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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Dean G Cameron,

10 Plaintiff,

11 v.

12 Avalon Mobility Incorporated, et al.,

13 Defendants.
14

No. CV-15-00963-PHX-JAT

ORDER

15
16 Pending before the Court are Plaintiff's Motion for Summary Judgment (Doc. 45)
17 and Defendants' Motion for Summary Judgment (Doc. 47). The Court now rules on the
18 motions.

19 **I. BACKGROUND**

20 On April 14, 2017, Plaintiff filed the pending Motion for Summary Judgment
21 (Doc. 45). At the Court's request, Defendants filed a Response on May 15, 2017 (Doc.
22 52). Plaintiff then filed a Reply on May 18, 2017 (Doc. 55).

23 On April 14, 2017, Defendants also filed their pending Motion for Summary
24 Judgment (Doc. 47). At the Court's request, Plaintiff filed a Response on April 28, 2017
25 (Doc. 49). Defendants then filed a Reply on May 15, 2017 (Doc. 51).

26 The Complaint in this case alleges that Defendants violated the Fair Labor
27 Standards Act ("FLSA") for failure and/or refusal to pay overtime to Plaintiff. (Doc. 1).

28 **A. Undisputed Material Facts**

1 Defendant Avalon Mobility, Inc., d/b/a Desert Sun Moving (“Avalon Mobility”) is
2 a moving company owned by Defendant Brenda Huffman and organized as a corporation
3 in Arizona with gross income exceeding \$500,000 per year. (Plaintiff’s Statement of
4 Facts in Support of Motion for Summary Judgment (“PSOF”), Doc. 46 at ¶¶ 1, 3;
5 Defendants’ Response to Plaintiff’s Statement of Facts and Controverting Statement of
6 Facts (“DCSOF”), Doc. 53 at ¶¶ 1, 3; Doc. 46-3 at 5-6). Avalon Mobility is
7 headquartered in Tucson, Arizona and maintains an office and warehouse in Phoenix,
8 Arizona. (PSOF at ¶¶ 1; DCSOF at ¶¶ 1). Avalon Mobility and Brenda Huffman
9 (together, “Defendants”) employed Plaintiff Dean Cameron (“Plaintiff”) at Defendants’
10 Phoenix location with the title of “Warehouse Manager” from approximately June 13,
11 2014 to approximately March 4, 2015. (PSOF at ¶¶ 5; DCSOF at ¶¶ 5; Plaintiff’s
12 Controverting Statement of Facts in Support of Response to Defendants’ Motion for
13 Summary Judgment (“PCSOF”), Doc. 50 at ¶¶ 12).

14 Throughout the duration of his employment with Defendants, Plaintiff received a
15 flat weekly salary of \$550 regardless of the number of hours that Plaintiff worked each
16 week. (PSOF at ¶¶ 10; DCSOF at ¶¶ 10). Defendants did not use a time clock to maintain
17 an exact record of the hours Plaintiff worked. (PSOF at ¶¶ 16; DCSOF at ¶¶ 16).
18 According to Defendants, Plaintiff spent approximately twenty percent of his time
19 performing manual labor and the remainder of his time operating a forklift in some
20 capacity. (PSOF at ¶¶ 7-8; DCSOF at ¶¶ 7-8). Both parties agree that Plaintiff’s duties
21 included “the care, placement, organization, inventory, cataloging, loading, unloading,
22 and damage claims relating to warehoused shipments and maintenance of the
23 [w]arehouse.” (Defendants’ Statement of Facts in Support of Motion for Summary
24 Judgment (“DSOF”), Doc. 48 at ¶¶ 23; PCSOF at ¶¶ 23). Plaintiff prepared a resume later
25 found on Defendants’ computer, which describes his duties and responsibilities as
26 follows:

- 27 • Select product to be distributed for the day.
- 28 • Stock incoming product.
- Maintain production rate in a fast paced work environment

- Prepare itinerary for drivers delivery and pickups
- Answering calls from carriers and customers
- Scheduling new deliveries and pack jobs
- Train new employees
- Supervise warehouse employees
- Oversee daily upkeep in warehouse
- Weigh all outbound deliveries
- Prepare paperwork for payroll
- Make inbound deliveries and local moves when short staffed

(DSOF at ¶¶ 26; PCSOF at ¶¶ 26).

During his employment, Plaintiff, at times, worked with one full-time Warehouse Assistant and one part-time Warehouse Assistant with only partial overlap. (DSOF at ¶¶ 29; PCSOF at ¶¶ 29). Who had oversight responsibility for these employees and whether Plaintiff supervised any others who occasionally performed work in the warehouse is disputed. (DSOF at ¶¶ 29-30; PCSOF at ¶¶ 29-30). During his employment with Defendants, Plaintiff did not “recommend to general management hiring, disciplinary action, or termination of any employee.” (DSOF at ¶¶ 33; PCSOF at ¶¶ 33).

B. Disputed Material Facts

1. Plaintiff’s Specific Employment and Oversight Duties

In addition to the undisputed facts outlined above, Plaintiff alleges and Defendants dispute that “Plaintiff’s primary duty was operating a forklift.” (PSOF at ¶¶ 9; DCSOF at ¶¶ 9). Alternatively, Defendants allege and Plaintiff dispute that “Plaintiff’s primary duty was to manage the warehouse and using the forklift was one of his tools with which to accomplish that.” (DCSOF at ¶¶ 9; PSOF at ¶¶ 9; PCSOF at ¶¶ 23). Defendants rely on Plaintiff’s resume as an accurate, if incomplete, description of Plaintiff’s employment duties, but Plaintiff disputes that bulleted contents of his resume are an accurate description of his duties. (DSOF at ¶¶ 26; PCSOF at ¶¶ 26).

