Coat Factory, it doesn’t give you the time to do all these things because there are never enough hourly associates on the floor to really do what you need to do. Therefore, most of my time during the day was spent doing markdowns, cashiering, putting merchandise away, emptying the stockroom, bringing rolling racks out onto the floor and putting them away, recovering.”); Ebbs (Ex. N) at 137 (“I don’t get a chance to do my managerial job. I don’t. I would love to –I would love to come in and delegate without hav[ing] to do it myself or have enough associates to get tasks done.”).

The Court finds after a rigorous review of all the evidence, that Plaintiffs have presented adequate evidence to show that the class members are similarly situated. The record reflects that all Plaintiffs had similar job duties, responsibilities, and compensation structures. The Plaintiffs claim uniformly that they were denied overtime compensation in violation of the FLSA.⁵⁷

Burlington's arguments which highlight differences and variation in the manner in which and the time dedicated to non-exempt tasks performed by the opt-in ASMs is set forth in a thorough manner. "[H]owever, complete symmetry of job functions is not required for final certification under the FLSA." Rivet, 207 F. Supp. 3d at 426 (citing Ruffin, 2014 WL 294675, at *3 ("While there are disparities in the deposition testimony about job duties, they are not material and 'any such differences are outweighed by the similarities between those Plaintiffs.'" (quoting Garcia v. Freedom Mortgage Corp., 790 F.Supp.2d 283, 287 (D.N.J. 2011))); Stillman, 2009 WL 1437817, *18 ("the similarly situated standard of § 216(b) . . . does not require that plaintiffs be identical." (quoting Big Lots Stores, Inc., 561 F.Supp.2d at 573-74))).

Several courts in this district have granted final certification pursuant to the FLSA with managers in similar retail experiences. In Rivet, the court certified a group of assistant store managers at a national retail chain store, Office Depot, where the ASMs in that case "differed in their levels of supervisory responsibility; the extent to which they hired, trained, disciplined, and reviewed other employees; and the degree to which they assumed other managerial functions." Rivet, 207 F. Supp. 3d at 422. The

⁵⁷ Burlington's Rule 30(b)(6) corporate designee and a Human Resources Manager both agreed in deposition that the ASMs are similarly situated because they all perform the same function across each store. Chambrelli-Hine (Ex. A) at 224-25; Hubbard (Ex. B) at 70.

court found that variance among the group underwhelming and insignificant so as not to overcome the similarities. Id. at 426. In Stillman, the court noted, in an opinion on post-trial motions where managers at various Staples stores claimed their primary duties were not managerial and involved hourly tasks, that “dissimilarities between the descriptions the representative plaintiffs may provide [. . .] does not preclude the admissibility of such testimony” as representative of the group. Stillman, 2009 WL 1437817, *18 (citing Pegasus Consulting Group v. Administrative Review Bd. for the Dept. of Labor, Wage and Hour Div., Employment, Civ. No. 05–5161, 2008 WL 920072, *18 (D.N.J. March 31, 2008); see also Johnson, 561 F.Supp.2d at 573–74 (stating that “the similarly situated standard of § 216(b) of the FLSA does not require that plaintiffs be identical.”) (citing Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996)).

In Ruffin, the court granted final certification to a group of Shift Managers who argued their primary responsibilities “included non-exempt tasks such as renting, cleaning, shuttling, and checking-in and counting vehicles.” Ruffin, 2014 WL 294675, at *3. The court noted that the defendant mandated nationwide uniform training, employee compensation, and a common job description. Id. The court rejected defendant’s argument that the class responsibilities varied to a degree that thwarted certification, stating that “[m]inor factual deviations do not defeat collective treatment.” Id. (citing Jacob v. Duane Reade, Inc., 289 F.R.D. 408, 421 on reconsideration in part, 293 F.R.D. 578 (S.D.N.Y. 2013) (determining that plaintiffs were similarly situated despite minor disparities because plaintiffs generally “perform a similar swath of duties, ranging from customer service to office work”).

