MAUREEN E. MCCLAIN (State Bar No. 062050)
Email: mcclain@kmm.com
ALEX HERNAEZ (State Bar No. 201441)
Email: hernaez@kmm.com
KAUFF MCCLAIN & MCGUIRE LLP
One Post Street, Suite 2600
San Francisco, California 94104
Tel: (415) 421-3111
Fax: (415) 421-0938

Attorneys for Defendant
DOLLAR TREE STORES, INC.

BETH HIRSCH BERMAN (VA Bar No. 28091)
Email: bberman@williamsmullen.com
WILLIAMS MULLEN
Dominion Tower, Suite 1700, 999 Waterside Drive
Norfolk, Virginia 23510
Telephone: (757) 629-0604
Facsimile: (757) 629-0660

Pro Hac Vice Attorneys for Defendant
DOLLAR TREE STORES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MIGUEL A. CRUZ, and JOHN D. HANSEN, individually and on behalf of all others similarly situated, Plaintiffs, v. DOLLAR TREE STORES, INC., Defendant.	CASE NO. C 07 2050 SC **DEFENDANT DOLLAR TREE STORES, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AS TO JOHN HANSEN; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **JUDGE:** Hon. Samuel Conti **COMPLAINTS FILED:** April 11, 2007; July 6, 2007 **TRIAL DATES:** No dates set.
ROBERT RUNNINGS individually, and on behalf of all others similarly situated, Plaintiff, v. DOLLAR TREE STORES, INC., Defendant.	CASE NO. C 07 04012 SC

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KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

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KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

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KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

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KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that as soon as counsel may be heard in Courtroom 1 of the above-entitled Court, located at 450 Golden Gate Ave., 17th Floor, San Francisco, CA, Defendant, Dollar Tree Stores, Inc. ("Dollar Tree") will, and hereby does, request that the Court summarily adjudicate in Dollar Tree's favor as to Plaintiff, John D. Hansen ("Hansen"), each and every count of the Complaint.

Specifically, this Court should find that Hansen was properly classified as an exempt employee under both the California Labor Code (First Cause of Action) and the Fair Labor Standards Act (Tenth Cause of Action), since he spent the majority of his time performing managerial exempt duties in order to carry out the primary purpose of his position which was the management of his Dollar Tree store. Thus, the First and Tenth Causes of Action should be adjudicated in Dollar Tree's favor.

The Second Cause of Action, Dollar Tree's alleged failure to pay unpaid wages at the time of termination, is premised exclusively upon Hansen's allegations that he was a non-exempt employee entitled to overtime compensation. Since Hansen does not allege he was entitled to any other additional compensation and since he was not entitled to overtime compensation, the Second Cause of Action should be adjudicated in Dollar Tree's favor.

Hansen's Third Cause of Action seeks relief for Dollar Tree's alleged failure to provide Hansen with itemized wage statements and his Fourth and Fifth Causes seek relief for Dollar Tree's alleged failure to provide him with meal and rest breaks, respectively. Each of those causes is supported exclusively by the premise that Hansen should have been classified as a non-exempt employee. As an exempt employee, Hansen was not entitled to a wage statement identifying the number of hours he worked, and he was not entitled to be provided mandatory meal and rest breaks. Accordingly, the Third, Fourth and Fifth Causes of Action should be adjudicated in favor of Dollar Tree.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

The Sixth Cause of Action seeks relief for unfair competition and unfair business practices. This claim is also derived from Hansen's erroneous assertion that he was a non-exempt employee and can survive only if supported by a violation of some other law. Since Hansen was properly classified as exempt, and Dollar Tree did not violate any of the other statutes as alleged by Hansen, this claim must fail too and should be adjudicated in favor of Dollar Tree. Hansen's Eighth Cause of Action asserts a claim for unjust enrichment stemming from Dollar Tree's alleged failure to provide Hansen with overtime compensation. This claim fails because Hansen was an exempt employee and not entitled to additional compensation. Thus, Dollar Tree was not unjustly enriched, and the Court should find in favor of Dollar Tree as to the Eight Cause of Action. Hansen's Ninth Cause of Action seeks injunctive and other equitable relief. Because Dollar Tree has not violated any of the statutes as alleged by Hansen, there is no basis upon which to grant equitable relief and this claim should be denied.[1]

This motion is based upon this Notice of Motion and Motion for Summary Judgment, the Memorandum Of Points And Authorities in support thereof, the Declarations of Carlos Hernandez, Paula Brady, Beth Hirsch Berman and Charlotta Jacobson-Allen as well as all records and proceedings in this action, and on such other and further matters as may be presented to the Court in connection with the hearing on this Motion for Summary Judgment. This motion is being filed and served pursuant to Fed. R. Civ. P. 56.

DATED: January 19, 2008

Respectfully submitted,

KAUFF MCCLAIN & MCGUIRE LLP

By: /S/
ALEX HERNAEZ

Attorneys for Defendant
DOLLAR TREE STORES, INC.

