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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

MIGUEL A. CRUZ and JOHN D. HANSEN, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

DOLLAR TREE STORES, INC.,

Defendant.

Case No. C-07-2050 SC

CLASS ACTION

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT DOLLAR TREE STORES, INC.'S MOTION TO BIFURCATE THE LIABILITY AND DAMAGES PHASES OF TRIAL AND TO SET THE ORDER OF PRESENTATION AND ARGUMENT AT TRIAL

ROBERT RUNNINGS, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

DOLLAR TREE STORES, INC.,

Defendant.

Case No.: C-07-4012 SC *(Consolidated Action)*

CLASS ACTION

Date: April 8, 2011
Time: 10:00 a.m.
Dept.: Courtroom 1, 17th Floor
Judge: Hon. Samuel Conti

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I. INTRODUCTION

Defendant Dollar Tree Stores, Inc.'s ("Defendant" and/or "Dollar Tree") February 3, 2011 Motion to Bifurcate the Liability and Damages Phases of Trial and to Set the Order of Presentation and Argument at Trial ("Motion") asks this Court to (1) bifurcate trial into two phases, (2) allow Dollar Tree to present its case first, and (3) foreclose the use of certain procedural tools during the adjudication of damages. While Plaintiffs remain amenable to bifurcating trial to adjudicate liability and damages issues separately, they ask this Court to deny Dollar Tree's request to present first or make decisions about the process for adjudicating damages now. First of all, Dollar Tree's offer to stipulate that each class member worked, in at least one week during the class period, more than eight hours in a work day and/or forty hours in a work week does not relieve Plaintiffs of their burden at the liability phase and is insufficient to alter the order of presentation at trial. Furthermore, given that a liability determination could significantly narrow the issues to be decided at the damages phase (e.g., if liability existed only for weeks when class members certified "no"), it makes no sense to attempt to make a detailed plan at this juncture about how to best handle class-wide damages.

II. STIPULATIONS

Plaintiffs accept Defendant's factual stipulation that each Class Member worked, in at least one week during the Class Period, hours beyond eight in a work day and/or forty hours in a work week. Plaintiffs do not agree, however, that such a stipulation provides the basis for any relief requested in Defendant's Motion. The *existence* of damages alone does not relieve Plaintiffs of the burden to show the quantity thereof or their nature (e.g., overtime pay, versus meal period versus rest period wages) or dispose of their burden of prosecution.

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III. LEGAL ARGUMENT

A. PLAINTIFFS AGREE THAT THE TRIAL SHOULD BE BIFURCATED INTO A LIABILITY PHASE AND A DAMAGES PHASE

1. Bifurcation Is Appropriate Because the Parties' Burdens of Proof Are Entirely Different During The Liability And Damages Phases of Trial

The parties bear different burdens of proof during the liability and damages phases and, as such, bifurcation is appropriate. *Goldman, Goldman v. RadioShack Corp.*, 2005 U.S. Dist. LEXIS 9174 at * 4 (E.D. Pa., May 13, 2005) (bifurcation appropriate where "the standards and evidence required to prove liability are entirely different than the evidence required to prove damages"); *see generally Sav-On Drug Stores v. Superior Court*, 34 Cal. 4th 319 (2004) (adopting a phased approach to trial which, first, permits resolution of common liability questions and, second, determines damages on a class-wide basis through a singular method such as sampling techniques, statistical analysis, questionnaires, surveys or representative sampling).

In the liability phase of trial, Plaintiffs carry the burden of proving the elements of their case. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (U.S. 1946) (an employee seeking remediation for wage and hour violations bears "the burden of proving that he performed work for which he was not properly compensated"). Furthermore, although Dollar Tree has its own burden (i.e., of proving that Plaintiffs were properly classified as exempt for each and every pay period during the class period[1]), Plaintiffs must prove that "misclassification was the rule rather than the exception."[2] *See Sav-On Drug Stores, Inc.*, 34 Cal. 4th at 330.

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[1] *See Nordquist v. McGraw Hill Broadcasting*, 32 Cal.App. 4th 555, 562 (1995); *Dalheim v KDFW-TV*, 918 F.2d 1220, 1224 (5th Cir. 1990); California Industrial Commission Wage Orders No. 1 to 14.

