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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Michael L. Taylor; Dilawar Khan; Volena)
Glover-Hale; Manuel Montoya, on behalf)
of themselves and other persons similarly)
situated,

CV 10-08125-PCT-FJM

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ORDER

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Plaintiffs,

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vs.

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AutoZone Inc., a Tennessee corporation;)
AutoZone Inc., a Nevada corporation;)
AutoZoners LLC,

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Defendants.

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The court has before it defendants' motion for summary judgment (doc. 219) and
separate statement of facts ("DSOF") (doc. 220), plaintiffs' response (doc. 260) and separate
statement of disputed facts ("PSOF") (doc. 265), and defendants' reply (doc. 272).

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I. Background

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Defendants (collectively referred to as "Autozone") operate retail automotive parts
and accessories stores. Plaintiffs are or were employed at Autozone as Store Managers.
They allege that they are entitled to overtime compensation under the Fair Labor Standards
Act ("FLSA"). On May 24, 2011, we conditionally certified this case as an FLSA collective
action (doc. 67). We defined the class as any person who worked at Autozone as a Store
Manager, anywhere in the United States except California, between May 24, 2008 and May

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1 24, 2011.¹ No motion to decertify the class has been filed.

2 **A. Autozone's Retail Store Structure**

3 Autozone stores maintain a uniform appearance nationwide. The company
4 determines, for example, product selection, marketing, pricing, promotions, and internal store
5 design. Store layout is determined by the "plan-o-gram." Legal compliance posters are
6 arranged the same way in every store. Employee appearance is governed by a detailed dress
7 code. Decisions regarding Autozone policy and processes are made at the corporate level.

8 Autozone divides its retail operations into divisions, which are further divided into
9 regions, and finally districts. Exclusive of California, Autozone has over 350 districts. Each
10 district has between eight and twelve retail stores. Retail operations in each district are
11 headed by a District Manager ("DM"). Each Autozone store employs a Store Manager
12 ("SM") and an average of seven to ten employees, including Assistant Store Managers
13 ("ASM"), Parts Sales Managers ("PSM"), Commercial Sales Managers ("CSM"), and non-
14 management full and part-time employees. The SM is the only exempt, salaried employee
15 stationed at a store.

16 The DMs are not physically stationed in the retail stores. Each DM makes on-site
17 visits to the stores in his assigned district. Plaintiffs report that the frequency of these visits
18 varies widely, ranging between a couple of times a year (PSOF ex. 34, Lemke Decl. ¶ 7;
19 PSOF ex. 43 Robbins Decl. ¶ 7; PSOF ex. 45, Sanders Decl. ¶ 7), a couple of times a month
20 (PSOF ex. 31, Jenkins Decl. ¶ 7; PSOF ex. 33, Lager Decl. ¶ 7), once a week (PSOF ex. 32,
21 Kolar Decl. ¶ 7), to multiple times a week (PSOF ex. 44, Rosales Decl. ¶ 4). When they are
22 not conducting a store visit, DMs communicate with SMs via email, phone, or text.

23 **B. Store Manager Duties and Compensation**

24 The Autozone SM job duties include:

- 25 a. Supervising and scheduling of store personnel;

27 ¹In June 2011 we amended our conditional class certification order to change the
28 operative dates of employment (doc. 87).

- 1 b. Assisting customers in finding parts and products using the electronic or
2 paper catalogs;
- 3 c. Addressing employee and customer concerns;
- 4 d. Operating cash registers and following established cash handling
5 procedures; including but not limited to deposits, petty cash, and Lane
6 Accountability;
- 7 e. Completing and delegating store merchandising tasks; including but not
8 limited to stocking the store;
- 9 f. Processing returns and managing inventory;
- 10 g. Recruiting and hiring personnel;
- 11 h. Conduct and review all opening and closing procedures, report
12 discrepancies to District Manager and Loss Prevention;
- 13 i. Compliance with established policies, procedures and legal requirements;
- 14 j. Strong desire and capability in managing weekly and monthly P&L
15 responsibilities;
- 16 k. Motivating their staff to provide WOW! Customer Service;
- 17 l. Loss Prevention;
- 18 m. Maintain sales productivity, store appearance and merchandising standards;
19 and
- 20 n. Managing the commercial department within the store and assisting with
21 day-to-day operational tasks; including but not limited to deliveries, sales calls,
22 and addressing customer concerns.

23 DSOF ¶ 16.

24 Employee scheduling begins at the corporate level. Each Autozone store labor budget
25 is modeled by projecting sales on an hour-by-hour basis. The model determines the number
26 of staff hours needed in a store at a given time. Based on the labor budget, a store schedule
27 is computer-generated. SMs modify the schedule if needed by making adjustments based,
28 for example, if a particular employee is unavailable that day. All store schedules are
approved by the DM. If stores are not meeting projected sales on a given day, then a DM
may tell the SM to cut labor by sending an employee home.