[1] The Seventh Cause of Action, Fraud and Deceit, was previously dismissed by the Court.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELIEF REQUESTED.

Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, Defendant Dollar Tree Stores, Inc. ("Dollar Tree") respectfully requests that the Court enter an Order granting summary judgment in Defendant's favor of Plaintiff John D. Hansen's ("Hansen") claims for relief which arises under the California Labor Code, IWC Wage Orders, the Fair Labor Standards Act, California Business and Professions Code and the common law.

II. INTRODUCTION.

Dollar Tree owns and operates retail variety discount stores nationwide, selling a broad assortment of goods, including but not limited to, housewares and household cleaners; foods and beverages; party and seasonal goods; toys; hardware; pet supplies; stationery; automotive products; and health and beauty aids, all at the $1.00 price point.

Hansen was employed by Dollar Tree as a Store Manager from July of 2006 until his employment ended on or about November 16, 2007. While employed as a Store Manager, Hansen was the highest level employee at his store and the only employee to be paid on an exempt salaried basis.

On April 10, 2007, Hansen filed a class action complaint on behalf of current and former California Dollar Tree Store Managers alleging that under both California and Federal law, they were misclassified as exempt employees and therefore improperly denied overtime pay. Hansen asserts that as a result of the alleged improper classification, Dollar Tree also violated California law by improperly denying them rest and meal breaks; failing to provide them with accurate itemized wage statements; failing to pay them all wages due them at the time their employment terminated; and that Dollar Tree's actions unjustly enriched it and constituted unfair competition and unfair business practices.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

Despite the numerous causes of action, Hansen has one basic theory of unlawful conduct upon which all his claims for recovery rest - that Dollar Tree improperly classified its Store Managers in California, including him, as exempt. It is that erroneous premise upon which Hansen relies to support his different causes of action and the various forms of relief he seeks.

Dollar Tree denies each of Hansen's allegations and asserts that its Store Managers, and Hansen particularly, were properly classified as exempt. Under California law, employees are exempt from overtime compensation if they: (a) spend the majority of their time performing work that either requires the exercise of independent judgment and discretion or is directly and closely related thereto; (b) supervise two or more full-time employees or the equivalent thereof; and (c) are compensated at a rate of at least two times California's minimum wage. As the undisputed facts demonstrate, Hansen met all these criteria and was properly classified as an exempt employee.

III. <u>UNDISPUTED FACTS</u>

1. Dollar Tree owns and operates approximately 220 retail stores throughout California. (Declaration of Paula Brady, ¶ 3 ("Brady Decl.").)

2. Each store is run by a Store Manager who is responsible for all that happens within his or her store. (Declaration of Carlos Hernandez, ¶ 3 ("Hernandez Decl.").)

3. Hansen was hired by Dollar Tree as an Assistant Manager in January of 2006. In July of 2006, he was promoted to the Store Manager position at store no. 1868 in Rohnert Park, California. In September of 2007, Hansen was transferred to Dollar Tree store no. 2262 in Healdsburg, California. Hansen's employment with Dollar Tree ended on or about November 16, 2007. (Brady Decl., ¶ 4.)

4. As a Store Manager, Hansen was assisted by between two and four Assistant Managers at any one time. The number of Assistant Managers in Hansen's store fluctuated as a result of employee terminations, both voluntary and involuntary. A

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

true and correct copy of the Deposition of John D. Hansen ("Hansen Dep.,") is attached as Exhibit A to the Declaration of Beth Hirsch Berman, 20:14-24.

5. Consistent with Dollar Tree policy and practice, Hansen was supervised by a District Manager. During most of Hansen's employment with Dollar Tree, his District Manager was Richard Tellstrom. A true and correct copy of the Deposition of Richard Tellstrom ("Tellstrom Dep.") is attached as Exhibit B to the Declaration of Beth Hirsch Berman, 22:1-8. Each District Manager oversees approximately ten to twelve stores while Hansen's District Manager, Tellstrom oversaw 12 stores. (Tellstrom Dep., 17:3-5.) District Managers do not run the stores or direct the work of the store employees. That is left to the Store Managers. (Tellstrom Dep., 21:12-18.)

6. The selling area of Dollar Tree's California stores vary in size from approximately 3,200 square feet to 21,000 square feet. Because of the disparity in the store size, Dollar Tree separates its stores into four different categories – small, large, super and race track. (Hernandez Decl., ¶ 4.)

7. At Dollar Tree, the merchandise mix and merchandise displays vary from store to store because Store Managers are expected to drive their stores' sales. (Hernandez Decl., ¶¶ 6 and 10(3); Tellstrom Dep., 66:16-67:2.)

8. As the Store Manager, Hansen was responsible for all the ordering in his store. Orders for merchandise were submitted on a weekly basis and included one order of all the frozen and dairy food carried by the store and another order of merchandise that, in Hansen's judgment, would drive store sales. (Hansen Dep., 94:5-96:22.) Hansen was also responsible for ordering all his store's supplies. (Brady Decl., ¶ 10.)

