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15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

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

19 Plaintiffs,

20 v.

21 DOLLAR TREE STORES, INC.,

22 Defendant.

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

24 Plaintiff,

25 v.

26 DOLLAR TREE STORES, INC.,

27 Defendant.
 28

Case No. C 07 2050 SC
 Case No. C 07 04012 SC

**NOTICE OF MOTION AND MOTION TO
 BIFURCATE THE LIABILITY AND
 DAMAGES PHASES OF TRIAL AND TO
 SET THE ORDER OF PRESENTATION
 AND ARGUMENT AT TRIAL**

Date: March 11, 2011
 Time: 10:00 a.m.
 Dept.: Crtrm. 1, 17th Floor
 Judge: Hon. Samuel Conti

Trial Date: None Set
 Complaints Filed: April 11, 2007
 July 6, 2007

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND ALL ATTORNEYS OF RECORD:

Please take notice that on March 11, 2011, at 10:00 a.m., or as soon thereafter as this matter can be heard, in the Courtroom of the Honorable Samuel Conti, Courtroom 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, Defendant Dollar Tree Stores, Inc. (“Dollar Tree” or “Defendant”) will, and hereby does, move the Court for an order bifurcating the liability and damages issues into two trial phases. Defendant will also, and hereby does, move the Court for an order setting the sequence of presentation and argument at trial. This motion is made pursuant to Rule 42(b) of the Federal Rules of Civil Procedure (“Rule 42(b)”) and Civil Local Rule 7-2. Defendant’s motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Matthew P. Vandall, the oral arguments of counsel and all other pertinent papers contained in the Court’s files.

RELIEF REQUESTED

Dollar Tree seeks an order bifurcating the liability and damages issues at trial into two distinct phases. Phase One will address liability and focus the Court and the jury upon the central question of whether Dollar Tree properly classified Class Members (“CMs”) as exempt executives under California law. If, and only if, there is a liability determination in Phase One, Dollar Tree seeks an order requiring Phase Two to commence immediately for the purpose of allowing the same jury to determine damages, if any, on a class-wide basis.

Dollar Tree also seeks an order setting the sequence of presentation and argument during Phase One based upon the proper allocation of the burden of proof. Specifically, Dollar Tree seeks an order allowing Defendant to: (1) present its case-in-chief first and then be permitted to rebut Plaintiff Runnings’ case-in-chief, and (2) give its opening statement first, its closing argument first, and its rebuttal argument last.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS.

On April 11, 2007, Plaintiffs Miguel Cruz and John Hansen, on behalf of themselves and others similarly situated, filed a class action lawsuit against Dollar Tree alleging that they were improperly classified as exempt employees and denied wages for overtime under California law. On July 6, 2007, Plaintiff Robert Runnings filed a substantially similar class action in California Superior Court, which Dollar Tree removed to this Court. On November 20, 2007, this Court consolidated the two actions and, on May 26, 2009, the Court certified this case as a class action. On September 9, 2010, the Court decertified a substantial portion of the class. (*See* Case No. 3:07-cv-04012-SC, ECF Ref. No. 260 (Order Granting in Part and Denying in Part Defendant’s Motion to Decertify (the “Partial Decertification Order”), at p. 23:2-17.)

Following the Partial Decertification Order, the class consists of “[a]ll persons who were employed by [Dollar Tree] as California retail Store Managers at any time [during the Class Period] and who responded ‘no’ at least once on Dollar Tree’s weekly payroll certifications.” (Partial Decertification Order, p. 23:4-8.) An effect of the Partial Decertification Order is that former class representatives Cruz and Hansen are no longer part of the class. *See* Declaration of Matthew P. Vandall, ¶ 3.¹ Dollar Tree maintains that each of the remaining CMs are “exempt” executives under Section 1 (A) (1) of the California Wage Order 7-2001, and, therefore, that each is due no more remuneration than the compensation already received.

This Court scheduled the class trial to begin on March 7, 2011. (Case 3:07-cv-02050-SC, ECF Ref. No. 150, ¶ 9.) On January 11, 2011, however, the trial date was vacated and the Court scheduled a Trial Setting Conference which is now scheduled to occur on June 24, 2011. (*Id.*, ECF Ref. Nos. 265, 271.)