Autozone maintains policies regarding attendance, job performance, and employee
complaints. SMs are responsible for monitoring the attendance of their employees. In some

1 cases, SMs are required to complete Corrective Action Reviews in response to an employee
2 violation of policy. Significant employee issues and complaints must be handled by the DM
3 or HR. SMs do not have authority to fire employees without DM approval. SMs evaluate
4 their employees by completing performance appraisals for each employee twice a year. The
5 SM is the only person in the store with authority to complete these appraisals. They provide
6 comments and ratings, which correspond to recommended pay increases. These are then sent
7 to the DM to be reviewed and finalized. SMs recommend employees for promotion. DMs
8 retain ultimate authority to promote employees and to decide pay raises.

9 All Autozone store employees, including the SM, are expected to provide outstanding
10 customer service, referred to as "WOW! customer service." Corporate policies detail how
11 customer complaints should be dealt with, including when an SM needs to get the DM
12 involved. Each store lists the DM phone number, and customers can contact the DM directly
13 with complaints.

14 An automated Store Management System assigns a list of daily tasks to be completed
15 by each store. SMs are responsible for ensuring that assigned tasks are completed by other
16 employees, and are expected to provide on-the-job counseling and coaching on store-related
17 issues. If store employees fail to complete their daily tasks by the end of their shift, SMs stay
18 and complete outstanding tasks.

19 SMs are responsible for managing inventory. Once a week, Autozone requires SMs
20 to perform an inventory matrix, which requires them to scan the product tag of certain
21 products to confirm that the correct number of items are available in the store and check for
22 discrepancies. They are also responsible for ensuring that returns are processed and
23 merchandise is unloaded from delivery trucks and placed on the shelves quickly according
24 to defendant's precise specifications in the plan-o-gram.

25 SMs are trained with respect to interviewing and hiring. SMs are the only employees
26 in their stores provided this training. Autozone expects SMs to identify the need for new
27 personnel and to recruit new applicants. After Autozone's automated system conducts an
28 initial screening of an applicant, SMs conduct interviews at the store. They follow

1 Autozone's interview protocol and complete a standardized interview feedback form. This
2 form is submitted to the DM, who makes the ultimate decision on hiring. Once a new
3 "Autozoner" is hired, he completes training modules through Autozone's computer-based
4 "Learning Garage." It is the SM's responsibility to ensure that each of her employees
5 completes the required training modules.

6 Autozone generates sales and inventory records ("P&L reports") which are given to
7 SMs for review. These reports provide information regarding each store's sales and profits.
8 Each week, the SM receives a "Key Performance Indicator" report. The SMs are responsible
9 for loss prevention and controlling "shrink" due to theft, damage, or the improper handling
10 of cash. SMs communicate with corporate management regarding sales, and may propose
11 possible solutions to improve sales performance. Autozone evaluates SMs on their stores'
12 sales and profit numbers, their maintenance of staffing levels and adherence to the labor
13 budget, their ability to ensure that all employees have completed company training modules,
14 their success of inventory management via the weekly inventory matrix, and shrink and loss
15 prevention skills.

16 SMs earn between \$800 and \$1,000 per week, regardless of the number of hours
17 worked. Each SM is eligible for incentive compensation under the Autozone bonus plan.
18 The bonus amount is primarily based on the financial performance of the SM's store.² Except
19 for the CSM in stores handling commercial accounts, no retail store employee other than the
20 SM is eligible for a bonus. Autozone expects SMs to work fifty hours a week. Plaintiffs
21 state that on average they work sixty hours a week. PSOF ¶¶ 49(b), 55(c).

22 **II. Autozone's Restriction of the Motion to Three Named Plaintiffs**

23 Autozone moves for summary judgment against three of the named plaintiffs (Khan,
24 Glover-Hale, and Montoya). Plaintiffs' response addresses the entire opt-in class and
25 includes testimony and declarations from other SMs. Autozone asks us to disregard
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27 ² Between 2008 and 2011, bonuses for named plaintiffs Glover-Hale, Khan and
28 Montoya ranged between \$1,364.89 and \$6,852.10.

1 plaintiffs' evidence concerning other SMs, arguing that plaintiffs' evidence is irrelevant
2 because Autozone's motion does not address the claims of all opt-in members. Autozone
3 complains that plaintiffs are attempting to "convert" its motion to address the claims of "more
4 than 1400 potential opt-ins." Reply at 3. In support of its attempt to restrict its motion to
5 three of the named plaintiffs, Autozone cites Hogan v. Allstate Ins. Co., 361 F.3d 621 (11th
6 Cir. 2004). In Hogan, the district court directed the parties to choose three test plaintiffs from
7 an opt-in class of over 2,300 for discovery and for summary judgment motions. Id. at 623.
8 Autozone argues that we may entertain a summary judgment practice as to individual
9 plaintiffs where, as here, the action has been conditionally certified but no final ruling has
10 been made as to whether the case will be tried as a collective action.