[2] Dollar Tree's offer to stipulate that Plaintiffs each worked overtime at least once during the class period does not obviate Plaintiffs' burden at the liability phase of trial since Plaintiffs must also show that they performed the same tasks and were subject to the same policies, and all missed meal and rest breaks. Furthermore, the exemplar plaintiffs will necessarily need to testify as to their particular damages (i.e. the number of overtime hours worked and meal and rest breaks missed) so that the Court can determine whether damages can be assessed on a class-wide basis. "In many cases, the quantum of damages for the entire class, as well as the issue of liability, may be proved by the class representative as a common issue, thus eliminating the need for individual damages proofs." 3 Newberg § 9:52; *see also* 3 Newberg § 10:2 ("The court found that it was appropriate to determine damages ***by using as a basis the representative plaintiffs*** or by using sampling to

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In the damages phase, however, the burdens are quite different. To adjudicate damages, (particularly since Dollar Tree failed to keep accurate records of the hours Plaintiffs worked or the meal/rest breaks they missed), Plaintiffs must prove the amount of their damages (i.e., the number of overtime hours worked and the meal and rest breaks missed). *McLaughlin v. Seto*, 850 F.2d 586, 589 (9th Cir. Cal. 1988) (*citing Mt. Clemens*, 328 U.S. at 687-88). If and after Plaintiffs make that showing, the obligation migrates to Dollar Tree to rebut the reasonableness of that evidence. *Id.* Given the distinct and shifting burdens of proof in these two phases, bifurcation is proper.

2. Bifurcation Is Appropriate Because the Evidence Used to Determine Liability and Damages is Entirely Different

Just as the burdens of proof differ between the liability and damages phases, so does the evidence required to meet them. For example, liability can be proven with documents and testimony showing that class members worked at Dollar Tree during the class period, that their work did not meet the test for exemption, that they worked overtime hours, and that they missed meal and rest breaks. Damages will be proven by entirely different evidence which does not address the nature of the work, but focuses on the quantity of it (i.e., documents and testimony evidencing the number of overtime hours worked, and meal and rest breaks missed). Given these distinctions, it would be a confusing and time-wasteful trial to throw all of these kinds of evidence at a jury at once and expect them to understand how to make use of each. It also makes no sense to drag out the trial so as to examine class-wide damages when no one yet knows if the company is liable for a dime of it.

3. Bifurcation Will Promote Efficiency and Has the Potential to Save a Lot of Time and Resources

Not only is a trial on both liability and damages, together, unnecessary, it could substantially waste the parties' and Court's resources. Endeavoring to adjudicate liability and damages together requires the parties to prepare and present evidence of damages including witness testimony, expert analyses and/or survey results which, if liability is lacking in the first instance, will be for nothing.[3]

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intensively study a representative group.") (*citing In re Antibiotic Antitrust Actions*, 333 F.Supp. 278, 287-88 (N.D. Ill., 1991)) (emphasis added).

[3] Note that, should a damages phase be necessary, it can be handled efficiently in a formulaic manner (e.g., formulaic distributions of back pay have been approved by courts for use in this

Such is also true with regard to this Court's efforts (e.g., considering motions on damages issues), again, for issues that may be mooted. The Court, the parties, and the jury should be using their time and resources addressing issues that we know require adjudication, not ones that *may eventually require* adjudication. Trial should be bifurcated.