On January 24, 2011, counsel for Dollar Tree and Plaintiff Runnings met and conferred with

¹ The parties are meeting and conferring with respect to the timing of the anticipated trial on the individual wage and hour claims of Cruz and Hansen. (Vandall Decl., ¶ 3). Dollar Tree proposes that such trial occur as soon as possible and before the class trial. (*Id.*) As of the date this motion was filed, counsel for Messrs. Cruz and Hansen have not identified their position on this subject. (*Id.*)

1 respect to numerous trial management issues, including the relief Dollar Tree now seeks. (Vandall
 2 Decl., ¶¶ 3-4.) With respect to bifurcation, Class counsel agreed in principle to the concept and
 3 indicated that Plaintiff Runnings would also seek a bifurcation order as part of his trial plan. (*Id.*)
 4 The parties' proposals differed, however, in several material respects: (1) Class counsel suggested
 5 that the damages phase occur one or two months after the liability phase (Vandall Decl., ¶ 5.); and
 6 (2) Class counsel proposed bifurcating liability and damages issues while also proposing that
 7 Plaintiff Runnings present damages evidence for select Class Members during the liability phase
 8 (Vandall Decl., ¶ 5.). With respect to Dollar Tree's request to alter the presentation of the order of
 9 proof at trial, Class counsel would not agree to allow Dollar Tree to present first and instead invited
 10 this motion. (Vandall Decl., ¶ 6.)

11 Dollar Tree also proposed simultaneous briefing so that this motion and Plaintiff Runnings'
 12 anticipated trial plan motion could be heard and resolved at the same time. (Vandall, ¶ 4.) Class
 13 counsel refused this proposal and was not able to commit to a date certain by which their trial plan
 14 motion will be filed. (*Id.*)

15 To narrow the issues that must be tried, Dollar Tree will stipulate that each Class Member
 16 worked, during at least one week in the Class Period, hours over eight hours in a work day and/or
 17 over forty hours in a work week.²

18 **II. ARGUMENT.**

19 **A. The Court Should Bifurcate Liability And Damages Issues Into Two Separate Trial Phases.**

20 **1. Legal Standard For Bifurcation Orders Under Rule 42(b).**

21 Rule 42(b) provides that this Court may "order a separate trial of one or more separate
 22 issues" for "convenience, to avoid prejudice, or to expedite and economize . . ." *See also Bates v.*
 23 *United Parcel Service*, 204 F.R.D. 440, 448 (N.D. Cal. 2001) (noting that factors commonly
 24 considered under Rule 42(b) include convenience and judicial economy, prejudice to the parties, risk
 25 of confusion, and separability of issues). To bifurcate a trial into phases, only one of Rule 42(b)'s

26 ² This case involves the CMs' claims for overtime compensation under Section 510(a) of the
 27 California Labor Code. Under the statute, "[a]ny work in excess of eight hours in one workday and
 28 any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh
 day of work in any one workweek shall be compensated at the rate of no less than one and one-half
 times the regular rate of pay for an employee." Cal. Lab. Code § 510(a) (2010).

1 requirements must be satisfied. *Giro Sport Design, Inc. v. Pro-Tec, Inc.*, No. C-88-20228-RPA,
 2 1989 U.S. Dist. LEXIS 9423, at * 3-4 (N.D. Cal. Mar. 17, 1989) (Rule 42(b) standards “are in the
 3 disjunctive instead of the conjunctive”); *United States v. Shell Oil Co.*, No. CV 91-0589-RJK, 1992
 4 U.S. Dist. LEXIS 3947, at * 29-30 (C.D. Cal. Jan. 17, 1992) (“Only one of Rule 42(b)’s conditions
 5 has to be met...”). When ordering a separate trial, however, “the court must preserve any federal
 6 right to a jury trial.” FED. R. CIV. PROC., Rule 42(b).

7 This Court has noted that “if this case proceeds to trial, the court is likely to divide the trial
 8 into a liability and damages phase.” *Cruz*, 2010 U.S. Dist. LEXIS 101340, at * 22.³ The Court
 9 should do so here because the Rule 42(b) standard is satisfied.

10 **2. The Court Should Order Bifurcation Because Liability and Damages**
 11 **Issues are Distinct and Separable.**

12 Bifurcation is appropriate “because the standards and evidence required to prove liability are
 13 entirely different than the evidence required to prove damages.” *Goldman*, 2005 U.S. Dist. LEXIS
 14 9174, at * 4. Indeed, the burden of proof as to various liability and damages issues shifts between
 15 the parties through each phase of the trial.