Plaintiff further alleges that he did not have supervisory authority over any of Defendants’ other employees. (PSOF at ¶¶ 21). Defendants contend that Plaintiff not only supervised one full-time and one part-time warehouse staff member, but also five to eight drivers and helpers who worked in the warehouse at various times. (DCSOF at ¶¶ 21).

1 Defendants also contend and Plaintiff disputes that Plaintiff had the authority and duty to
2 make personnel recommendations to management—including the need to hire or
3 terminate staff—but the need to make such recommendations never arose during
4 Plaintiff’s employment. (DSOF at ¶¶ 30, 32; PCSOF at ¶¶ 30, 32).

5 **2. Plaintiff’s Work Schedule**

6 Plaintiff also alleges and Defendants dispute that Plaintiff worked over forty hours
7 nearly every week of his employment with Defendants. (PSOF at ¶¶ 11; DCSOF at ¶¶
8 11). Defendants maintain that Plaintiff’s work schedule was Monday through Friday from
9 7 a.m. to 4 p.m. (less one hour for lunch) and every other Saturday from 7 a.m. to 1 p.m.,
10 totalling forty or forty-six hours per week (DCSOF at ¶¶ 13). Plaintiff provides that his
11 work schedule was Monday through Friday from 6 a.m. to 5 p.m. and every other
12 Saturday from 6 a.m. to 12 p.m. for an estimated fifty-five or sixty-one hours per week.
13 (PSOF at ¶¶ 14-16; Doc. 46-1 at 7-8). Defendants dispute that this calculation is a “good
14 faith” attempt to estimate hours worked because Plaintiff did not account for any days
15 where he did not work at all, such as holidays or sick days. (DCSOF at ¶¶ 11, 22).

16 **II. SUMMARY JUDGEMENT STANDARD**

17 Summary judgment is appropriate when “there is no genuine dispute as to any
18 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
19 56(a). “A party asserting that a fact cannot be or is genuinely disputed must support that
20 assertion by . . . citing to particular parts of materials in the record, including depositions,
21 documents, electronically stored information, affidavits, or declarations, stipulations . . .
22 admissions, interrogatory answers, or other materials,” or by “showing that materials
23 cited do not establish the absence or presence of a genuine dispute, or that an adverse
24 party cannot produce admissible evidence to support the fact.” Id. 56(c)(1)(A), (B). Thus,
25 summary judgment is mandated “against a party who fails to make a showing sufficient
26 to establish the existence of an element essential to that party’s case, and on which that
27 party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
28 (1986).

1 Initially, the movant bears the burden of demonstrating to the Court the basis for
2 the motion and the elements of the cause of action upon which the non-movant will be
3 unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to
4 the non-movant to establish the existence of material fact. *Id.* A material fact is any
5 factual issue that may affect the outcome of the case under the governing substantive law.
6 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant “must do
7 more than simply show that there is some metaphysical doubt as to the material facts” by
8 “com[ing] forward with ‘specific facts showing that there is a genuine issue for trial.’”
9 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting
10 *Fed. R. Civ. P.* 56(e)). A dispute about a fact is “genuine” if the evidence is such that a
11 reasonable jury could return a verdict for the non-moving party. *Liberty Lobby, Inc.*, 477
12 U.S. at 248 (1986). The non-movant’s bare assertions, standing alone, are insufficient to
13 create a material issue of fact and defeat a motion for summary judgment. *Id.* at 247–48.
14 However, in the summary judgment context, the Court construes all disputed facts in the
15 light most favorable to the non-moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075
16 (9th Cir. 2004).

17 At the summary judgment stage, the Court’s role is to determine whether there is a
18 genuine issue available for trial. There is no issue for trial unless there is sufficient
19 evidence in favor of the non-moving party for a jury to return a verdict for the non-
20 moving party. *Liberty Lobby, Inc.*, 477 U.S. at 249-50. “If the evidence is merely
21 colorable, or is not significantly probative, summary judgment may be granted.” *Id.*
22 (citations omitted).

23 **III. FLSA OVERTIME REQUIREMENTS**

24 The FLSA generally requires employers to pay employees one and one-half times
25 their regular hourly rate of pay for hours worked in excess of forty per week
26 (“overtime”). 29 U.S.C. § 207(a)(1). The FLSA creates a private cause of action for an
27 employee against his employer to recover unpaid overtime wages and back pay “[i]f a
28 covered employee is not paid the statutory wage.” *Quinonez v. Reliable Auto Glass, LLC*,

1 No. CV-12-000452-PHX-GMS, 2012 WL 2848426, at *1–2 (D. Ariz. July 11, 2012)
2 (citing *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1298 (11th Cir.
3 2011)). An FLSA claim includes the following three elements: (1) Plaintiff was
4 employed by Defendants during the relevant time period; (2) Plaintiff was a covered
5 employee; and (3) Defendants failed to pay Plaintiff overtime pay during the relevant
6 time period. *Id.* at *2 (citations omitted). Anyone “employed in a bona fide executive,
7 administrative, or professional capacity,” however, is exempt from overtime pay
8 requirements by the FLSA. 29 U.S.C. § 213(a)(1).

9 **A. Defendants were Plaintiff’s Employers**

10 Under the FLSA, an “employer” includes “any person acting directly or indirectly
11 in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d).
12 Characteristics of an employer can include the power or responsibility to: (1) hire and fire
13 employees, (2) supervise and control employee work schedules, (3) determine rates of
14 compensation, and (4) maintain employment records. See *Hale v. State*, 993 F.2d 1387,
15 1394 (9th Cir. 1993). Here, both Avalon Mobility and Brenda Huffman, as the owner and
16 President of Avalon Mobility, exercised those powers and responsibilities over Plaintiff.
17 (PSOF at ¶¶ 2-4; DCSOF at ¶¶ 2-3; see also Doc. 46-3 at 16-18). Accordingly, the Court
18 finds that both Avalon Mobility and Huffman qualify as Plaintiff’s employers as a matter
19 of law.