B. PLAINTIFFS BEAR THE ULTIMATE BURDEN OF PROVING LIABILITY AND THEREFORE THEIR CASE SHOULD BE PRESENTED FIRST

1. Plaintiffs' Burden of Proof at Trial Requires Them to Present Their Case First

As the party bringing this action, Plaintiffs carry the "burden of prosecution," as the so-called "masters of their case." This is as true in a motor vehicle case as it is here, and does not change just because, as in almost every case, an affirmative defense exists. *See, generally*, *Oberkotter v. Spreckels*, 64 Cal.App. 470 (1923) (the burden is on the plaintiff to prosecute). Contrary to Dollar Tree's contention, the fact that the affirmative defense here (the "executive" exemption) plays a heavy role in the liability aspect of this case doesn't serve to re-write hornbook law with respect to the natural order of presentation. This is Plaintiffs' case; they chose the claims to bring; they now carry the burden of proving the elements of those claims and their right to collect a particular amount of damages and/or seek other forms of recovery. *See Marlo v. UPS*, 251 F.R.D. 476, 482 (C.D. Cal. 2008) (*citing Teamsters v. United States*, 431 U.S. 324, 336 (1977) *and Sav-On Drug Stores, Inc.*, 34 Cal. 4th at 330) (finding that *plaintiffs* have the ultimate burden of proving liability in an exemption case: "A plaintiff bringing a class action normally has the ultimate burden of proving class-wide liability at trial. Because Plaintiff has brought a class action challenging UPS's exemption of FTS as a policy of misclassification, Plaintiff must be "able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception. . . .").[4] Indeed, even in presenting their case, Plaintiffs must anticipate Dollar Tree's affirmative defense, and it would be a

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context. *See, e.g., Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996).

[4] *See also Combs v. Skyriver Communications, Inc.*, 159 Cal. App. 4th 1242, 1262-63 (Cal. App. 4th Dist. 2008) ("The purpose of Code of Civil Procedure section 631.8 is … to dispense with the need for the defendant to produce evidence … where the court is persuaded that the plaintiff has failed to sustain its burden of proof." (internal citations omitted).

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dangerous tactic indeed to "sit on their hands," hoping Dollar Tree cannot make its showing. *See Morgan v. Family Dollar Stores, Inc.*, Dckt. No. 533 Case No. 7:01-cv-00303-UWC (N.D. Ala. Feb. 6, 2006) (**twice** denying the defendant's request to present its case first and instead ordering that "[i]n the presentation of their testimonial evidence, **class counsel shall anticipate the Defendant's affirmative defense**") (emphasis added).[5] To satisfy their burden of prosecution, Plaintiffs logically proceed in presenting their case first.

2. Public Policy Requires That Plaintiffs Present Their Case First

Even if one was to accept that Plaintiffs did not carry the burden of prosecution, it is more than noteworthy that IWC Wage Orders are specifically designed to ***remedy*** wage and hour violations and are, thus, expected to be "construed liberally 'for the protection and benefit of employees.'" Wage and hour cases are confusing enough to juries; to further complicate matters by confusing the order of presentation at trial would only work to make these issues seem more complicated than they really need to be since, by Dollar Tree's suggestion, it would initiate trial defending itself against claims that have yet to become clear to the trier of fact – without sufficient context, without a chance for the jury to become educated about the scope of the claims. Leaving the jury so perplexed hardly promotes the remedial public policy interests identified above. *See also Reber v. AIMCO/Bethesda Holdings, Inc.*, 2008 U.S. Dist. LEXIS 81831, *11 (C.D. Cal. Aug. 25, 2008) (*quoting Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 794-795 (1999)). The order of presentation should not be reversed.

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[5] *See* RJN Exhs. A, B (*Morgan Dckt.* No. 510), and C (*Morgan Dckt. No.* 533). The *Morgan* Court's verdict was affirmed on appeal. *See Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2008).

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3. Plaintiffs Should Present Their Case First For Practical Reasons

Finally, as the party who selects[6] the "handful" of plaintiffs who will testify at trial (the "exemplar plaintiffs"), Plaintiffs should also present them to the jury. These plaintiffs are represented by class counsel, not Dollar Tree and, as such, class counsel should start with their direct examination. The alternate approach of allowing Dollar Tree to, essentially, cross examine these exemplar plaintiffs before they've offered their facts is illogical.

4. Defendant's Motion Relies On A Host Of Inapposite Cases

The cases upon which Dollar Tree relies to alter the order of presentation are not binding in this Circuit nor universally followed in *any* Circuit. Defendant essentially argues that the unchaptered *Goldman v. Radioshack Corp.*, 2005 U.S. Dist. LEXIS 9174 (E.D. Pa. May 13, 2005) opinion (which was written for an FLSA case) provides a roadmap on this issue. Although that Court altered the order of presentation -- after acknowledging that "the Court's allocation of the right to open and close … rests within the sound discretion of the trial court,"[7] the weight of more pertinent authority militates against the Goldman Court's reasoning. *See Marlo v. UPS*, 251 F.R.D. 476, 482 (C.D. Cal. 2008); *Teamsters v. United States*, 431 U.S. 324, 336 (1977)*; Sav-On Drug Stores, Inc.*, 34 Cal. 4th at 330); *Combs v. Skyriver Communications, Inc.*, 159 Cal. App. 4th 1242, 1262-63 (Cal. App. 4th Dist. 2008).