16 In Phase One, CMs need only show that they worked, during at least one week in the Class
 17 Period, hours over eight hours in a work day and/or over forty hours in a work week. *Bell v.*
 18 *Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 749-750 (Cal. App. 1st Dist. 2004); *see also Lopez v.*
 19 *United Parcel Service, Inc.*, No. C 08-05396 SI, 2010 U.S. Dist. LEXIS 68868, at * 14-15 (N.D. Cal.
 20 June 18, 2010) (affirming plaintiff bears the burden of proving he worked overtime hours). As
 21 described above, Dollar Tree is willing to stipulate to this showing.

22 Dollar Tree therefore bears the ultimate burden in Phase One of proving that CMs are not
 23 entitled to overtime because they were properly classified as exempt executives.⁴ *See e.g., Ramirez*

24 ³ The Court further noted that it “is likely to appoint a special master to handle particular damages
 25 claims of class members”. (*Cruz*, 2010 U.S. Dist. LEXIS 101340, at * 22). As described below,
 26 Dollar Tree objects to the appointment of a special master in this case to the extent such appointment
 27 does not allow Dollar Tree to preserve its federal right to a jury trial. (*See* Rule 42(b).)

28 ⁴ The executive exemption is set forth in Industrial Welfare Commission (“IWC”) Order 7-2001, Cal.
 Code Regs., tit. 8 § 11070. To qualify as an exempt executive employee, the employee must: (1)
 manage the enterprise, a customarily recognized department, or subdivision thereof; (2) direct the
 work of two or more other employees; (3) have the authority to hire or fire, or have their
 recommendations to hire, fire, or promote given weight; (4) exercise discretion and independent
 judgment; (5) be primarily engaged in exempt activity more than fifty percent of the time; and (6)

1 v. *Yosemite Water Co.*, 20 Cal. 4th 785, 794-95 (1999) (“the assertion of an exemption from the
 2 overtime laws is considered to be an affirmative defense, and therefore the employer bears the
 3 burden of proving the employee’s exemption”); *Johaness v. Aerotek, Inc.*, No. CV 98-6153 DT
 4 (AJWx), 2001 U.S. Dist. LEXIS 25409, at * 38 (C.D. Cal. June 25, 2001) (“Under the FLSA and
 5 California law, the burden is placed squarely upon the employer to establish the application of any
 6 exemption to an employee”). Thus in Phase One, the evidence will focus upon Dollar Tree’s exempt
 7 status expectations for the California Store Manager position, whether and how those expectations
 8 were communicated to CMs, store manager training, the job duties store managers actually
 9 performed, how CMs were paid (e.g., more than double the prevailing minimum wage), and the
 10 meaning of the weekly payroll certifications Dollar Tree received during the Class Period. Plaintiff
 11 Runnings and the CMs will present evidence in Phase One attempting to rebut this showing.

12 In Phase Two, which becomes necessary only following a liability determination, the burden
 13 shifts to Plaintiff Runnings and the CMs to prove damages on a class basis. *Hernandez v. Mendoza*,
 14 199 Cal. App. 3d 721, 727 (Cal. App. 2d Dist. 1988). The damages evidence, if any, that would
 15 arise in Phase Two includes the amount and extent of uncompensated overtime work performed, and
 16 whether and how often CMs were denied the opportunity to take rest breaks and/or meal periods.
 17 These issues, and the supporting evidence required to prove them, are separate and distinct from the
 18 liability determination the jury will be asked to make in Phase One.

19 California state and federal courts recognize that bifurcation orders are appropriate under
 20 analogous circumstances. See *Rees v. Souza’s Milk Transp. Co.*, No. 1:05-cv-00297-LJ-SMS, 2008
 21 U.S. Dist. LEXIS 11370, at * 3-5 (E.D. Cal. Jan. 29, 2008) (bifurcating liability and damages in a
 22 motor carrier safety exemption action brought under both the FLSA and the California Labor Code);
 23 *Pellegrino v. Robert Half Int’l, Inc.*, 182 Cal. App. 4th 278, 285-86 (Cal. App. 4th Dist. 2010) (same
 24 with respect to the administrative exemption);⁵ see also *Stewart v. City and County of San*

25
 26 earn a monthly salary equal to twice the state minimum wage for full-time employment. Cal. Code
 Regs., tit. 8 § 11070(1)(A)(1)(a)-(f) (2010).