9. Hansen was responsible for the design of various merchandise displays and the placement and amount of shelf space devoted to each item of merchandise. (Hansen Dep., 52:19-55:10.)

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ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

10. As a Store Manager, Hansen was in charge of a multitude of discretionary decisions that needed to be made each day such as: safeguarding company assets; scheduling employees; hiring, firing, and disciplining employees; dealing with customer or product problems; teaching employees how properly to perform their duties and supervising their performance; reviewing, analyzing and preparing reports; recommending and/or determining employee raises and promotions; planning the daily work duties; assigning tasks on a daily basis to employees; supervising the completion of tasks; supervising cashier performance; performing cashier audits; ensuring that the store was properly merchandised; approving checks and returns; enforcing Dollar Tree policies and procedures; performing and overseeing cashier reconciliations; reviewing and correcting payroll data; setting merchandising goals; reconciling invoices; training employees; maintaining the store property and ensuring proper security; creating and maintaining a workplace that was compliant with federal and state OSHA, local fire codes and, ensuring compliance with various other local, state and federal laws, regulations and ordinances. (Hansen Dep., 234:4-13; 245:23-246:6; 27:5-12; 244:21-245:4; 245:23-246:1; 28:5-12; 246:2-6; 246:7-20; 52:19-53:12; 33:16-34:24; 57:8-60:24; 54:5-55:10; 228:8-17; 269:18-25; 230:19-231:18.)

11. During his tenure as a Store Manager, California's minimum wage ranged from $6.75 to $7.50. Hansen's base salary was $48,000 annually -- more than three times the minimum wage. Additionally, as a Store Manager, Hansen was eligible to receive bonuses tied to the sales performance of his store. During the fifteen months that Hansen was a Store Manager for Dollar Tree, he received $12,019.62 in bonuses. (Brady Decl., ¶ 4.)

12. Hansen also regularly and customarily supervised far more than the equivalent of two full-time employees. The total number of hours worked by the employees in stores nos. 1868 and 2262 under Hansen's direct supervision ranged from a low of approximately 272 per week to a high of approximately 689 per week. (Declaration of Charlotta Jacobson-Allen, ¶ 13 ("Jacobson-Allen Decl.").

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

IV. ARGUMENT

A. Summary Judgment Standard.

Summary judgment is appropriate when the pleadings, affidavits and other material present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rebel Oil Co, Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1432 (9th Cir. 1995). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). As set forth herein, the undisputed facts establish that, as a Store Manager, Hansen's employment met all of the criteria necessary to qualify him as an executive, exempt from California and Federal overtime requirements and exempt from California's rest and meal break and itemized wage statement requirements.

B. Analysis Of The Evidence In Light Of California's Executive Exemption Test.

Under California's Labor Code sections 510 (computation of overtime pay) and 515 (exemptions from payment of overtime), an employee is entitled to overtime pay for his work for an employer unless the employer demonstrates the employee's work is subject to an exemption from payment of overtime. *Conley v. Pacific Gas & Electric Co.*, 131 Cal.App.4th 260, 266 (2005). Labor Code section 515 provides that California's Industrial Welfare Commission (IWC) may establish exemptions from the requirement for overtime compensation for various types of employees. Lab. Code § 515(a).

The IWC established the exemptions by means of wage orders. The IWC's wage orders are compiled in the California Code of Regulations, Title 8. Regarding the executive employee exemption, section 1(A)(1) of the wage order states:

> A person employed in an executive capacity means any employee:
>
> (a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

thereof; and

(b) Who customarily and regularly directs the work of two or more other employees herein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116.7 Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

8 Cal. Code Regs. § 11070(1)(A) ("Wage Order").

1. Hansen's Duties And Responsibilities Involved The <u>Management Of The Enterprise In Which He Was Employed.</u>

As set forth above, to qualify as an exempt executive employee, Hansen's duties and responsibilities must have included the management of the enterprise in which he was employed. As a Store Manager, Hansen was in sole charge of his store, with complete responsibility for its operations. (Hansen Dep., 222:18-223:11.) "In the vast majority of cases there is no difficulty in determining whether an individual is in charge of a customarily recognized department or subdivision of a department. For example, it is clear that where an enterprise comprises more than one establishment, the

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

employee in charge of each establishment may be considered in charge of a subdivision of the enterprise." 29 CFR 541.104(b) (2001). In each store where Hansen was the Store Manager, he was the highest ranking (and only exempt) employee in the store. During Hansen's tenure, Hansen was responsible for all aspects of store no. 1868. For example, he was responsible for the following: supervising associates (Hansen Dep., 227:8-17); overseeing daily activities; opening and closing the store; taking care of money (Hansen Dep., 228:21-230:6); ensuring customer and associate safety (Hansen Dep., 230:15-232:17); processing Worker's Compensation claims (*Id.*); protecting all company assets (Hansen Dep., 233:13-25); maintaining proper sales, banking, inventory, accounting, productivity and time records (Hansen Dep., 234:4-13); knowing all the facts and figures about the store sales, the number of employee hours, and the deposits (Hansen Dep., 244:12-18); improving employee productivity and morale (Hansen Dep., 244:15-20); auditing payroll and time records (Hansen Dep., 244:21-245:4); staffing the store and recruiting and training new employees (Hansen Dep., 245:17-22); scheduling and assigning all work (Hansen Dep., 245:23-246:1); evaluating, counseling, disciplining and discharging employees (Hansen Dep., 246:2-6); maintaining production reports to evaluate job performance of sales associates (Hansen Dep., 246:7-16); providing leadership to associates; communicating company policies to associates (Hansen Dep., 246:21-24); ensuring appropriate cleanliness and appearance of the store (Hansen Dep., 250:9-14); providing customer service; ensuring compliance with applicable laws (Hansen Dep., 255:6-17) and approving payroll records (Hansen Dep., 269:18-25).