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[6] Plaintiffs' counsel are in a far better position than Dollar Tree to determine which five class members are most representative of the class. Plaintiffs' counsel has had extensive contact with the class members in this case regarding the work they performed for Dollar Tree (especially given that Plaintiffs' counsel have defended *dozens* of class members at deposition and have also obtained declarations and discovery responses from *hundreds* of class members). Moreover, any information Plaintiffs' counsel may still need to select the exemplar plaintiffs is readily accessible to them since they may freely communicate with the class members -- who are all clients of Plaintiffs' counsel -- at any time. Indeed, to allow Dollar Tree to select the exemplar plaintiffs would undermine the efficiencies of this class action trial (and the attorney-client privilege) since, if Dollar Tree were charged with proving the nature of the work Plaintiffs performed, it would necessarily need to contact the class members (and seek additional discovery) to determine which exemplar plaintiffs it wished to select as trial witnesses. Allowing Dollar Tree to conduct additional discovery (such as more individual class member discovery requests and depositions) at this late hour would create a whole host of practical problems and only delay trial.

[7] *Id.* at *4.

The other cases cited by Defendant fail to support the relief requested in its Motion:

- *Johannes v. Aerotek, Inc.*, 2001 U.S. Dist. LEXIS 25409, *38 (C.D. Cal. June 25, 2001):

The *Johannes* Court merely points out that employers bear the burden of proving the exemption applies but does not address the ultimate burden of proof as to liability.

- *Rees v. Souza's Milk Transp. Co.*, 2008 U.S. Dist. LEXIS 11370 (E.D. Cal. Jan. 29, 2008):

Rees just orders bifurcation – which is not disputed here – and does not reach the a decision as to the sequence of presentation.

- *Pellegrino v. Robert Half Internat., Inc.*, 182 Cal. App. 4th 278, 285 (2010):

The dicta in this state court opinion also does not reach whether defendant-employers must categorically be allowed to present their case-in-chief on exemption issues first.

- *Stewart v. City & County of San Francisco*, 834 F. Supp. 1233, 1236 (N.D. Cal. 1993)

The *Stewart* Court does not address whether the defendant-employer bore the ultimate burden of proof at trial. *Stewart* merely addresses questions of law related to the reach of the Department of Labor's regulatory powers with respect to municipal employers.

- *Latino Food Marketers, L.L.C. v. Ole Mexican Foods, Inc.*, 2004 U.S. Dist. LEXIS 5239 (W.D. Wis. Mar. 30, 2004):

Dollar Tree characterizes the defendant's affirmative defense in *Latino Foods* as the "principal disputed issue" (*see* Motion at 14:16) but in reality it was the *only* disputed issue. Unlike the instant matter where Plaintiffs bear the ultimate burden of proof with respect to liability, the *Latino Foods* Court allowed that defendant to present its case first because "[t]he only way that defendant can avoid liability is to prove its own breach of contract claim by proving the existence of the … contract." *Id.* at *2. Here, the liability analysis cannot be boiled down to such a binary inquiry.

- *Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359, 364 (8th Cir. Ark. 1985):

The *Montwood* Court affirmed the trial court's election to allow the defendant to present its affirmative defense first because "the *only* issue in dispute at this point in the trial was whether the back rents were included in the $500,000 sales price." *Id.* (emphasis added). Here, there are myriad factual and legal issues that must be analyzed to determine whether Dollar Tree properly applied the executive exemption to the class members.

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- *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1251 (7th Cir. Ill. 1992):

Moylan, which recognized that it is "customary" for the party bearing the burden of proof ("usually the plaintiff") to open and close the argument,[8] is inapposite because it was an individual case and presented only a single liability question. This case is a class action and questions beyond the exemption will be adjudicated at liability.