27 ⁵ In that case, the court ordered the defendant to proceed first during the liability phase because it
 28 had the burden of proof on the defense. As discussed below, Dollar Tree should be permitted to
 proceed first during the liability phase of trial because it bears the burden of proof as to the
 applicability of the executive exemption to the CMs.

1 *Francisco*, 834 F. Supp. 1233, 1234 (N.D. Cal. 1993) (in an FLSA action, bifurcating the issue of
 2 liability and the applicability of the “salary test” for the managerial exemption from the issue of
 3 damages).⁶

4 Hence, because the liability and damages issues are readily separable and because Courts
 5 regularly issue bifurcation orders in exemption cases, this Court should order bifurcation of the class
 6 trial into two phases.

7 3. Bifurcation Serves the Ends of Convenience and Judicial Economy.

8 Consideration of judicial economy and expedition is of special import in a class action which
 9 carries with it “the prospect of burdening a jury with the task of analyzing the damages as to each
 10 class member” in a class currently comprised of approximately 273 members.⁷ *Arthur Young & Co.*
 11 *v. U.S. District Court*, 549 F.2d 686, 697 (9th Cir. 1977), quoting *In re Memorex Security Cases*, 61
 12 F.R.D. 88, 103 (N.D. Cal. 1973). Doubtless, by focusing the attention on the overarching issues
 13 concerning Dollar Tree’s exemption defense, bifurcation will save time and resources. See
 14 *Goldman*, 2005 U.S. Dist. LEXIS 9174, at * 3-4 (“Bifurcating the trial promotes judicial expedition
 15 and economy by limiting evidence to that which is essential to the disposition of the case”); *Rees*,
 16 2008 U.S. Dist. LEXIS 11370, at * 4 (“Determination of the liability issue or issues may completely
 17 eliminate the need for adjudication of damages issues ...”).

18 Importantly, bifurcation will promote convenience and judicial economy regardless of the
 19 determination during the liability phase. Indeed, if Dollar Tree prevails in Phase One, the jury will
 20 be released and need not expend any unnecessary time considering the parties’ damages evidence.
 21 Even if Dollar Tree does not prevail in Phase One, however, a bifurcation order will promote
 22 convenience and economy by clarifying the scope of Phase Two. For example, if the jury

23 ⁶ Likewise, courts outside of California also bifurcate the liability and damages phases in wage and
 24 hour class and collective actions. See generally, *Reich v. Dep’t of Conserv. & Nat. Res.*, 28 F.3d
 25 1076, 1078 (11th Cir. 1994) (“The district court bifurcated the issues of liability and damages...”);
 26 *Thiebes v. Wal-Mart Stores Inc.*, No. 98-802-KI, 2004 U.S. Dist. LEXIS 15263, at * 2 (D. Or. July
 27 26, 2004) (ordering “separate trials on liability and damages”); *Lamon v. City of Shawnee*, No. 88-
 28 4200-S, 1990 U.S. Dist. LEXIS 10608, at * 3 (D. Kan. July 10, 1990) (“the court finds that
 convenience, expedition and economy will be promoted by separate trials of the damage and liability
 issues”).

⁷ Dollar Tree separately moves for the dismissal of 109 CMs who failed to respond to Court-ordered
 discovery in this action. (ECF Ref. No. 259.) That motion is scheduled for hearing on February 4,
 2011. If Dollar Tree’s motion is granted in full, the class will be reduced to 164 members.

1 determines that liability may be imposed only during weeks in which a “no” certification response
 2 was received by Dollar Tree, then Phase Two will be tailored to that issue. If, however, the jury
 3 determines that misclassification was the rule rather than the exception at Dollar Tree, there “may be
 4 more scope for individual testimony from class members at the damages phase” *Cruz*, 2010 U.S.
 5 Dist. LEXIS 101340, at * 23. Thus, no matter what the outcome of the liability phase, a bifurcation
 6 order serves the purposes of Rule 42(b).