20 **B. Plaintiff was a Covered Employee**

21 Plaintiff qualifies as a covered employee under the FLSA through his employer if
22 he was “employed in an enterprise engaged in commerce or in the production of goods
23 for commerce.” *Zorich v. Long Beach Fire Dept. & Ambulance Serv., Inc.*, 118 F.3d 682,
24 684 (9th Cir. 1997). The FLSA defines “enterprise engaged in commerce or in the
25 production of goods for commerce” to include “an enterprise whose annual gross volume
26 of sales made or business done is not less than \$500,000.” *Id.* (citing 29 U.S.C. §
27 203(s)(1)(A)(ii)). The parties agree that Defendants met this threshold dollar requirement
28 during both years in which Plaintiff was employed by Defendants and, therefore, Plaintiff

1 qualifies as a covered employee. (Doc. 46-3 at 5-6).

2 **C. Defendants Paid Plaintiff a Weekly Salary**

3 Both parties agree that Defendants compensated Plaintiff with a flat weekly salary
4 of \$550 regardless of the number of hours that Plaintiff worked in a given week. (PSOF
5 at ¶¶ 10; DSOF at ¶¶ 10). If Plaintiff did in fact work greater than forty hours in any
6 week, Defendants admit that he was not compensated with overtime pay. (PSOF at ¶¶ 10.
7 12; DSOF at ¶¶ 10, 12). Defendants argue, however, that Plaintiff fits under an FLSA
8 exemption, thus relieving them from any obligation to provide overtime pay to Plaintiff.

9 **D. FLSA Exemptions**

10 The FLSA specifically exempts those employed in an “administrative” or
11 “executive” capacity from overtime requirements, but does not define those terms in the
12 Act. See 29 U.S.C. § 213(a)(1). Instead, the FLSA delegates broad rule-making authority
13 to the Secretary of Labor to “define[] and delimit[]” what constitutes an administrative or
14 executive capacity through regulations, which have “the force and effect of law.” See *id.*;
15 see also *Ridings v. Lane Cty., Or.*, 862 F.2d 231, 234 (9th Cir. 1988). The application of
16 an FLSA exemption “is a matter of affirmative defense on which the employer has the
17 burden of proof” as to whether the exemption applies. *Corning Glass Works v. Brennan*,
18 417 U.S. 188, 197 (1974) (citations omitted). The Ninth Circuit has further reasoned that
19 “FLSA exemptions are to be narrowly construed against . . . employers and are to be
20 withheld except as to persons plainly and unmistakably within their terms and spirit.”
21 *Klem v. Cty. of Santa Clara, Ca.*, 208 F.3d 1085, 1089 (9th Cir. 2000). Here, Defendants
22 argue that Plaintiff was an exempt employee under both the administrative and executive
23 exemptions.

24 **1. Administrative Exemption**

25 Under 29 C.F.R. § 541.200(a), a bona fide administrative employee is any
26 employee:

27 (1) Compensated on a salary or fee basis pursuant to §
28 541.600 at a rate per week of not less than [\$455] . . . ;

(2) Whose primary duty is the performance of office or non-

1 manual work directly related to the management or general
2 business operations of the employer or the employer's
customers; and

3 (3) Whose primary duty includes the exercise of discretion
4 and independent judgment with respect to matters of
significance.

5
6 29 C.F.R. § 541.200(a) (2014).

7 Here, the parties do not dispute that Defendants paid Plaintiff on a salary basis at a rate of
8 \$550 per week, thus satisfying the first requirement. (PSOF at ¶¶ 10; DSOF at ¶¶ 10).
9 The parties do, however, dispute whether Defendants satisfy the remaining two
10 requirements of the test.

11 **2. Executive Exemption**

12 Under 29 C.F.R. § 541.100(a), a bona fide executive employee is any employee:

13 (1) Compensated on a salary basis pursuant to § 541.600 at a
14 rate per week of not less than [\$455] . . . ;

15 (2) Whose primary duty is management of the enterprise in
16 which the employee is employed or of a customarily
recognized department or subdivision thereof;

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

18 (4) Who has the authority to hire or fire other employees or
19 whose suggestions and recommendations as to the hiring,
20 firing, advancement, promotion or any other change of status
of other employees are given particular weight.

21 29 C.F.R. § 541.100(a).

22 Again, the parties do not dispute that Defendants paid Plaintiff on a salary basis at a rate
23 of \$550 per week, thus satisfying the first requirement. (PSOF at ¶¶ 10; DSOF at ¶¶ 10).
24 The parties do, however, dispute whether Defendants satisfy the remaining three
25 requirements of the test.

26 In order to determine whether Plaintiff qualified as an exempt employee, the Court
27 must conduct “a thorough, fact-intensive analysis of the employee’s employment duties
28 and responsibilities.” *Schaefer–LaRose v. Eli Lilly & Co.*, 679 F.3d 560, 572 (7th Cir.

1 2012). In conducting this analysis, the Court will construe all disputed facts in the light
2 most favorable to the non-moving party in analyzing Plaintiff's and Defendants'
3 respective motions for summary judgment. See Ellison, 357 F.3d at 1075.

4 **IV. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

5 Plaintiff argues that Defendants fail to fit Plaintiff under either the administrative
6 or executive exemption. (See Doc. 45 at 11-13). If that is the case, then Defendants owe
7 Plaintiff overtime pay consistent with FLSA requirements.

8 **A. Administrative Exemption**

9 Plaintiff argues that Defendants fail to meet requirements two and three of the
10 administrative exemption because Plaintiff's primary duty was operating a forklift. (See
11 Doc. 45 at 12). In furtherance of this argument, Plaintiff contends that operating a forklift
12 is manual labor unrelated to Defendants' general business operations that does not require
13 the exercise of discretion and independent judgment over matters of significance. (See *id.*
14 at 12-13).