- *Reyes v. Texas EzPawn, L.P.*, 2007 U.S. Dist. LEXIS 78846 (S.D. Tex. Oct. 24, 2007):

Unlike the instant matter, the *Reyes* "parties [had] stipulated to **each** element of Plaintiff's prima facie case." *Id.* at *3 (emphasis added). Moreover, in *Reyes*, "the only issue that remained at closing was the defendant's affirmative defense that plaintiff was exempt from overtime pay provisions of the FLSA" since "the records clearly show[ed] the number of overtime hours worked by Reyes and it is undisputed that he performed work for which he was not compensated." *Reyes* at *5-8. Here, the proposed stipulations do not boil all liability issues down to a binary question as to whether the exemption applies. Moreover, there are no facts on the record regarding the number of overtime hours class members worked in the instant litigation.

C. THIS COURT SHOULD NOT MAKE DETERMINATIONS ABOUT THE ADJUDICATION OF DAMAGES UNTIL AFTER LIABILITY IS DECIDED

The Court should not rule out any particular process for determining damages until after Phase I (liability) concludes. Dollar Tree agrees that "the issues of liability are not intertwined with the issues to be addressed during the damages phase"[9] and that "bifurcation will promote convenience and judicial economy regardless of the determination during the liability phase."[10] Nevertheless, Dollar Tree asks this Court to make specific determinations *now* about how damages will be adjudicated before liability has been tried. This is not a topic ripe for evaluation.

It is highly questionable whether a jury will even be needed during the damages phase since individual damages can efficiently be adjudicated by common evidence or through one or more of

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8 *Moylan* at 1251.
9 *Id.* at 6:10-11.
10 Motion at 5:18-19.

the formulaic tools discussed in *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 749 (2004). Moreover, as Dollar Tree admits, the damages landscape might change considerably after liability is concluded. Motion at 5:21-6:5. ("Even if Dollar Tree does not prevail in Phase One, however, a bifurcation order will promote convenience and economy by clarifying the scope of Phase Two. For example, if the jury determines that liability may be imposed only during weeks in which a "no" certification response was received by Dollar Tree, then Phase Two will be tailored to that issue. If, however, the jury determines that misclassification was the rule rather than the exception at Dollar Tree, there "may be more scope for individual testimony from class members at the damages phase" *Cruz*, 2010 U.S. Dist. LEXIS 101340, at * 23). In Dollar Tree's example, if the jury found that liability only exists for weeks in which a "no" certification response was received, then the parties themselves could review and stipulate to the "no" certifications during the damages phase of trial. In such a scenario, there would be no need to employ a jury to determine damages.

Moreover, even if further testimony is required to determine the level of damages, the jury does not need to be familiar with the liability phase of the case (which Dollar Tree already admits requires different burdens of proof and different evidence) to do that job. Nor does it make sense to hold jurors over to the damages phase of trial when the case will likely settle before a damages determination is made (assuming liability is found in the first place). Even if this case never settles, the delay required for motion work, class surveys and expert analyses before the damages adjudication can begin would place an onerous burden on jurors and make their continued participation in the case difficult to guarantee.

For the same reasons it is impossible to know whether a jury would be needed for a damages phase, it is impossible to predict whether a magistrate judge will be either. Dollar Tree offers no evidence or good reason why this case would benefit by prematurely rejecting the use of a magistrate judge now. Furthermore, there is at least one reason (which is, ironically, raised in Dollar Tree's Motion) to employ a magistrate judge during the damages phase: if damages is to be determined based on "no" certifications, a magistrate may indeed be the *best* person to handle discovery disputes arising from the review of the certifications (e.g., squabbles over how to handle purportedly illegible handwritten certifications, etc.) since handling discovery disputes are commonplace for them. In any

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event, no one can forecast what procedural tools and rulings will be appropriate for a damages phase prior to a liability determination. The Court should hold in abeyance any decision regarding the structure of Phase II (damages) until after Phase I is over.

IV. CONCLUSION

Based upon the foregoing, Dollar Tree's Motion should be granted with respect to its request to bifurcate trial, and denied with respect to its requests to (1) modify the order of trial presentation, and (2) reach damages (Phase II) determinations.

Dated: March 18, 2011

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