7 **4. Bifurcation is Necessary to Avoid Prejudice to Dollar Tree.**

8 Dollar Tree is entitled to fair trial. Combining evidence of liability and damages, however,
 9 may lead the jury to find Dollar Tree liable simply by exposure to damages testimony.⁸ On the other
 10 hand, because the issues of liability are not intertwined with the issues to be addressed during the
 11 damages phase, the CMs are unaffected by bifurcation. *See Goldman*, 2005 U.S. Dist. LEXIS 9174,
 12 at * 4 (“The issue of liability and the issue of damages are legally distinct; therefore, bifurcation will
 13 not prejudice [plaintiff]. Conversely, if the Court did not bifurcate, the intermingling of liability
 14 with the issues of [...] damages might prejudice [defendant]”). The Court should order bifurcation
 15 on this ground.

16 **5. Bifurcation is Necessary to Avoid the Risk of Jury Confusion.**

17 Given the distinct, shifting burdens of proof and the required elements of the executive
 18 exemption, described above, there exists a risk of juror confusion unless the Court orders
 19 bifurcation. Without bifurcation, the jury will be called upon prematurely to endure evidence of
 20 damages while simultaneously considering questions of liability. In addition, the jury will hear
 21 individual facts and circumstances bearing on a potentially needless proof of hours worked, pay
 22 rates, meal periods, rest breaks and wage statements, all ostensibly before Dollar Tree presents its
 23 exemption defense. This would be difficult under any circumstance. In the context of a class action,
 24 however, the risk of confusion is amplified by the individualized nature of damages and the need to

25 ⁸ During the parties’ meet and confer discussions regarding this issue, Class counsel agreed to the
 26 concept of a phased approach to trial. (Vandall Decl., ¶ 5.) They revealed for the first time,
 27 however, that Phase One of the trial should include the presentation of evidence of liability for the
 28 entire class and damages for the individual CMs they will select to testify at trial. (*Id.*) Phase Two,
 in Class counsel’s view would focus upon damages for the remainder of the Class – or the non-
 testifying CMs. (*Id.*) This plan is nonsensical and would increase juror confusion by purporting to
 separate liability and damages in theory but not in practice.

1 assess such damages for 273 CMs. The Court should grant Dollar Tree’s bifurcation request on this
2 ground.

3 **B. The Liability and Damages Phases of the Trial Should be Tried by the Same**
4 **Jury Sequentially.**

5 In the interest of judicial efficiency, convenience, and the avoidance of prejudice, the liability
6 and damages phases should be tried sequentially by the same jury. “Generally, when issues are
7 severed for separate trials, they should be tried before the same jury unless they are entirely
8 unrelated.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.632 (2010). Such a trial may be
9 conducted by having evidence on discrete issues presented sequentially, with the jury returning a
10 verdict on an issue before the trial moves on to the next issue. *Id.* In fact, the preferred practice in
11 bifurcated trials is to use the same jury for all issues in an action, even though the jury may hear
12 those issues at different times. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL
13 PRACTICE AND PROCEDURE § 2391 (3d ed. 2008); *Wilkins v. City of Oakland*, No. C 01-1402 MMC,
14 2006 U.S. Dist. LEXIS 37299 (N.D. Cal. Feb. 8, 2006) (granting defendant’s motion for bifurcated
15 trial before same jury). Although this Court contemplated the use of a special master in the damages
16 phase of the trial, Dollar Tree objects to any bifurcation procedure that does not preserve its “federal
17 right to a jury trial.” (FED. R. CIV. PROC., Rule 42(b).)

18 Under the current version of Rule 53 of the Federal Rules of Civil Procedure (“Rule 53”),⁹
19 the use of a special master in the damages phase of trial is inappropriate in this case. Under Rule 53,
20 masters can be appointed in jury cases only when the parties have given their consent.¹⁰ Because
21 Dollar Tree neither consents to the use of a special master at the damages phase of trial nor waives
22 its right to a jury determination of damages, the appointment of a special master would be improper.

23 Finally, in the unlikely event that Phase One of the trial results in a liability determination
24 against Dollar Tree, Defendant is prepared to move immediately into Phase Two and present its

25 ⁹ This Rule provides for the appointment of a special master under certain circumstances, none of
26 which are present in this litigation.