2. Hansen Customarily And Regularly Directed The Duties Of Two Or More Employees.

The Wage Order also requires that an executive employee customarily and regularly direct the work of two or more employees. The stores that Hansen managed were usually staffed with three Assistant Managers (although the number fluctuated between two and four depending on turnover and staffing needs), and 13-14 regular

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

hourly Associates (that number also fluctuated and went as high as 32 during the Christmas season). (Hansen Dep., 46:23-47:9; Jacobson-Allen Decl., ¶ 13.) Hansen was the highest ranking and only exempt employee in both stores he managed. (Hernandez Decl., ¶ 3.) Each week, Hansen created the work schedule for the employees in his store. Hansen adjusted the employee's schedule throughout the week to meet the needs of the store. (Hansen Dep., 59:8-18.) Hansen also directed the duties of his employees on a daily basis and ensured the assigned tasks were accomplished. (Hansen Dep., 52:19-53:2; 434:11-435:20.) Such responsibilities meet the supervisory criteria even if Hansen was not present in the store when each of his employees worked. *Baldwin v. Trailer Inns, Inc.,* 266 F.3d 1104, 1117 (9th Cir. 2001).

3. Hansen Had The Authority To Hire And Fire Employees And His Recommendations Were Given Particular Weight With Regard To Promotions.

The third prong of the exemption test requires that Hansen had either the authority to hire or fire employees or that his suggestions and recommendations as to hiring, firing and promoting and advancement of employees was given particular weight. In fact, Hansen had the authority to interview, hire, evaluate, discipline, and fire employees in his store. (Hansen Dep., 27:5-12.) Hansen decided when his store needed more Sales Associates. (Hansen Dep., 47:10-13.) Hansen hired at least fifteen employees while at store no. 1868. (Hansen Dep., 176:7–184:2.) Hansen was solely in charge of screening employment applications for his store and selecting who to interview to work in the store. (Hansen Dep., 164:1-12.) He would personally interview the applicants he selected. (Hansen Dep., 164:23-165:4.) Hansen would interview about 5-6 applicants before finding the right person for the job and making them an offer to work at Dollar Tree. (Hansen Dep., 165:14–166:16.) Each interview took about twenty minutes. (Hansen Dep., 165:5-7.) Hansen made employment offers to Sales Associates without supervision or oversight. (Hansen Dep., 164:23-166:4; 165:8-13.)

Hansen also made decisions and/or recommendations about promotions. (Hansen Dep., 18:20-20:9.) Hansen's recommendations were given considerable

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

weight. (*Id.*) On other occasions, Hansen even selected and hired and promoted management level employees without meaningful input from his District Manager. (Hansen Dep., 303:20-304:16.) According to Hansen, his District Manager was supposed to interview Assistant Managers before they were put on the payroll; however, often Hansen was the only person to evaluate an Assistant Manager candidate before the person was hired. (Hansen Dep., 212:1-22:2; 303:20-304:16.)

In addition, Hansen had the authority to and did terminate employees. (Hansen Dep., 518:3-6.) Usually, Hansen consulted with his District Manager and Dollar Tree's Human Resources Department for compliance with federal and state regulations prior to terminating an employee but no independent investigation was conducted by either. (Hansen Dep., 23:3-24:6.) Based on the forgoing, Hansen clearly exercised the authority required by the third prong of the exemption test.

4. Hansen Customarily And Regularly Exercised Discretion And Independent Judgment.

The California executive exemption requires that the employee be employed in work that is "primarily" managerial and which requires the exercise of discretion and independent judgment. *Id.* "Primarily" is defined as "more than one-half the employee's work time." 8 Cal. Code Regs. § 11070(2)(N). The Wage Order does not define "discretion and independent judgment." The California Court of Appeals in *Nordquist v. McGraw-Hill Broadcasting Co.*, however, defined "discretion and independent judgment" as:

> "Discretion and independent judgment" . . . involves the comparison of possible courses of conduct, and acting after considering various possibilities. It implies that the employee has the power to make an independent choice free from immediate supervision and with respect to matters of significance. The decisions must be at a level appropriate to administrative work. Matters of consequence are those of substantial significance to the policies or general operations of the business of the employer.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