15 **1. Primary Duty**

16 The relevant Department of Labor (DOL) regulation provides, in pertinent part:

17 Determination of an employee's primary duty must be based
18 on all the facts in a particular case, with the major emphasis
19 on the character of the employee's job as a whole. Factors to
20 consider when determining the primary duty of an employee
21 include, but are not limited to, the relative importance of the
22 exempt duties as compared with other types of duties; the
23 amount of time spent performing exempt work; the
24 employee's relative freedom from direct supervision; and the
25 relationship between the employee's salary and the wages
26 paid to other employees for the kind of nonexempt work
27 performed by the employee.

28 29 C.F.R. § 541.700(a).

As such, the amount of time an employee spends on exempt and non-exempt work "can
be a useful guide in determining whether exempt work is the primary duty of an
employee," but time alone is not the sole test in evaluating an employee's primary duty.
Id. Rather, "nothing in this section requires that exempt employees spend more than

1 [fifty] percent of their time performing exempt work.” Id.

2 In interpreting the primary duty requirement, the Ninth Circuit has reasoned that a
3 court should “not presume that [an] exemption fails merely because the proportion of
4 time spent on exempt managerial tasks is less than fifty percent, where, as here,
5 managerial duties are packaged in employment with non-managerial tasks, and the
6 management function cannot readily and economically be separated from the nonexempt
7 tasks.” Baldwin v. Trailer Inns, Inc., 266 F.3d 1104, 1113-14 (9th Cir. 2001) (holding
8 that employees qualified as exempt even though the employees spent ninety percent of
9 their time on nonexempt tasks because “other relevant factors established that the
10 [employees’] primary duty was management of [a recreational vehicle] park”). Similarly,
11 the Court does not presume here that Plaintiff’s primary duty was manual work unrelated
12 to Defendants’ general business operations simply because Plaintiff operated a forklift
13 during the majority of his time at work.

14 **2. Requirement (2): Non-manual Work, Business Operations**

15 DOL regulations provide that an employee’s work under the administrative
16 exemption must be “directly related to assisting with the running or servicing of the
17 business, as distinguished, for example, from working on a manufacturing production line
18 or selling a product in a retail or service establishment.” 29 C.F.R. § 541.201. The
19 relevant regulation gives some examples of roles that generally qualify for the
20 administrative exemption, but is silent as to whether the role of warehouse manager
21 generally qualifies for the exemption. 29 C.F.R. § 541.203 (explaining that an executive
22 assistant or human resources manager generally qualifies for the exemption, but a safety
23 inspector or employee who grades lumber typically does not).¹ Courts have previously
24 found warehouse managers to qualify for the administrative exemption under the

25
26 ¹ The responsibilities of an exempt employee should include more than simply
27 “work [that] involves the use of skills and technical abilities in gathering factual
28 information, applying known standards or prescribed procedures, determining which
procedure to follow, or determining whether prescribed standards or criteria are met.” 29
C.F.R. § 541.203. The regulation requires that employees do more than follow a script or
preset guidelines without exercising independent judgment and decision-making
authority. See, e.g., Eli Lilly & Co., 679 F.3d at 574.

1 circumstances presented therein. See, e.g., *Hundt v. DirectSat USA, LLC*, 294 F.R.D. 101,
2 111 (N.D. Ill. 2013) (holding that a warehouse manager fell within the scope of the
3 administrative exemption even though “he performed manual labor such as operating
4 forklifts, unloading trucks, and moving equipment”); see also *infra* note 3 (other courts
5 have also routinely found warehouse managers to fit within the executive exemption
6 without having to reach the question of whether the warehouse manager therein fit within
7 the administrative exemption).

8 Here, Defendants stated that Plaintiff spent approximately twenty percent of his
9 time performing manual labor and the remainder of his time operating a forklift.
10 (Compare PSOF at ¶¶ 7-9 with DCSOF at ¶¶ 7-9 (citing Doc. 46-3 at 12-13)). Defendants
11 explain, however, that Plaintiff’s primary duty was to manage the warehouse and using
12 the forklift was a tool by which Plaintiff fulfilled that duty. (See Doc. 52 at 3-4; see also
13 DCSOF at ¶¶ 9). Specifically, Plaintiff oversaw the “receipt, storage and delivery of
14 clients’ goods” and ensured Defendants remained in compliance with client storage
15 contracts. (Doc. 52 at 4). To this end, Plaintiff independently determined where to place
16 and organize shipments in an efficient, accessible manner within Defendants’ 35,000
17 square foot warehouse (See *id.* at 5-6). Although Plaintiff used a forklift to fulfill his
18 warehouse management duties, Plaintiff’s cognitive, non-manual work could reasonably
19 be his primary duty in this regard. (See *id.* at 4-5).

20 Even though Plaintiff’s “managerial duties [were] packaged in employment with
21 non-managerial tasks,” these facts could support the conclusion that Plaintiff’s primary
22 duty was management of the warehouse. See *Baldwin*, 266 F.3d at 1114. Thus, Plaintiff
23 has failed to establish that he is entitled to summary judgment on this theory. Further,
24 Plaintiff has failed to establish that the duty of management of the warehouse is not
25 directly related to Defendants’ general business operations as a moving business.
26 Accordingly, the Court finds that this fact-intensive inquiry presents a jury question as to
27 whether Plaintiff’s primary duty was the performance of non-manual work directly
28 related to the management or general operations of his employer.