27 ¹⁰ As the Advisory Committee explained, “The use of a trial master without party consent is
28 abolished as to matters to be decided by a jury unless a statute provides for this practice. . . . A trial
master should be appointed in a jury case, with consent of the parties and concurrence of the court,
only if the parties waive jury trial with respect to the issues submitted to the master or if the master’s
findings are to be submitted to the jury as evidence in the manner provided by former Rule

1 damages evidence. There is no need for any delay between Phases and none should be ordered by
 2 the Court because any such delay will only impose additional hardships on the jurors who must
 3 resolve the damages issues.
 4

5 Accordingly, Dollar Tree respectfully requests that the liability and damages phases be tried
 6 sequentially, without delay and by the same jury.

7 **C. The Court Should Grant Dollar Tree’s Request To Alter The Order Of
 8 Presentation Of Evidence And Argument.**

9 **1. The Court Has Discretion to Allow Dollar Tree to Present and Argue Its
 10 Case First at the Liability Phase of Trial.**

11 Federal courts need not follow the traditional notion that the plaintiff automatically has the
 12 right to open first, present evidence first, and close last. Rather, the order of proof is within the trial
 13 court’s discretion and can be varied as the occasion requires. 75 Am. Jur. 2d Trial § 275 (2010).
 14 Customarily, the party with the burden of proof is given the benefit of opening and closing the
 15 argument. *Id.* § 276; 53 A.L.R. Fed. 900 (2009). Consequently, federal courts have allowed the
 16 defendant to open first, present evidence first, and close last where the defendant has the burden of
 17 proof as to the principal disputed issue. *See, e.g., Latino Food Marketers, LLC v. Ole Mexican
 18 Foods, Inc.*, No. 03-C-0190-C, 2004 U.S. Dist. LEXIS 5239, at * 2 (W.D. Wis. Mar. 30, 2004)
 19 (allowing defendant in a contract dispute to present evidence first on an affirmative defense because
 20 it was the principal disputed issue at trial); *Montwood Corp. v. Hot Springs Theme Park Corp.*, 766
 21 F.2d 359, 364 (8th Cir. 1985) (affirming the district court’s decision to allow defendant to proceed
 22 first because defendant bore the burden of proof on the disputed issue). Further, “fairness requires
 23 that the party with the burden of proof should have the first and last opportunity to persuade the jury
 24 of its position. When that party is the defendant, it makes sense to give that privilege to the
 25 defendant.” *Latino Food Marketers*, at * 3-4.

26 The Court’s discretion to control the order of proof at trial is well established. *U.S. v. Zemek*,
 27 634 F.2d 1159, 1169 (9th Cir. 1980) (“This court has repeatedly held that the order of proof is within
 28 the sound discretion of the trial court”); *U.S. v. Downing*, 753 F.2d 1224, 1241 (3d Cir. 1985) (“the
 53(e)(3).” *See* Advisory Committee Notes to the 2003 Amendment to Rule 53 (emphasis added).

1 control of the order of proof at trial is a matter committed to the discretion of the trial judge”);
 2 *Lentner v. Lieberstein*, 279 F.2d 385, 388 (7th Cir. 1960) (“The conduct of a trial, the order of
 3 introducing evidence, and the time when it is to be introduced are matters vested in the sound
 4 discretion of the trial court”) (internal quotations omitted); FED. R. EVID. 611(a) (court may control
 5 presentation of evidence so as to make presentation “effective for the ascertainment of truth” and to
 6 avoid “needless consumption of time”).

7 Accordingly, Dollar Tree respectfully requests that the Court exercise its discretion by
 8 ordering that Dollar Tree proceed first at trial.

9 **D. Dollar Tree Should Be Permitted to Proceed First Because It Bears the Burden**
 10 **of Proof as to the Central Issue of this Litigation.**

11 It is undisputed that Dollar Tree bears the burden of proving its exemption defense at trial.
 12 *See Ramirez*, 20 Cal. 4th at 794-95 (1999) (“the assertion of an exemption from the overtime laws is
 13 considered to be an affirmative defense, and therefore the employer bears the burden of proving the
 14 employee’s exemption”); *Johaness*, 2001 U.S. Dist. LEXIS 25409, at * 38 (C.D. Cal. June 25, 2001)
 15 (“Under the FLSA and California law, the burden is placed squarely upon the employer to establish
 16 the application of any exemption to an employee”).