11 Autozone's strategy of filing a summary judgment motion as to three individual
12 plaintiffs in this action is curious. Unlike in Hogan, we have not expressly directed, or
13 indeed even discussed, the use of test plaintiffs in this action. The Rule 16 scheduling order
14 we set in October, 2010 (doc. 22) cautioned that parties represented by the same lawyer
15 "shall file no more than one motion for summary judgment unless leave of Court is
16 obtained." Scheduling Order at 3-4. Autozone has not sought leave to file any additional
17 motions for summary judgment. Even if Autozone requested leave, at this point we would
18 deny it. This action is set for trial on March 20, 2012, and dispositive motions were due on
19 September 30, 2011.³ Thus, even if we granted Autozone's motion for summary judgment
20 against three of the four named plaintiffs, the claims of close to 1,400 conditional class
21 members would remain.

22 Hogan held that the district court's entry of summary judgment against not only the
23 test plaintiffs, but against all opt-in plaintiffs, violated Rule 56, Fed. R. Civ. P.'s notice
24 requirement. Hogan, 361 F.3d at 628. This was because the district court had not explicitly
25 notified all plaintiffs that if the test plaintiffs lost on summary judgment, the remaining opt-in
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27 ³ Autozone filed the instant motion for summary judgment on September 30, 2011,
28 the deadline for filing.

1 plaintiffs would also lose. Id. We do not face a similar notice problem here. We did not
2 authorize a test plaintiff procedure in this case. And plaintiffs opposed Autozone's motion
3 as if the motion addressed the claims of the entire opt-in class.

4 Autozone has not challenged the propriety of conditional class certification by moving
5 to decertify the class. Thus, our decision that this action is an FLSA collective action stands
6 undisturbed. Accordingly, we construe Autozone's motion for summary judgment as filed
7 against the conditional class in its entirety.

8 **III. The FLSA Executive Exemption**

9 Summary judgment will be granted if the moving party shows that there is no genuine
10 dispute as to material facts and judgment is warranted as a matter of law. Fed. R. Civ. P.
11 56(a). In an action for overtime wages under the FLSA, "the question of how an employee
12 spends his or her workday is one of fact, while the question of whether his or her activities
13 exclude him or her from the overtime-pay requirement is one of law." Christopher v.
14 SmithKline Beecham Corp., 635 F.3d 383, 391 (9th Cir. 2011). Under the FLSA, employees
15 working more than forty hours in a work week must receive overtime pay. 29 U.S.C. §
16 207(a)(1). Employees working "in a bona fide executive. . . capacity" are excluded from this
17 requirement. Id. § 213(a)(1). In 2004 the Department of Labor updated the regulations
18 interpreting the executive exemption.⁴ The current regulations define an employee working
19 in a bona fide executive capacity as one

20 (1) Compensated on a salary basis at a rate of not less than \$455 per week (or
21 \$380 per week, if employed in American Samoa by employers other than the
Federal Government), exclusive of board, lodging or other facilities;

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

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

25 (4) Who has the authority to hire or fire other employees or whose suggestions
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27 ⁴ Because the conditional class is limited to Autozone SMs who worked between May
28 2008 and May 2011, we apply the post-2004 regulations.

1 and recommendations as to the hiring, firing, advancement, promotion or any
2 other change of status of other employees are given particular weight.

3 29 C.F.R. § 541.100(a).

4 It is undisputed that plaintiffs are salaried employees earning between \$800 and
5 \$1,000 per week. It is also undisputed that as SMs plaintiffs direct on average between seven
6 to ten full- and part-time employees on a regular basis.⁵ The parties agree that the SMs do
7 not have authority to hire and fire employees without DM consent. Thus, the issues before
8 us are (1) whether an Autozone SM's primary duty is management and (2) whether an
9 Autozone SM's "suggestions and recommendations as to the hiring, firing, advancement,
10 promotion or any other change of status of other employees are given particular weight." Id.
11 § 541.100(a)(4). It is Autozone's burden to show that it is entitled to the executive
12 exemption. Baldwin v. Trailer Inns, Inc., 266 F.3d 1104, 1112 (9th Cir. 2001).

13 **IV. Management as Primary Duty**

14 The FLSA regulations describe management activities as including:

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

24 ⁵ Plaintiffs argue in their response that all prongs of the executive exemption test other
25 than the weekly salary component are "subject to fierce factual debate." Response at 4.
26 However, they admit that as SMs they were the most senior person stationed at their store,
27 which employed seven to ten other employees. They also fail to address Autozone's
28 argument that this prong is met. See MSJ at 16. Accordingly, we find that there is no
material factual dispute as to whether SMs "customarily and regularly" direct the work of two
or more employees. See 29 C.F.R. § 541.100(a)(3).