1 **3. Requirement (3): Discretion over Matters of Significance**

2 Next, Plaintiff disputes that his primary duty involved the use of “discretion and
3 independent judgment” and that, even so, it was not with respect to “matters of
4 significance.” (Doc. 45 at 3-4). DOL regulations explain that the “exercise of discretion
5 and independent judgment involves the comparison and the evaluation of possible
6 courses of conduct, and acting or making a decision after the various possibilities have
7 been considered.” 29 C.F.R. § 541.202. “The term ‘matters of significance’ refers to the
8 level of importance or consequence of the work performed.” Id. The relevant regulation
9 lists several factors for a court to consider in evaluating this requirement, including an
10 employee’s level of autonomy, “free from immediate direction or supervision,” and the
11 extent to which an employee has authority over “matters that have significant financial
12 impact.” Id.

13 As reasoned above, Defendants argue that Plaintiff’s ability to fulfill his primary
14 duty of managing the warehouse and coordinate shipments depended heavily on his use
15 of discretion and independent judgment. (See Doc. 52 at 3-4; supra Part IV(A)(2)).
16 Defendants contend that the sheer size of the warehouse and volume of shipments that
17 Plaintiff was charged with organizing forced Plaintiff to use his independent judgment in
18 fulfilling his primary duty. (See Doc. 52 at 5-6). Although Plaintiff may have been
19 “guided in these decisions based on factors outside of his control, such as length of time
20 of storage, contractual terms, and governing regulations,” this does not prove that he did
21 not use his discretion and independent judgment. (Doc. 55 at 4). There is evidence that
22 Plaintiff had to process shipment information and independently determine how and
23 where to store specific shipments regardless of whether policy documents provided
24 guidance on how to handle each shipment. (Doc. 52 at 4-5 (citing Doc. 54 at ¶¶ 5, 6, 11,
25 15-18)); see also Baldwin, 266 F.3d at 1115 (finding that employees exercised sufficient
26 independent judgment even though employees “had to adhere to company policies [and]
27 record completed tasks on checklists”). Thus, Plaintiff failed to establish as a matter of
28 undisputed fact that he did not exercise independent judgment; therefore, a jury question

1 remains on this issue.

2 Finally, Plaintiff argues that even if Plaintiff's primary duty involved the use of
3 discretion and independent judgment, "it was clearly not with respect to 'matters of
4 significance.'" (Doc. 55 at 3 (emphasis in original)). Plaintiff points out that a matter is
5 not necessarily significant simply "because the employer will experience financial losses
6 if the employee fails to perform the job properly." 29 C.F.R. § 541.202. Defendants,
7 however, provide evidence that Plaintiff's job had a significant impact on its ability to
8 fulfill contractual obligations and provide its moving services in an efficient manner, in
9 addition to impacting its ability to retain clients. See Doc. 52 at 4-5 (citing Doc. 54 at ¶¶
10 5, 6, 11, 15-18)). The complexity brought about by the physical expansiveness of the
11 warehouse and its importance to Defendants' business demonstrate that there is at least a
12 dispute of fact as to whether its management required Plaintiff to exercise discretion and
13 independent judgment with respect to matters of significance. Accordingly, there is a jury
14 question as to whether Plaintiff falls under the FLSA's administrative exemption.

15 **B. Executive Exemption**

16 Plaintiff also argues that Defendants fail to meet requirements two, three, and four
17 of the executive exemption on several grounds discussed below. (See Doc. 45 at 11).²

18 **1. Requirement (2): Management of the Enterprise**

19 The relevant DOL regulation provides that "management" of the enterprise or a
20 customarily recognized department thereof generally includes "activities such as
21 interviewing, selecting, and training of employees; setting and adjusting their rates of pay
22 and hours of work; directing the work of employees; maintaining production or sales
23 records for use in supervision or control," among others. 29 C.F.R. § 541.102. Here,

24
25 ² Defendants focused on the administrative exemption and only made brief
26 reference to the executive exemption in Defendants' Response to Plaintiff's Motion for
27 Summary Judgment (Doc. 52). However, the issue of whether the executive exemption
28 applies is fully briefed in Defendants' Motion for Summary Judgment (Doc. 47),
Plaintiff's subsequent Response (Doc. 49), and Defendants' Reply (Doc. 51).
Accordingly, the Court will consider the arguments made in and regarding Defendants'
Motion for Summary Judgment when analyzing Plaintiff's Motion for Summary
Judgment (Doc. 45).

1 Plaintiff argues that Defendants fail requirement two because his primary duty of
2 “operating a forklift was not related in any way to the management duties contemplated
3 by the FLSA.” (Doc. 45 at 11; Doc. 49 at 8). Plaintiff, however, listed his own duties and
4 responsibilities on his resume found in Defendants’ computer system in a more expansive
5 manner. (Doc. 48-5 at 2). Duties listed therein include, but are not limited to:

- 6 • Maintain production rate in a fast paced work
7 environment
- 8 • Prepare itinerary for drivers delivery and pickups
- 9 • Train new employees
- Supervise warehouse employees
- Oversee daily upkeep in warehouse

10 (Doc. 48-5 at 2).

11 As described in Plaintiff’s own resume, his duties are akin to those of an exempt
12 management employee set forth in DOL regulations. See 29 C.F.R. § 541.102. Plaintiff,
13 however, explains that he only created the resume at the direction of Defendants’
14 manager of business development and “disputes that the contents of the document at
15 issue accurately reflects the job duties that Plaintiff performed[.]” (See Doc. 49 at 8-9;
16 PCSOF at 18-19 (citing Doc. 50-3 at 17-18)). The Court previously found that there was
17 a genuine dispute as to whether Plaintiff’s primary duty was management of the
18 warehouse, rather than operating a forklift, and need not to repeat its analysis here. See
19 *supra* Part IV(A)(1)-(2).