17 To effectively present its affirmative defense, Dollar Tree should be permitted to present
 18 evidence and argument first during Phase One. Courts often reverse the standard order for
 19 presenting evidence and argument at trial in overtime compensation cases where the primary issue
 20 for trial is the defendant’s exemption defense. For example, in *Pellegrino*, 182 Cal. App. 4th at 285,
 21 the court bifurcated trial on the defendant’s exemption defense and ordered the defendant to proceed
 22 first because the defendant had the burden of proof. Similarly, in *Goldman*, 2005 U.S. Dist. LEXIS
 23 9174, at *4-7, an executive exemption collective/class action involving retail sales managers, the
 24 court granted the defendant’s request to open first, present evidence first, and close first. In granting
 25 the defendant’s request, the court noted that the plaintiffs’ burden to make a *prima facie* showing
 26 that he and all other members of the class worked more than 40 hours per week without receiving
 27 overtime compensation is not as significant as the employer’s burden to dispute liability.¹¹ *Id.* at * 6.

28 ¹¹ In *Goldman*, trial of the amount of plaintiffs’ alleged damages—if liability was established—was to be handled in a bifurcated portion of the trial, where plaintiffs would proceed first, in part to

1 See also, *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1251 (7th Cir. 1992) (affirming the district
 2 court's decision to allow defendant to go first and last during closing arguments where defendant
 3 had the burden of proof on its FLSA exemption defense); *Reyes v. Texas EZPawn, L.P.*, No. V-03-
 4 128, 2007 U.S. Dist. LEXIS 78846, at * 7 (S.D. Tex. Oct. 24, 2007) (granting defendant's pre-trial
 5 request to open and close first on similar grounds).

6 Like *Pellegrino*, *Goldman*, *Moylan*, and *Reyes*, the issue here is whether an exemption
 7 applies to the CMs. In those cases, the defendants were permitted to proceed first with their case-in-
 8 chief and, therefore, Dollar Tree respectfully requests the same opportunity.

9 **E. Dollar Tree Will Stipulate That Each Class Member Worked, During At Least**
 10 **One Week In The Class Period, Hours Over Eight Hours In A Work Day**
 11 **And/Or Over Forty Hours In A Work Week.**

12 California courts recognize the principle that, in order to recover overtime compensation, the
 13 plaintiffs must meet their initial burden of showing that they indeed worked overtime hours. *Bell*,
 14 115 Cal. App. 4th at 749-750; *Lopez*, 2010 U.S. Dist. LEXIS 68868, at * 14-15. To narrow the
 15 triable issues Dollar Tree will stipulate that each CM worked, during at least one week in the Class
 16 Period, hours over eight hours in a work day and/or over forty hours in a work week. Thus, Plaintiff
 17 Runnings and the CMs are relieved of their burden in Phase One.¹² As a consequence, if Dollar Tree
 18 is unable to prove its exemption defense, the CMs will be entitled to recover overtime compensation
 19 upon proof of overtime hours worked.¹³ If Dollar Tree is able to carry its burden then, as described
 20 above, the damages issues are moot. Because Dollar Tree will stipulate to the CMs' Phase One
 21 burden, as described above, there is no rational basis for refusing Dollar Tree's request to proceed
 22 first in its presentation and argument at trial.

23 "avoid prejudice to RadioShack" in presenting its case-in-chief on liability. *Goldman*, 2005 U.S.
 24 Dist. LEXIS 9174, at * 3-4.

25 ¹² In *Goldman* and *Reyes*, the defendants stipulated to the elements of plaintiffs' *prima facie* claim
 26 under the FLSA, including that plaintiffs each worked some overtime hours, which led the courts in
 27 both cases to set the order of presentation and allow the defendants to open first, present evidence
 28 first, and give closing arguments first and rebuttal last. See *Reyes*, 2007 U.S. Dist. LEXIS 78846, at
 * 10; *Goldman*, 2005 U.S. Dist. LEXIS 9174, at * 6-7.