Nordquist v. McGraw-Hill Broadcasting Co, 32 Cal.App.4th 555, 573 (1995). In the above quoted passage, *Nordquist* adopts the definition found in 29 CFR § 541.207.[2] The FLSA interpretation defining "discretion and independent judgment" applies equally to both the "administrative" and "executive" exemption.[3]

Hansen made numerous decisions on a daily basis utilizing discretion and independent judgment. Operating a Dollar Tree store requires that many decisions be made on a daily basis, with those decisions varying based on the particular circumstances of the store. (Hernandez Decl., ¶ 4.) Hansen was the highest ranking executive in the stores in which he worked as a Store Manager and the employee charged with making those decisions. Although each store was overseen by a District Manager, the District Manager was incapable of making the daily decisions required to run the store. (Tellstrom Dep., 21:12-18.) Hansen alleges he worked in store no. 1868 an average of 49 hours a week,[4] while his District Manager, for the most part, visited the store for 4 hours twice a month. (Hansen Dep., 65:5-66:1.) Hansen was ultimately the person in charge of all store operations and his managerial decisions impacted the profitability of his store. (Hansen Dep., 57:8-60:24.)

Hansen was responsible for increasing store sales through his own entrepreneurial talents and management skills. (Hansen Dep., 33:6-34:21; 57:8-60:24.) Unlike many other retail chains, Dollar Tree views its Store Managers as individual entrepreneurs who know their customers and best know how to serve their needs. As a result of that philosophy, while at store no. 1868, Hansen ordered 19.62% of all store merchandise and he was responsible for ordering 100% of the frozen and refrigerated foods. (Jacobson-Allen Decl., ¶ 14; Hansen Dep., 92:13-93:4.)

[2] Courts may look to the federal regulations in interpreting California wage laws. *See, e.g., Alcala v. Western Ag Enters.*, 182 Cal.App.3d 546, 550 (1986) (FLSA regulations "may serve as persuasive guidance for interpreting California law").
[3] "For enforcement purposes, therefore, DLSE will … rely upon the language of 29 CFR § 541.207 to define the term "discretion and independent judgment" in each of the exempt classifications." DLSE 2002 Operations and Procedures Manual § 51.5.1.
[4] (Hansen Dep., 81:7-21). A review of those records indicate he averaged 49 hours a week. Jacobson-Allen Decl., ¶ 10.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

Hansen was in charge of identifying sales opportunities, creating merchandise displays and developing and executing a plan to sell the merchandise. (Hernandez Decl., ¶ 6.) These tasks required independent judgment and discretion. (Hansen Dep., 221:18-222:11; 247:24-248:16.) Thus, merchandise displays vary from store to store as determined by the skill of the individual Store Managers and the customers preferences. (Hernandez Decl., ¶ 5.) Dollar Tree uses a merchandise planner for its stores, which it intends the Store Manager to use as a guideline. However, the merchandise planner applies only to that merchandise which the customers expect to see each week, and offered Hansen great discretion in ordering and displaying the merchandise which he determined suitable for his store and customers. (Hernandez Decl., ¶ 8.) As intended, Hansen used the merchandise planner as a guideline, taking into consideration the merchandise and fixtures he had available and using his knowledge of what sold well in his particular store. (Hansen Dep., 53:4-19.) Therefore, decisions about which merchandise to put on the sales floor and how to display that merchandise were left to Hansen's discretion. (Hansen Dep., 54:5-55:5.) Hansen also determined which products sold well together and how to increase sales of high margin items. (Hansen Dep., 32:9-33:5.) In addition, Hansen took responsibility for organizing the merchandise in the backroom. (Hansen Dep., 321:20-322:22.)

Hansen admitted he used his discretion and independent judgment to make management decisions calculated to ensure store success. Hansen: (1) hired the Associates he wanted (Hansen Dep., 47:10-13); (2) arranged merchandise in the store in a manner he believed to be attractive to customers (Hansen Dep., 54:5-17); (3) ordered store merchandise (Hansen Dep., 92:13-96:24); (4) counseled and terminated employees, (Hansen Dep., 246:2-6); (5) was responsible for driving sales (Hansen Dep., 32:20-33:18; 33:25-34:21; 57:8-60:24); (6) made recommendations regarding promotions (Hansen Dep., 18:20-20:9); (7) made decisions about scheduling employees, prioritizing tasks, and assigning tasks to employees daily (Hansen Dep., 245:23-246:1);

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

and (8) evaluated his employees (Hansen Dep., 246:2-6). Hansen even had the ability to deviate from company polices. (Hansen Dep., 44:13-46:8.)

Hansen had substantially more responsibilities than any other employee in his store. Hansen's Assistant Managers did not hire, order merchandise, or prepare employee work schedules. (Hansen Dep., 245:17-246:1.) When he delegated duties to his Assistant Managers, he remained ultimately responsible for ensuring the duties were carried out timely and correctly. (Hernandez Decl., ¶ 7.)