1 29 C.F.R. § 541.102. This list is not exhaustive, and the regulations do not require that an
2 employee perform a certain number of "management" activities before the executive
3 exemption applies. What is required to qualify for the exemption, however, is that an
4 employee perform exempt (in other words, managerial) work as his "primary duty." Id. §
5 541.700(a). Primary duty means the "principal, main, major or most important duty that the
6 employee performs." Id. Our determination of an employee's primary duty "must be based
7 on all the facts in a particular case, with the major emphasis on the character of the
8 employee's job as a whole." Id.

9 An employee can still have management as her primary duty even if less than fifty
10 percent of her time is spent performing exempt duties, if the following factors support this
11 classification:

12 the relative importance of the exempt duties as compared with other types of
13 duties; the amount of time spent performing exempt work; the employee's
14 relative freedom from direct supervision; and the relationship between the
employee's salary and the wages paid to other employees for the kind of
nonexempt work performed by the employee.

15 Id. §§ 541.700(a), 541.700(b); see also Baldwin v. Trailer Inns, Inc., 266 F.3d 1104, 1114
16 (9th Cir. 2001) ("[w]e do not presume that the executive exemption fails merely because the
17 proportion of time spent on exempt managerial tasks is less than fifty percent, where, as here,
18 managerial duties are packaged in employment with non-managerial tasks"). Autozone does
19 not dispute plaintiffs' claims that they spend less than fifty percent of their time performing
20 exempt work. Accordingly, Autozone must address the above factors. Although Autozone
21 has the burden to establish that the SMs' primary duty is management, it must "carry its
22 burden only on the primary-duty element as a whole, not on each individual factor relevant
23 to that inquiry." Thomas v. Speedway SuperAmerica, LLC, 506 F.3d 496, 505 n.6 (6th Cir.
24 2007).

25 **A. Relative Importance of Exempt Duties**

26
27 Plaintiffs admit that they are required as SMs to perform some exempt duties, but
28 argue that they have "no meaningful role" in doing so. Response at 7. They contend that the

1 most important duty of every Autozone store employee, including the SM, is "direct
2 customer service and manual labor." Id. at 6. Without their customer service and labor,
3 plaintiffs aver that Autozone stores would "cease to function properly." Id. According to
4 plaintiffs, their exempt duties are less important because SMs perform work that nonexempt
5 employees do (such as stocking shelves and helping customers), and Autozone requires
6 nonexempt employees to perform some of the same duties as the SM (such as opening and
7 closing the store and checking cash register balances). Performance of "some managerial
8 tasks" by nonexempt workers does not transform these tasks into nonexempt duties.
9 Baldwin, 266 F.3d at 1115. See also Murray v. Stuckey's Inc., 939 F.2d 614, 618 (8th Cir.
10 1991) (irrelevant to question of primary duty whether "other employees. . . were capable of
11 performing part or even all of the manager's duties"). Similarly, that SMs performed even
12 a substantial amount of manual labor does not end the analysis, because assessing the SMs'
13 primary duty requires us to place a "major emphasis on the character of the [] job as a
14 whole." 29 C.F.R. § 541.700(a).

15 It is undisputed that SMs are the only employees within their store who complete
16 performance appraisals and recruit and interview candidates for open positions. The SMs
17 are the ones responsible for ensuring that their employees complete the required computer
18 training modules. SMs are also responsible for ensuring that all daily tasks assigned by the
19 Autozone System are completed. While SMs argue that it is their manual labor that keeps
20 their stores running (and that it is Autozone policy to resist paying overtime wages by forcing
21 SMs to work long hours to complete unfinished tasks), if they did not perform their assigned
22 managerial tasks, candidates would not be interviewed, employees may skip out on training,
23 daily tasks might slip through the cracks, and employee performance appraisals would sit
24 untouched. See Baldwin, 266 F.3d at 1115 (plaintiffs' principal value to employer was
25 directing "day-to-day operations" of a recreational vehicle park, despite their performance
26 of "a substantial amount of manual labor"). Moreover, plaintiffs admit that if customer
27 service is not provided, sales will suffer, and plaintiffs admit that Autozone evaluates them
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1 and awards bonus pay based in part on store profitability. Thus, even the nonexempt task
2 that plaintiffs complain takes up most of their time - providing WOW! customer service -
3 could be performed "in a manner that could make the store profitable, the goal of [the SM]
4 managerial responsibility." In re Family Dollar FLSA Litig., 637 F.3d 508, 515 (4th Cir.
5 2011).