¹³ During the damages phase of trial, CMs must be able to produce sufficient evidence to permit a
 reasonable inference as to the amount and extent of uncompensated overtime work. 1-5 Susan
 Spurlark, *California Employment Law* § 5.72 (2010), citing *Hernandez*, 199 Cal. App. 3d at 727. If
 CMs are able to provide such evidence, the burden will shift to Dollar Tree to negate the inference
 drawn from the CMs' evidence. *Id.*

1 **F. Dollar Tree Will Suffer Prejudice If Plaintiff Runnings Is Allowed to Proceed**
 2 **First.**

3 To try Phase One using the typical order of presentation and argument will prejudice Dollar
 4 Tree's ability to prove its case. The CMs will call witnesses and attempt to rebut a case-in-chief that
 5 has not been presented and on which Dollar Tree bears the burden of proof. Moreover, during cross-
 6 examination of the CMs' witnesses, Dollar Tree will be forced to extract admissions regarding each
 7 of the prongs of the exemption defense without first explaining to the jury what its expectations for
 8 the Store Manager position were or what is necessary to establish exempt status under California
 9 law. That sequence likely will confuse the jury who would begin the trial hearing evidence meant to
 10 counter Dollar Tree's exemption evidence before understanding what the evidence shows. On the
 11 other hand, the CMs suffer no prejudice from this sequence of presentation because Dollar Tree will
 12 stipulate to their Phase One burden and because the CMs will can rebut Dollar Tree's evidence
 13 during their turn at presenting evidence.

14 **G. Proposed Order of Presentation and Argument.**

15 Ease of presentation and fairness dictate that Dollar Tree be allowed to establish its burden of
 16 proof in Phase One by presenting its case to the jury first. Therefore, Dollar Tree requests that the
 17 Court exercise its discretion to set the order of presentation and argument during Phase One as
 18 follows:

- 19 1. Dollar Tree gives its opening statement first. *See Reyes*, 2007 U.S. Dist. LEXIS 78846, at * 10; *Goldman*, 2005 U.S. Dist. LEXIS 9174, at * 7.
- 20 2. Dollar Tree presents its case-in-chief first, and has the opportunity to offer
 21 evidence in rebuttal after Plaintiffs' rest. *Reyes*, 2007 U.S. Dist. LEXIS 78846, at * 10 ("the Court will permit Defendant to open and close first and
 22 initiate the presentation of evidence") (emphasis added).
- 23 3. Dollar Tree makes its closing argument first, and has the opportunity to rebut
 24 Plaintiffs' closing argument. *See id.*; *Moylan*, 979 F.2d at 1251.

25 Dollar Tree does not seek an alteration of the order of presentation in Phase Two because, as
 26 described above, Plaintiff Runnings and the CMs bear the burden of proof with respect to damages.

27 **III. CONCLUSION**

28 The nature of this litigation requires Dollar Tree to prove that it properly classified Class
 Members as exempt executives under California law. Here, Dollar Tree plans to do so by presenting

1 evidence of, among other things, its exempt status expectations for the California Store Manager
 2 position during the Class Period and evidence that its expectations were realistic. For example,
 3 Dollar Tree corporate witnesses will explain Dollar Tree’s business model, describe the training
 4 provided to SMs during the Class Period, and explain to the jury what Defendant expected the CMs
 5 to do to manage their stores. Dollar Tree will also present the testimony of individual SMs who both
 6 understood and complied with Dollar Tree’s management expectations throughout the Class Period.
 7 In addition, Dollar Tree will show the jury it received more than 25,000 “yes” certification responses
 8 during the Class Period indicating that the vast majority of its California SMs repeatedly indicated
 9 that they were performing their jobs in accordance with Dollar Tree’s management expectation.
 10 Hence, to recover damages, the Class Members must rebut this evidence and establish that
 11 misclassification was the rule rather than the exception at Dollar Tree.

12 There is no reason to complicate the trial and prejudice Dollar Tree by prematurely forcing
 13 the jury to endure the presentation of damages evidence. Bifurcation of the liability and damages
 14 phases will set the stage for a fair, economical, and expeditious trial. Dollar Tree therefore
 15 respectfully requests that it not be required to introduce evidence or defend against testimony on
 16 damages—which have no relevance as to liability—until such time, if any, that a jury determines
 17 such liability exists.

18 In addition, because Dollar Tree bears the burden of proving the applicability of the
 19 executive exemption during the liability phase of trial, Dollar Tree respectfully requests that the
 20 Court set the order of presentation and argument as detailed herein.

21 Dated: February 3, 2011

Respectfully submitted.

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 23
 24 /s/ Matthew Vandall
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