5. Hansen Spent More Than Half His Time Performing Exempt Work.

The Wage Order specifically incorporates the definition of "managerial work" set forth in the regulations promulgated under the FLSA.[5] 8 Cal. Code Regs. § 11070(1)(A)(1)(e). In particular, the Wage Order incorporates 29 C.F.R. § 541.102, which provides some examples of exempt work, including:

> interviewing, selecting and training employees, setting and adjusting pay rates and work hours, directing work, keeping production records for subordinates, evaluating employee's efficiency and productivity, handling employee complaints, disciplining employees, planning work, determining techniques to be used, distributing work, deciding on types of materials, supplies, machinery and tools to be used or merchandise to be bought, stocked, and sold, controlling the flow and distribution of merchandise and supplies, and providing for employee safety.

29 C.F.R. § 541.102 (2001). Moreover, a person may be simultaneously engaged in hands on, non-exempt work while exercising managerial duties. One example would be a manager training an employee by stocking shelves with the employee.

California law mandates a quantitative review of an employee's duties. *Ramirez v. Yosemite Water Company*, 20 Cal.4th 785, 797 (1999). The work actually performed by the employee during the course of the work week must be examined and the amount of time the employee spent on such work, together with the employer's

[5] Note that the FLSA regulations were changed in 2004. The Wage Order has not been amended to reference the new regulations, thus the pre-2004 regulations will be relied upon in this section.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

realistic expectations and the realistic requirements of the job, are to be considered in determining whether the employee satisfies the requirement that more than half his time has been spent performing tasks that qualify for the exemption. 8 Cal. Code Regs. 11070 § 1(A)(1)(e).

The evidence shows that Hansen meets the test for exempt status. Hansen spent the majority of his time either performing tasks that were directly exempt (direct management of staff, hiring and firing, counseling and disciplining subordinates, and the like) or were "closely related" to his management tasks.

In addition to the foregoing duties set forth at length in Section III.B.1. above, Hansen performed the following exempt duties:

Educated his employees about job duties and performance, company policies, safety rules, and governmental requirements (Hansen Dep., 246:21-24; 230:15-232:17; 255:6-13); prepared workers' compensation reports (Hansen Dep., 232:5-8); analyzed store reports (Hansen Dep., 257:5-258:25); approved and managed payroll (Hansen Dep., 244:21-245:4); safeguarded store assets, managed cash adjustments, and voids at the registers, and prepared management reports (Hansen Dep., 97:12-98:13); addressed employee grievances and was responsible for employee morale (Hansen Dep., 244:15-20).

All these duties required Hansen's independent discretion and judgment and consumed more than fifty percent (50%) of his work time. (Hernandez Decl., ¶ 6.)

Hansen will likely argue that he spent substantial time stocking or running cash registers; indeed, they are the only non-exempt tasks he identified. (Hansen Dep., 255:21-256:12.) Dollar Tree does not dispute that a good manager may spend some part of their day helping the store employees by performing such tasks as relieving cashiers from the register to take a rest break; however, this and similar work does not take up fifty percent (50%) of a competent Store Manager's time. It did not take up fifty percent of Hansen's time. The records show that Hansen spent far less than half of his working hours stocking and cashiering.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

Dollar Tree is able to ascertain the amount of time each store employee spent on a cash register by reviewing certain cashier reports. (Brady Decl., ¶ 7.) These reports show that, as a Store Manager, Hansen spent an average of only 12% of his time in the store cashiering. (Jacobson-Allen Decl., ¶ 12.) During the period of time when Hansen was employed as a non-exempt Assistant Store Manager and was required to perform fewer exempt duties, he spent 25% of his time cashiering. (Jacobson-Allen Decl., ¶ 12.)

While Dollar Tree does not maintain records that identify the amount of time an employee spends stocking and Hansen stated he was not able to estimate the amount of time he spent stocking merchandise, Hansen admits he spent more time cashiering than stocking because he was better at customer service than at stocking. (Hansen Dep., 266:22-267:12.)

Given Hansen's admission that he spent more time cashiering than stocking, coupled with the fact that he spent only 12% of his time cashiering, Hansen cannot have performed non-exempt tasks more than 25% of the time he worked. The numerous exempt functions Hansen performed account for the remainder of his time in the store.

Additionally, even the time Hansen spent cashiering and stocking does not automatically qualify as non-exempt. The Wage Order states that "[e]xempt work shall include all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions." 8 Cal. Code Regs. § 11070(1)(A)(1)(e). This requires that activities, which when viewed in the abstract seem non-exempt, be considered exempt if they are undertaken with the purpose of effectuating exempt functions of a manager's job. Thus, to the extent Hansen was cashiering or stocking to train employees or oversee their work, such work was directly and closely related to supervising and managing employees and is exempt. To the extent Hansen's stocking was performed as an integral part of his creating merchandise displays, training or engaging in asset protection, it also would be exempt. "[I]n other