6 Autozone argues that the value it places on the SMs' managerial functions is revealed
7 by its SM evaluation criteria. Plaintiffs urge that the managerial areas appearing on the
8 evaluation forms are "disconnected from the reality of SMs' actual job duties." Response at
9 9. They fail to explain why this is relevant, when they do not dispute that Autozone actually
10 evaluates them on these criteria. If an employee's primary duty is management, it remains
11 so regardless of whether the employee meets employer expectations by successfully
12 performing the assigned duties. See Fetrow-Fix v. Harrah's Entm't, Inc., 10-CV-00560-RLH-
13 PAL, 2011 WL 5827199 at *6 (D. Nev. Nov. 18, 2011) (looking at an employee's job duties
14 and finding that the employee's primary duty was management, despite there being "no
15 evidence that [plaintiff] actually performed any of these duties"). Plaintiffs also argue that
16 nonexempt hourly employees are evaluated on some of the same criteria as the SMs. But it
17 is undisputed that, with the exception of stores with CSMs, SMs are the only store employees
18 eligible to receive a bonus. And it is also undisputed that the SM bonus is directly tied to
19 store profitability. This supports Autozone's argument that it values SM managerial duties
20 by singling SMs out to receive bonuses that reward them for the success of their stores. By
21 contrast, without the opportunity for a bonus, pay increases for nonexempt employees are
22 tied to individual performance as assessed by SMs and DMs in the performance appraisals.

23
24 Finally, plaintiffs argue that Autozone's extensive policies and processes render the
25 SMs' nonexempt work more important than their regimented and standardized exempt work.
26 Plaintiffs essentially view themselves as insignificant cogs in a vast corporate machine. The
27 mere existence of company-wide standardized processes and policies does not as a matter
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1 of law prevent a supervising employee from being classified as an exempt manager. See
2 Baldwin, 266 F.3d at 1117 (ensuring company policies are followed is "essence of
3 supervisory work") (citing Donovan v. Burger King Corp., 672 F.2d 221, 226 (1st Cir.
4 1982)). Plaintiffs' own evidence reveals that Autozone, despite plaintiffs' repeated assertions
5 that SMs are interchangeable with nonexempt employees, relied specifically on SMs to
6 ensure that tasks were completed and corporate directives and policies were followed. See
7 PSOF ex. 37, Marcano Decl. ¶ 6 ("Every Monday morning I was required to participate in
8 mandatory conference calls. . . I was required to be available for these calls no matter if I was
9 out of the Store or on a day off."); PSOF ex 40, Padilla Decl. ¶ 7 ("My [DM] would come in
10 to [sic] the Store every two weeks and expect that the [SM] be present in the Store, even if
11 it was the [SM]'s day off."); PSOF ex. 26, D. Brown Decl. ¶ 7 ("As a [SM] I was always
12 expected to stay at the Store until everything was done for the day, sometimes long after the
13 hourly employees had gone home. . . [t]oday as an hourly Assistant Store Manager I am
14 required to leave when my shift is over and it is now my [SM]'s job to finish up the work I
15 did not complete or get to during my shift."). Plaintiffs also submitted evidence showing that
16 if an SM leaves the company, Autozone will require another store employee to "step up" and
17 fill an SM's role until the vacancy is filled. PSOF ex 67, Bacon Dep. 153:18 - 153:20 ("We
18 have someone step up, a [PSM] steps up and helps out until we can fill the vacancy.").

19 Thus, despite plaintiffs' attempts to dilute the importance of the SM position, the
20 record and the weight of the case law support the conclusion that the exempt duties of SMs -
21 the only employees in each Autozone store charged with certain tasks essential to the
22 operations of the store, and the only employees directly rewarded based on the store's success
23 - are relatively more important to Autozone than their nonexempt duties.

24 **B. Amount of Time Spent Performing Exempt Work**

25 Autozone does not dispute plaintiffs' contention that they spend the majority of their
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1 time on nonexempt tasks such as providing customer service and stocking shelves.⁶
2 Spending less than fifty percent of the time performing exempt duties is not dispositive to a
3 determination of primary duty. 29 C.F.R. § 541.700(b). Baldwin, 266 F.3d at 1114 (no
4 presumption that executive exemption fails "because the proportion of time spent on exempt
5 managerial tasks is less than fifty percent"); In re Family Dollar, 637 F.3d at 514-15
6 (concluding that a store manager in a nationwide chain was an exempt executive despite her
7 testimony that she performed nonexempt work "99% of the time").

8 FLSA regulations explicitly recognize that [c]oncurrent performance of exempt and
9 nonexempt work does not disqualify an employee from the executive exemption." 29 C.F.R.
10 § 541.106(a). As an example,

11 an assistant manager in a retail establishment may perform work such as
12 serving customers, cooking food, stocking shelves and cleaning the
13 establishment, but performance of such nonexempt work does not preclude the
14 exemption if the assistant manager's primary duty is management. An assistant
15 manager can supervise employees and serve customers at the same time
16 without losing the exemption. An exempt employee can also simultaneously
17 direct the work of other employees and stock shelves.