20 Defendants further contend that the warehouse is a “customarily recognized
21 department or subdivision” of the moving business. (Doc. 47 at 11). Thus, the primary
22 duty of managing a warehouse in certain circumstances satisfies requirement two of the
23 executive exemption. (See *id.* at 11-12). Indeed, other courts have routinely found that the
24 role of warehouse manager does in fact satisfy requirement two and the exemption as a
25 whole when the other requirements are met.³ Thus, because a jury could find that Plaintiff

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27 ³ See, e.g., *Ramos v. Baldor Specialty Foods, Inc.*, 687 F.3d 554, 560 (2d Cir.
28 2012) (holding that a group of warehouse “captains” in an employer’s warehouse fell
within the scope of the executive exemption even though the captains only exercised
supervisory responsibility over teams of warehouse “pickers,” which the Court
determined to be customarily recognized departments of the employer); *Velazquez-*

1 fell within this definition of a warehouse manager, Plaintiff has failed to establish he is
2 entitled to summary judgment on this issue. However, Plaintiff has established (in
3 response to Defendants’ Motion) a disputed issue of fact as to whether his duties met
4 with these other courts’ definitions of “warehouse manager.” Accordingly, the Court
5 finds that there is a jury question as to whether Plaintiff’s primary duty was management
6 of a customarily recognized department of the enterprise.

7 **2. Requirement (3): Customarily Direct Two or More Employees**

8 Next, Plaintiff disputes that he customarily and regularly directed the work of two
9 or more full-time employees. (Doc. 45 at 11). The relevant DOL regulation explains that
10 “[t]he phrase ‘two or more other employees’ means two full-time employees or their
11 equivalent. One full-time and two half-time employees, for example, are equivalent to
12 two full-time employees. Four half-time employees are also equivalent.” 29 C.F.R. §
13 541.104. Plaintiff asserts that only two other employees worked in the warehouse during
14 Plaintiff’s employment with limited overlap and one of them was part-time, making it
15 impossible for Defendants to satisfy requirement three. (See Doc. 45 at 11 (citing PSOF
16 at ¶¶ 21)). Defendants, however, provide that Plaintiff customarily supervised “[v]arious
17 drivers and drivers’ helpers,” conducting loading, unloading, and packing activities in the
18 warehouse for at least 20 hours per week, in addition to the one full-time and one-part
19 time regular warehouse staff member. (Doc. 47 at 14-15). The relevant DOL regulation
20 allows Defendants to aggregate time spent supervising multiple part-time employees to
21 satisfy requirement three. See 29 C.F.R. § 541.104.

22 Plaintiff further “disputes that he managed or supervised any employees” at all.
23 (Doc. 45 at 11). Plaintiff argues that Patrick Kyle, Defendants’ operations manager, had

24
25 Fernandez v. NCE Foods, Inc., 476 F.3d 6, 14 (1st Cir. 2007) (holding that a warehouse
26 manager qualified for the executive exemption because he “was in charge of the
27 warehouse, and ... everything that dealt with the warehouse, purchase, sales, dispatch,
28 reporting, everything that the warehouse entailed.”); Branstetter v. Gen. Parts
Distribution, LLC, No. 3:12-CV-02328-KI, 2013 WL 6780672, at *1 (D. Or. Dec. 19,
2013) (finding that a “Warehouse Manager Trainee” fell within the scope of the
executive exemption even though the employee estimated that “he spent about ten
percent of his time supervising the employees under his direction. The rest of the time, he
did manual labor, including picking parts, unloading pallets, and driving the forklift.”).

1 sole supervisory authority over any potential subordinates who worked with Plaintiff in
2 the warehouse. (Id. at 12 (citing PSOF at ¶¶ 21)). Defendants, however, dispute this
3 assertion with alternative deposition testimony pointing to Plaintiff as the other
4 warehouse staff members' supervisor (See DCSOF at ¶¶ 21; see also Doc. 48-1 at ¶¶ 36;
5 Doc. 54-2 at 5-6). Accordingly, there is a question reserved for the fact-finder as to
6 whether Plaintiff customarily and regularly directed two or more full-time employees
7 during his employment.

8 **3. Requirement (4): Hiring, Firing Decisions**

9 The relevant DOL regulation provides that in assessing whether an employee's
10 recommendations as to hiring, firing, or otherwise changing the employment status of
11 other employees are given "particular weight," a court should consider "whether it is part
12 of the employee's job duties to make such suggestions and recommendations [and] the
13 frequency with which such suggestions and recommendations are made or requested." 29
14 C.F.R. § 541.105. The regulation goes on to provide that an employee's input may still
15 have particular weight "even if the employee does not have authority to make the
16 ultimate decision." Id.

17 Here, Plaintiff argues that Defendants fail to satisfy requirement four because
18 Plaintiff never hired or fired any employees of Defendants, nor did he make such
19 recommendations. (See Doc. 45 at 12-13; see also PCSOF at ¶¶ 33). Defendants
20 unequivocally admit this fact. (See DCSOF at ¶¶ 18-19). Defendants, however, argue that
21 just because Plaintiff never exercised his authority to provide hiring or firing
22 recommendations to management does not mean that he did not have such authority or
23 duty. (See Doc. 47 at 15-16). Plaintiff was only employed by Defendants for
24 approximately nine months, so Defendants contend that the opportunity to advise on
25 personnel decisions never arose during this time even though it was one of Plaintiff's
26 general duties. (Id. at 16 (citing Doc. 48-1 at ¶¶ 37-40)). Given the short duration of
27 Plaintiff's employment, the Court finds a disputed issue of fact as to whether Plaintiff
28 maintained hiring and firing authority or whether his suggestions held particular weight.

1 Accordingly, there is a question reserved for the fact-finder as to requirement four and
2 whether Plaintiff falls under the executive exemption.