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

establishments it is not uncommon to leave the actual distribution of materials and supplies in the hands of the supervisor. In such cases it is exempt work since it is directly and closely related to the managerial responsibility of maintaining the flow of materials...." 29 C.F.R. §541.108(c); *See Palazzolo-Robinson v. Sharis Management Corporation*, 68 F.Supp. 1186, 1190 (WD Wash. 1999) (plaintiff never stopped being the manager, even when she was on the floor of the restaurant pouring coffee); "[O]ne can still be 'managing' ... even while physically doing something else." *Donovan v. Burger King*, 672 F.2d 221, 226 (1st Cir. 1982) (Burger King I); "[A]n employee can manage while performing other work." *Id.*; "It is possible for an employee to perform managerial duties simultaneously with nonexempt work." *Cooper v. Spring Haven*, 1995 U.S. Dist. LEXIS 16918. *7 (D. Kan. 1995) (plaintiff oversaw the work of other dietary employees while at the same time cooking, serving meals, etc.); "[M]uch of the oversight of the operation can be carried out simultaneously with the performance of non-exempt work." *Donovan v. Burger King*, 675 F.2d 516, 521 (2nd Cir. 1982) (Burger King II); *Horne v. Crown Central Petroleum, Inc.*, 775 F.Supp. 189, 190 (D. SC 1991) (convenience store manager performed management duties "simultaneously" with assisting store clerks in waiting on customers); "Management function cannot readily and economically be separated from nonexempt tasks." *Baldwin v. Trailer Inns, Inc.*, 266 F.3rd at 1114; "One can still be managing if one is in charge, even while physically doing something else." *Id.*

Hansen admits that he was evaluating, motivating, training and directing employees while he was on the sales floor stocking merchandise. (Hansen Dep., 188:12-195:25.) In addition, Hansen admits all of his time spent at the register was not necessarily non-exempt time. (Hansen Dep., 256:4-12.)

Accordingly, Hansen's own testimony bolstered by Dollar Tree's records, establishes that the majority of Hansen's time was spent performing work that is considered exempt under California (and Federal) law.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

6. Hansen's Monthly Salary Was Two Times The California Minimum Wage.

The Wage Order requires that an executive employee "earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." 8 Cal. Code Regs. § 11070(1)(A). Hansen's salary as a Store Manager was $4,000 a month. (Hansen Dep., 105:1.) This is well above twice the minimum wage ($2,600). IWC Minimum Wage Order (MW-2007). In addition to his base salary, Hansen routinely received monthly bonuses for meeting sales goals. (Hansen Dep., 105:5-7.)

As demonstrated by the foregoing, Hansen's employment by Dollar Tree met every criteria necessary to qualify him for the executive exemption under California law. Accordingly, Hansen was properly treated as an exempt employee.

C. Hansen Was Exempt Under The Fair Labor Standards Act.

Section 13(a)(1) of the Fair Labor Standards Act ("FLSA") provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 C.F.R. § 541. An employee may qualify for exemption an if all of the pertinent tests relating to duties and salary are met. Section 541.100 states that an employee is employed in a "bona fide executive capacity" for purposes of the exemption if the employee:

> (1) [is] Compensated on a salary basis at a rate of not less than $455 per week . . . , exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
>
> (3) Who customarily and regularly directs the work of two or more other employees; and
>
> (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

29 C.F.R. § 541.100(a) (2007).

Under 29 C.F.R. § 541.100(a)(2), an exempt executive's "primary duty" must be management of the enterprise or of a customarily recognized department or subdivision of the enterprise. Primary duty is defined in § 541.700(a) as the "principal, main, major, or most important duty that the employee performs." Factors to consider in determining an employee's primary duty include "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a) (2007). The primary duty determination is based on all of the facts and circumstances in each individual case with the major emphasis on the character of the employee's job as a whole. Further, although the amount of time spent on exempt work can act as a guide, time alone is not the sole test. Generally, employees who spend more than 50 percent of their time performing exempt work will satisfy the primary duty requirement. *See* 29 C.F.R. § 541.700(b) (2007). Section 541.102 contains a non-exhaustive list illustrating the type of activities constituting "management," including:

> activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102 (2007).

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

As shown above, Hansen qualifies for the executive exemption under California law. California's standard for the executive exemption is stricter than the FLSA. Specifically, California requires that the employee spend more than 50% of his time performing exempt functions. The FLSA requires only that the employee's "primary duty" is an exempt function. 29 C.F.R. § 541.700(b) states that "[t]ime alone, however, 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. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion."

Thus, the FLSA defines "primary duty" using a qualitative standard while California's definition of "primary duty" is quantitative. Because Hansen meets the quantitative standard, Hansen also meets the FLSA's qualitative requirements. *See* 29 C.F.R. § 541.700(b) (2007) ("The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement").