18 Id. § 541.106(b). Autozone argues that plaintiffs perform their nonexempt work concurrently
19 with their managerial duties. It contends that plaintiffs admit observing employee
20 performance while working nearby, and training even while stocking the shelves. Plaintiffs
21 argue that they cannot possibly supervise employees in the store at the same time as working
22 on a customer's car in the back or giving the full attention required to provide WOW!
23 customer service.⁷ But managing while serving customers in a retail establishment is an

24 ⁶ There is no clear indication, even among plaintiffs, exactly how much time SMs
25 spend performing nonexempt work. Plaintiffs allege that they spend "approximately 90%"
26 of the time performing manual labor. Response at 2. Yet, in a survey of class members that
27 plaintiffs submitted, only 55.25% of respondents reported spending less than 25% of their
28 weekly work time performing managerial activities such as interviewing employees and
supervising employee performance. PSOE, Lewin Decl. Ex. 2, question 11.

⁷ These assertions are made despite almost 78% of plaintiffs' survey respondents
stating that while performing non-exempt tasks (including customer service), they were able
to "simultaneously do[] other things." PSOE, Lewin Decl. Ex. 2, question 9b.

1 explicit example provided by the regulations. Id. The Department of Labor noted in issuing
2 the final rule of the 2004 regulations that the concurrent duties test "accurately reflects the
3 appropriate test of exempt executive status and is a practical approach that can be realistically
4 applied in the modern workforce, particularly in restaurant and retail settings." Defining and
5 Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and
6 Computer Employees, 69 Fed. R. 22,122-01, 22,137 (Apr. 23, 2004) (to be codified at 29
7 C.F.R. pt. 541). Thus, the fact that SMs served customers in a retail setting - a task that
8 requires focus - does not, as a matter of law, mean that this nonexempt duty was not
9 performed concurrently with managerial tasks.

10 Plaintiffs nevertheless argue that concurrent performance of duties is inapplicable,
11 because they are "directed by a supervisor to perform the exempt work," 29 C.F.R. §
12 541.106(a), pointing to Autozone's comprehensive task-scheduling system and their DMs'
13 involvement. But that regulation describes exempt executives as those who "[g]enerally . .
14 . make the decision regarding when to perform nonexempt duties and remain responsible for
15 the success or failure of business operations under their management while performing the
16 nonexempt work." Id. (emphasis added). Here, it is undisputed that SMs are responsible for
17 the profitability of their stores and can receive bonuses based on their store's success.
18 Plaintiffs also admit that the nonexempt task of customer service helps to increase sales in
19 their stores. The record suggests that plaintiffs were concurrently performing exempt and
20 nonexempt tasks as envisioned by the Department of Labor.

21 Even if plaintiffs did not perform nonexempt tasks concurrently with exempt tasks,
22 however, their assertion that they perform nonexempt tasks more than fifty percent of the
23 time is not dispositive. The amount of time spent on customer service and manual labor does
24 not preclude summary judgment, as this is just one of several factors we must consider in
25 determining the SMs' primary duty.

26 **C. Relative Freedom from Direct Supervision**

27 We next consider the SMs' relative freedom from direct supervision. It is undisputed
28 that Autozone retail stores are governed by "meticulously detailed corporate policies."

1 Response at 14. The plan-o-gram dictates the placement of products within the store.
2 Checklists detail standard procedures for opening and closing the store. The SMs cannot
3 decide to hold a sale, offer new products, or rearrange their merchandise. The DMs make
4 visits, ranging in frequency from several times a year to once weekly or more. And when not
5 in the store, they communicate with SMs through phone, email, text messages, and
6 conference calls.

7 Plaintiffs argue that because of Autozone's detailed policies, SMs rarely exercise
8 discretionary powers. It is unclear under the current regulations how much this matters. The
9 pre-2004 regulations listed frequency of exercise of discretionary powers as one factor in
10 determining primary duty. Relative freedom from supervision was listed as a separate factor.
11 Baldwin, 266 F.3d at 1113 (listing pre-2004 factors to determine primary duty). Under the
12 new regulations, discretion is not mentioned at all in the definition of primary duty. See 29
13 C.F.R. § 541.700. This may simply be because the exercise of discretion is one aspect of
14 relative freedom from supervision. In any case, there is abundant case law (even in cases
15 applying pre-2004 regulations) stating that a manager's required adherence to detailed
16 company policies and lack of unilateral authority to make decisions does not automatically
17 exclude a position from the executive exemption. See, e.g., Thomas, 506 F.3d at 506-07 (day
18 to day discretion of manager not eliminated by active district manager supervision and
19 standardized company procedures as a matter of law); Murray, 939 F.2d at 619 (standardized
20 procedures and active supervision of district manager did not entirely eliminate manager
21 discretion); Burger King, 672 F.2d at 226-27 (citing with approval decision that drug store
22 manager had primary duty as management despite being unable to make "any significant or
23 substantial decisions," including "setting prices and wages"). Thus, that the SMs lack
24 discretion due to nationwide corporate policies, to the extent that this is relevant under the
25 current regulations, does not mean that their primary duty is something other than
26 management.