Burlington's argument that the facts of this case are similar to those where courts have decertified or rejected certification the class is not without some force, but on this record the Court finds that it does not carry the day. See *Morisky*, 111 F. Supp. 2d 493; *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265 (M.D. Ala. 2004). In *Aquilino v. Home Depot, U.S.A., Inc.*, the court found that the assistant store managers responsibilities lacked "uniformity in how often MASMs directed the work of subordinate employees [and] that great disparities [existed in the] testimony in regards to the amount of time that the Opt-Ins spent performing exempt responsibilities and duties." No. CIV.A. 04-04100 PGS, 2011 WL 564039, at *4 (D.N.J. Feb. 15, 2011).

Likewise, in *Swank v. Wal-Mart Stores, Inc.*, the court held that "the AMs' individualized experiences, as contained in the record before the Court, vary significantly in precisely the ways that bear on the Court's eventual determination of liability and damages." No. 2:13-CV-1185, 2018 WL 2684102, at *3 (W.D. Pa. June 5, 2018), reconsideration denied, No. 2:13-CV-1185, 2018 WL 3541861 (W.D. Pa. July 23, 2018). Specifically the court found that the record demonstrated "that the proposed collective plaintiffs have materially different circumstances of employment, particularly regarding their decision-making authority, level of supervision, and daily tasks, which require individualized liability determinations they are all AMs employed by Wal-Mart in Pennsylvania, for instance, and the Plaintiffs' evidence with regard to Wal-Mart's employment manual, job description, and other employment policies provides some common links among the proposed collective plaintiffs". Id.

The Court has considered the reasoning and the record in those cases and finds that it does not bear directly on the facts contained in this record. The record reflects

that the Opt-in Plaintiffs are employed in the same corporate department, advance similar claims and seek substantially the same form of relief, and have similar salaries and circumstances of employment. See Zavala, 691 F.3d at 536-37. The variances present here are not significant in a manner that impacts the Court's determinations as to liability and damages.

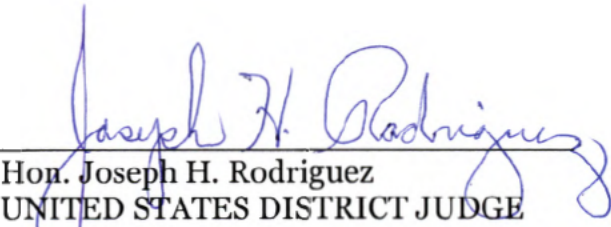
Like Stillman, Ruffin, and Rivets, Plaintiffs here have shown through testimony that they spent the majority of their time accomplishing non-exempt tasks such as stocking, fronting and recovering merchandise, working the cash register, engaging in customer service, cleaning the store, and unloading trucks. See, supra., notes 15-31, 53. In addition, the evidence reflects slight differences in the nature of the influence ASMs had regarding hiring, terminations, discipline, and employee pay. Id. While most had little input regarding these decisions, the majority did not have any influence with respect to human resource issues. The common factor, which tilts in favor of finding the ASMs similarly situated, is that no ASM had total authority over the processes, implementation of discipline, or the power to hire, fire, promote, or adjust salary. As a result, the slight variations in the roles AMSs played in human resourcing, as highlighted by the testimony Burlington offers, does not override the similarities of their limitations and lack of autonomy. Simply put, the experiences are not dissimilar enough to frustrate final certification.

Because the Court finds that the Plaintiffs are similarly situated, that the slight variations in the testimony are not material, and for reasons of fairness, the Court will deny Defendant's Motion to Decertify the collective action, and grant Plaintiff's Motion for Final Certification.

V. Conclusion

For the reasons stated above, the Defendants' Motion to Decertify the Class is denied and Plaintiffs' Motion to Certify the is granted. An appropriate Order shall issue.

Dated: November 20th, 2019


Hon. Joseph H. Rodriguez
UNITED STATES DISTRICT JUDGE