3 **C. Damages**

4 If Plaintiff prevails in proving liability, there is an open question on the issue of
5 damages. The relevant DOL regulation provides that an employer is responsible for
6 maintaining records containing “[h]ours worked each workday and total hours worked
7 each workweek” for all employees subject to overtime provisions. 29 C.F.R. § 516.2. The
8 Ninth Circuit has recognized that an employer’s lack of records cannot “penalize the
9 employee by denying him any recovery on the ground that he is unable to prove the
10 precise extent of uncompensated work.” Brock v. Seto, 790 F.2d 1446, 1448 (9th Cir.
11 1986) (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946),
12 superseded by statute on other grounds, Portal-to-Portal Act of 1947, Pub. L. No. 80-49,
13 61 Stat. 84, as recognized in Integrity Staffing Sols., Inc. v. Busk, 135 S. Ct. 513, 519
14 (2014)). In this situation, an employee must produce “sufficient evidence to show the
15 amount and extent of that work as a matter of just and reasonable inference.” Mt.
16 Clemens Pottery Co., 328 U.S. at 687. Upon such a showing, the burden then shifts to the
17 employer to produce “evidence of the precise amount of work performed or . . . negate
18 the reasonableness of the inference to be drawn from the employee’s evidence.” Id. at
19 687-88.

20 Here, Defendants admit that it does not have precise records proving the hours that
21 Plaintiff actually worked. (See PSOF at ¶¶ 16; DCSOF at ¶¶ 16). Defendants, however,
22 do maintain alarm code records showing when the warehouse was opened and closed.
23 (See Doc. 52 at 8). Defendants may use this evidence, as relevant, to rebut Plaintiff’s
24 testimony of his own hours worked. See Mt. Clemens Pottery Co., 328 U.S. at 687-88.
25 Defendants further contend that Plaintiff failed to account for any breaks in his regular
26 weekly schedule, such as holidays or sick days. (DCSOF at ¶¶ 11, 22). Plaintiff’s
27 calculation of the number of hours he worked for Defendants also fails to account for any
28 lunch breaks in his weekly schedule. (See PSOF at ¶¶ 14; Doc. 46-1 at 7-8). Plaintiff

1 argues that his damages are “certain and easily calculated” based on the estimated work
2 schedule he provided, but the Court finds that Defendants put the reasonableness of
3 Plaintiff’s hours worked estimations in question. (See Doc. 52 at 9). Accordingly, there is
4 a genuine dispute as to the number of hours Plaintiff worked for Defendants.⁴

5 **V. DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

6 Defendants argue that Plaintiff fits within the executive and administrative
7 exemptions provided by the FLSA. (See Doc. 47 at 8-9). If either exemption applies, then
8 Defendants do not owe Plaintiff overtime pay under the FLSA. In analyzing Defendants’
9 Motion, the Court will not repeat the law on each issue discussed at length above, but
10 only the relevant factual distinctions. See supra Part IV.

11 **A. Administrative Exemption**

12 First, Defendants argue that Plaintiff qualifies as exempt under the administrative
13 exemption. See 29 C.F.R. § 541.200(a). Plaintiff disputes whether Defendants prove
14 requirements two and three of the administrative exemption. (See Doc. 49 at 15).
15 “[B]ecause the test to qualify for the administrative exemption under FLSA is
16 conjunctive, not disjunctive,” Plaintiff creates a disputed issue of fact requiring the Court
17 to deny Defendants’ Motion if the Court finds that Defendants fail to satisfy their burden
18 as to any requirement of the exemption. *McKeen-Chaplin v. Provident Sav. Bank, FSB*,
19 No. 15-16758, 2017 WL 2855084, at *1 n.1 (9th Cir. July 5, 2017).

20 **1. Requirement (2): Non-manual Work, Business Operations**

21 As to requirement two, the Court recognized above that there is a disputed issue of
22 fact as to what Plaintiff’s primary duty actually was. See supra Part IV(A)(1)-(2). Just as
23 Defendants’ argument that Plaintiff’s primary duty was managing the warehouse survives
24 summary judgment, Plaintiff’s argument—supported by the deposition testimony of
25 Defendants’ manager of business development—that his primary duty was operating a
26 forklift because that is how he spent the majority of his time at work similarly creates an

27
28 ⁴ As a result, the Court also will not reach Plaintiff’s liquidated damages argument
at this time. (See Doc. 45 at 16).

1 issue of fact when construing all disputed facts in the light most favorable to Plaintiff.
2 (See Doc. 45 at 13; see also PCSOF at ¶¶ 23). Further, the Court finds that there is a
3 disputed issue as to whether Plaintiff’s forklift work constitutes manual labor. (See Doc.
4 45 at 13). Accordingly, the Court finds that Defendants fail to carry their burden to
5 prevail on summary judgment under the administrative exemption. In finding that
6 Defendants cannot carry their burden to prove that Plaintiff’s primary duty was the
7 performance of non-manual work related to Defendants’ general business operations, the
8 Court need not analyze whether Defendants satisfy requirement three of the
9 administrative exemption because test is conjunctive.⁵

10 **B. Executive Exemption**

11 Next, Defendants argue that Plaintiff falls under the executive exemption. 29
12 C.F.R. § 541.100(a). Plaintiff disputes whether Defendants meet requirements two, three,
13 and four of the executive exemption. (See Doc. 49 at 8). The test to determine whether an
14 employee qualifies for the executive exemption is also conjunctive. See, e.g., McKeen-
15 Chaplin, 2017 WL 2855084, at *1 n.1. Accordingly, Plaintiff creates a disputed issue of
16 fact requiring the Court to deny Defendants’ Motion if the Court finds that Defendants
17 fail to satisfy their burden as to any requirement of the executive exemption.