27 Next, plaintiffs contend that the SMs are not relatively free from direct supervision
28 due to the frequent visits from and "constant communication" with their DM. Response at

1 14. Although the DMs are not physically present in the stores at all times, plaintiffs argue
2 that the constant communication from DMs effectively "project[s] their presence into stores
3 on a daily basis." Id. Autozone contends that SMs, who are the most senior employees
4 stationed at their stores, are relatively free from direct supervision as the DMs cover eight
5 to twelve stores each. It is unclear how often SMs are contacted by the DM, and over the
6 exact purpose of this communication. Plaintiffs state that DMs supplement the store
7 management system daily task assignments with "additional instructions concerning task
8 prioritization, sales objectives and techniques, daily operations, and general store
9 administration." PSOF 6(d).⁸ DMs also monitor sales and instruct the SMs to send staff
10 home if sales were slow. Autozone offers evidence that DM calls relate to inquiries about
11 sales. DSOF, Badoux Decl. Ex. A, Montoya Dep. 55:8-55:9 ("Here is an example. You
12 guys are at \$400. What are you doing to increase your sales?"). Some of plaintiffs' own
13 evidence suggests that the frequency of DM communications is tied to a particular store's
14 performance. See PSOF, ex. 67, Bacon Dep. 50:10-50:13 ("[S]ome store managers, I
15 wouldn't have to contact that much, but the ones that had more issues than others, I would
16 be in contact with them more often."). Although the exact frequency of calls is in dispute,
17 it appears that the DMs were often in contact with the SMs daily.

18 Close supervision by a district manager, including frequent calls, does not necessarily
19 equate to a finding that this factor weighs in favor of plaintiffs. See Thomas, 506 F.3d at
20 507-08 (store manager relatively free from direct supervision, despite frequent monitoring
21 by district manager); Thomas v. Jones Rests., Inc., 64 F. Supp. 2d. 1205, 1214 (M.D. Ala.
22 1999) (restaurant manager relatively free from supervision despite superior calling ten to
23 fifteen times a day, because plaintiff was responsible for restaurant's operation in superior's
24 absence and was answerable for restaurant's performance). Here, we are presented with a
25

26 ⁸ Plaintiffs also claim that DMs monitor operations in "real time" and immediately
27 intervene if corrective action is needed. PSOF ¶ 6(e). This is unsupported by plaintiffs'
28 corresponding citation to the record, which states that the DMs can log onto a system and
ascertain a particular store's total sales as of that moment, not individual transactions.

1 situation where plaintiffs were unquestionably the most senior employees at their store, and
2 were present in their stores by their own calculations for hundreds of hours a month without
3 the physical presence of a DM. Indeed, plaintiffs concede that because DMs cannot be
4 present in all stores, they rely on SMs to be the eyes and ears of the DM. And plaintiffs' own
5 evidence indicates that frequency of DM communication is influenced by store performance.
6 Thus, even viewing the disputed facts in the light most favorable to the plaintiffs, we
7 conclude that plaintiffs, despite frequent electronic and telephonic contact with DMs, are
8 nevertheless relatively free from day-to-day direct supervision.

9 **D. Relationship Between SM Salary and Wages Paid to Others**

10 It is undisputed that SMs earn between \$800 and \$1,000 weekly and (with the
11 exception of stores with CSMs) are the only employees in their stores eligible to receive a
12 bonus. By contrast, the ASMs and PSMs are paid hourly. According to Autozone, the
13 average hourly wage for ASMs and PSMs at Glover-Hale, Khan, and Montoya's stores
14 ranges from \$12.00 to \$15.00. DSOF ¶ 49. Autozone compared Glover-Hale, Khan, and
15 Montoya's bi-weekly salary earnings to the average bi-weekly amount earned by the highest
16 paid PSM/ASM at their respective stores. For example, in 2009 Khan earned \$2,060.60
17 every two weeks, while the highest paid PSM/ASM earned an average of \$1,311.85. DSOF
18 ¶ 49(b). In 2010 Montoya earned a bi-weekly salary of \$2,089.90, while his highest paid
19 PSM/ASM earned an average of \$1,715.44 every two weeks. DSOF ¶ 49(c). Plaintiffs do
20 not dispute the amounts cited concerning these particular plaintiffs, but state that the average
21 nationwide hourly wage for PSMs and ASMs ranges between \$10.74 and \$17.64. PSOF ¶
22 49(d). Plaintiffs do not, however, provide evidence of the average numbers of hours worked
23 by PSMs and ASMs nationwide or their average bi-weekly pay.