Moreover, summary judgment is not appropriate for Hansen's FLSA claim based on the FLSA's qualitative standard. The most important duties Hansen performed were the exempt management functions. As shown above, Hansen was responsible for the day-to-day operation and profitability of the stores in which he worked. "[T]he person in charge of a store has management as his primary duty, even though he spends the majority of the time on non-exempt work." *Murray v. Stuckey's*, 939 F.2d 614, 618 (8th Cir. 1991); *Horne v. Crown Central Petroleum, Inc.*, 775 F.Supp. at 190 (convenience store manager performed management duties "simultaneously" with assisting store clerks in waiting on customers); "Management function cannot readily and economically be separated from nonexempt tasks." *Baldwin v. Trailer Inns, Inc.*, 266 F.3rd at 1114; "One can still be managing if one is in charge, even while physically doing something

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

else." *Id.* Since Hansen readily acknowledged he was responsible for managing his stores, (Hansen Dep., 222:18-223:11), Hansen was exempt under the FLSA.

D. Hansen Was Properly Treated As An Exempt Employee, Thus The Remaining Counts Must Be Denied.

1. Exempt Employees Are Not Entitled To Itemized Wage Statements.

The California Labor Code requires employers to furnish itemized wage statements to all their employees "except for any employee . . . who is exempt . . . under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission . . . ." Cal. Labor Code § 226(a). Since Hansen has asserted no basis to support his claim that Dollar Tree improperly failed to provide him with itemized wage statements other than his assertion that his position was non-exempt and since Hansen's position as a Store Manager was properly classified as exempt, this claim, must be denied.

2. Exempt Employees Are Not Entitled To Meal Periods Or Rest Periods.

California law leaves exempt employees without overtime compensation and all "other benefits, such as meal and rest breaks." *Whiteway v. FedEx Kinko's Office and Print Servs., Inc.*, No. C 05-2320 SBA, 2007 WL 2408872, at *3 (N.D.Cal., Aug. 21, 2007); *see also* Wage Order 7-2001 § 1(A) ("Provisions of Section 3 through 12 [including meal breaks and rest breaks] shall not apply to persons employed in administrative, executive, or professional capacities."). It follows that under California law Hansen's claims for meal and rest break violations must be denied because Hansen was an exempt employee.

3. Unfair Competition And Unfair Business Practices Claims Fail When The Underlying, Claimed Labor Law Violations Fail.

Hansen bases his unfair competition and unfair business practices claims on his underlying claims for overtime, meal and rest breaks, and itemized wage statements. However, Hansen's status as an exempt employee moots each of his underlying claims of state labor law violations. Because unfair competition and unfair

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

business practices claims "borrow[] violations of other laws [including the Labor Code] when committed pursuant to business activity," *Harris v. Investor's Business Daily, Inc.*, 138 Cal.App.4th 28, 32-33 (2006), it follows that Hansen's unfair competition and unfair business practices claims fail due to the mooted underlying claims. Stated differently, because Hansen, as an exempt employee, was not entitled to overtime compensation, meal breaks, rest breaks or itemized wage statements, none of his claims remain to sustain an unfair competition and unfair business practices claim. Accordingly, this claim must be denied.

4. <u>The Unjust Enrichment Claim Fails When The Underlying, Claimed Labor Law Violations Fail.</u>

Hansen bases his unjust enrichment claim on his underlying claims for overtime, meal and rest breaks, and itemized wage statements. "Unjust Enrichment" is not a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so. *Lauriedale Assocs., Ltd. v. Wilson,* 7 Cal.App.4th 1439, 1448 (1992). However, Hansen's status as an exempt employee moots each of is underlying claims of state labor law violations. Because Hansen is an exempt employee, he is not entitled to overtime compensation, meal breaks, rest breaks or itemized wage statements, and thus is owed no restitution. Accordingly, this claim must be denied.

5. <u>Hansen Is Not Entitled Unpaid Wages Due at Termination.</u>

The California Labor Code requires employers to pay employees all wages due the employee. Cal. Labor Code §§ 201(a) and 203. However, as Hansen was an exempt employee, he is not entitled to overtime compensation. Therefore, he was owed no wages that were not paid at termination. Accordingly, this claim must be denied.

E. <u>Hansen Has No Basis For Equitable Relief.</u>

Hansen seeks an injunction and other equitable relief to stop Dollar Tree from engaging in the alleged unlawful conduct, se forth in the other causes of action in his Complaint. Since all the other causes of action are due to be denied, there is no

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111

basis on which to grant Hansen equitable relief and accordingly this claim should be denied.

V. CONCLUSION

For all the foregoing reasons, the Court should find that Hansen was an exempt executive employee under California law and the FLSA; that he was not entitled to any overtime compensation, rest or meal breaks; was not owed any money and therefore not due any relief for unpaid wages; he has failed to establish that Dollar Tree engaged in unfair competition and unfair business practices; and he has failed to establish that Dollar Tree was in any way unjustly enriched. Dollar Tree, therefore, respectfully requests that judgment be entered in its favor as to all causes of action.

DATED: January 19, 2008

Respectfully submitted,

KAUFF MCCLAIN & MCGUIRE LLP

By: /S/
ALEX HERNAEZ

Attorneys for Defendant
DOLLAR TREE STORES, INC.

KAUFF MCCLAIN & MCGUIRE LLP
ONE POST STREET
SUITE 2600
SAN FRANCISCO, CA 94104
TELEPHONE (415) 421-3111