18 **1. Requirement (2): Management of the Enterprise**

19 Again, the Court previously recognized a disputed issue of fact as to Plaintiff’s
20 primary duty. See supra Part IV(B)(1). Defendants nearly state as much in conceding that
21 “there might be a factual dispute over Plaintiff’s qualification as an exempt employee as
22 an executive.” (Doc. 51 at 3). Defendants argue that Plaintiff’s resume lists several duties
23 befitting an executive according to the relevant DOL regulation (29 C.F.R. § 541.102),
24 such as training new employees, supervising employees, and monitoring production

25
26 ⁵ But consistent with the Court’s findings above, the Court acknowledges that the
27 disputed issue regarding Plaintiff’s primary duty necessarily informs whether Plaintiff
28 exercised independent judgment over matters of significant (requirement three). See
supra Part IV(A)(3). Accordingly, the Court finds that there is also a disputed issue of
fact reserved for the fact-finder to determine whether Plaintiff’s primary duty included
the exercise of independent judgment, and, if necessary, whether oversight of the
warehouse qualifies as a matter of significance to Defendants’ business.

1 records. (Doc. 47 at 12). Plaintiff, however, provides evidence that his primary duty of
2 operating a forklift to move items in accordance with company policies does not clearly
3 fall within that description. (See Doc. 49 at 9). While Defendants point out that other
4 courts have recognized that employees holding the title of “warehouse manager” qualify
5 for the executive exemption, whether a specific employee falls within the exemption is a
6 “mixed question of law and fact” based on individual circumstances. See *supra* note 3;
7 see, e.g., *Resurrection Bay Auto Parts, Inc. v. Alder*, 338 P.3d 305, 307 (Alaska 2014).

8 Here, the Court finds that there is a disputed issue of fact as to whether Plaintiff’s
9 primary duty was the management of the warehouse. Under the conjunctive executive
10 exemption test, the Court need not answer whether the warehouse qualifies as a
11 customarily recognized department of the enterprise to completely satisfy require two or
12 whether Defendants carry their burden on requirements three and four of the executive
13 exemption.⁶ Accordingly, the Court finds that Defendants fail to carry their burden to
14 prevail on summary judgment under the executive exemption.

15 C. Loader Exemption

16 Finally, Defendants first mention that Plaintiff qualifies as exempt “as an
17 employee of a motor carrier” in Defendants’ Reply (Doc. 51), but makes no further
18 mention of the motor carrier exception in that document.⁷ Defendants later argue in the
19 Response to Plaintiff’s Motion (Doc. 52) that Plaintiff qualifies as an exempt “loader”
20 under 29 C.F.R. § 782.2.⁸ The application of an FLSA exemption “is a matter of

21
22 ⁶ Again, consistent with the Court’s findings above, the Court acknowledges that
23 there are also disputed issues of fact as to whether Plaintiff directed the work of at least
24 two full-time employees and whether Plaintiff had the authority to hire or fire other
25 employees or provide recommendations of particular weight on personnel decisions. See
26 *supra* Part IV(B)(2)-(3). Any one of those disputed issues is sufficient for Plaintiff to
27 prevent the Court from granting summary judgment on the executive exemption.

28 ⁷ Defendants do not even mention the “loader exemption” in its Reply, nor do
29 Defendants cite to any statute or regulation supporting the notion that “an employee of a
30 motor carrier” qualifies as an exempt employee. (See generally Doc. 51). The Court can
31 only assume that Defendants’ bald characterization of Plaintiff as an employee of a motor
32 carrier refers to the loader exemption because Defendants pick up that argument for the
33 first time in their Response to Plaintiff’s Motion (Doc. 52).

⁸ For this proposition, Defendants cite *McClendon v. B & H Freight Servs., Inc.*,

1 affirmative defense.” See *Corning Glass Works*, 417 U.S. at 197 (citations omitted). An
2 affirmative defense is one that “the defendant must raise at the pleadings stage and that is
3 subject to rules of forfeiture and waiver.” *John R. Sand & Gravel Co. v. United States*,
4 552 U.S. 130, 133 (2008) (citations omitted); see also Fed. R. Civ. P. 8(c) (Generally,
5 “[i]n responding to a pleading, a party must affirmatively state any avoidance or
6 affirmative defense”).

7 Here, Defendants’ Answer to Plaintiff’s Complaint (Doc. 14) specifically alleges
8 affirmative defenses, including exempt status under the administrative and executive
9 exemptions “per 29 C.F.R. § 541.100-203 et seq.” (Doc. 14 at 2). Nowhere in their
10 Answer do Defendants assert the loader exemption or the relevant regulation (29 C.F.R. §
11 782.2) as an affirmative defense. See *id.* The Court finds that because Defendants did not
12 assert this affirmative defense in their pleadings, they are therefore precluded from doing
13 so now. Accordingly, the Court will not consider the merits of this untimely argument.

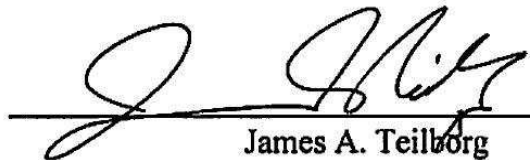
14 **VI. CONCLUSION**

15 For the reasons set forth above,

16 **IT IS ORDERED** that Plaintiff’s Motion for Summary Judgment (Doc. 45) is
17 **DENIED**.⁹

18 **IT IS FURTHER ORDERED** that Defendants’ Motion for Summary Judgment
19 (Doc. 47) is **DENIED**. The Clerk of the Court shall not enter judgment at this time.

20 Dated this 21st day of August, 2017.

21
22
23 
24 **James A. Teiborg**
Senior United States District Judge

25
26 910 F. Supp. 364, 366 (E.D. Tenn. 1995) (citing 29 C.F.R. § 782.2(b)(2)(i)) (“[i]f an
employee fits within the classification of loader, the [overtime] exemption applies”).

27 ⁹ The Court observes that Plaintiff asks for a declaratory judgment (listed as
28 “Count Two”) in the Complaint. (Doc. 1 at 9-10). Neither Plaintiff nor Defendants
addressed the declaratory judgment action in their respective motions for summary
judgment.