24
25 Plaintiffs argue that SMs earn essentially the same as nonexempt workers. They urge
26 us to compare SM salaried pay to hourly pay by dividing the SMs' weekly salary by sixty
27 hours a week (the hours that plaintiffs claim they work on average). Doing so sets the hourly
28 rate for SMs at \$13.33 to \$16.67, which plaintiffs point out is either the same as or less than

1 the wage paid to nonexempt PSMs and ASMs. This is not the approach the Ninth Circuit
2 took in Baldwin. Baldwin simply compared the plaintiffs' monthly salary earned as
3 managers to their assistant managers' monthly salary. Baldwin, 266 F.3d at 1115. The court
4 did so despite knowing the number of hours that each plaintiff and each assistant manager
5 worked, and knowing that plaintiffs worked more hours than their assistant managers. Id.
6 at 1110; see also Moore v. Tractor Supply Co., 352 F. Supp. 2d 1268, 1279 (S.D. Fla. 2004)
7 (noting that the Fourth Circuit does not perform "mathematical gymnastics," but "simply
8 compare[s] the manager's weekly salary with the highest possible non-exempt weekly wage"
9 to determine the pay differential).

10 Autozone has presented evidence showing that SMs Khan, Glover-Hale, and Montoya
11 made hundreds of dollars more on a bi-weekly basis than their highest paid PSMs and ASMs.
12 DSOF ¶ 49. Although plaintiffs dispute the average nationwide hourly wage paid to PSMs
13 and ASMs, PSOF ¶ 49, they offer no evidence to suggest that the bi-weekly wage gap
14 between SMs and PSMs/ASMs is any narrower than Autozone presents. Indeed, taking the
15 highest hourly wage for ASMs/PSMs proposed by plaintiffs, \$17.64, and assuming a forty
16 hour workweek, this would place the weekly pay of the highest paid PSM/ASM nationwide
17 at \$705.60 (for a bi-weekly amount of \$1,411.20). In contrast, the lowest-paid SMs receive
18 \$800 (for a bi-weekly amount of \$1,600.00). In addition, while plaintiffs urge us to ignore
19 SM bonus pay, it is undisputed that SMs were eligible for and received regular bonuses that
20 ASMs and PSMs were ineligible to receive. See Baldwin, 266 F.3d at 1115-16 (considering
21 plaintiffs' bonuses separately from their base pay). Between the class certification period of
22 2008 and 2011, these bonuses added between \$1,364.89 and \$6,852.10 to Khan, Glover-
23 Hale, and Montoya's salaries, which reveals a further separation between the salary and
24 bonus compensation paid to the SMs and bi-weekly wages paid to nonexempt workers
25 working a forty hour work week.

26 In sum, the relationship between the SM salary and the wages paid to nonexempt
27 PSMs and ASMs weighs in favor of finding that the primary duty of SMs is management.
28

1 **E. Primary Duty Determination**

2 In assessing primary duty we look at all the relevant facts, but place the "major
3 emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). Here,
4 although some disputes remain over exactly how much time the SMs spend performing
5 nonexempt tasks and how frequently they are in contact with their DMs, these disputes do
6 not affect our ability to determine as a matter of law whether the SMs have management as
7 their primary duty. See Christopher, 635 F.3d at 391.

8 The SMs are the most senior employee stationed in each Autozone retail store. They
9 contribute to the hiring of their employees, are responsible for ensuring all daily tasks in the
10 store were completed pursuant to Autozone policy (even if this means performing the tasks
11 themselves), are evaluated on their store's success and their managerial tasks, and are
12 exclusively eligible for bonuses based on store performance. Despite the SMs' frequent
13 contact with their DMs, their lack of authority to deviate from corporate policy, and the
14 significant time they spend performing nonexempt tasks, the overall character of the SM
15 position is that of manager, not simply a retail salesperson. Autozone has met its burden of
16 showing that the primary duty of the SM position is management.⁹

17 **V. Employment Recommendations Afforded "Particular Weight"**

18
19 It is undisputed that SMs lack authority to hire or fire people without Autozone
20 approval. Accordingly, Autozone must show that the SMs' "suggestions and
21 recommendations as to the hiring, firing, advancement, promotion or any other change of
22 status of other employees are given particular weight." 29 C.F.R. § 541.100(a)(4). Plaintiffs
23 argue that they cannot make any decisions to fire employees, and can only alert the DM when
24 they observe behavior that merits termination. Additionally, they argue that their role in

25 _____
26 ⁹ Several courts have reached similar conclusions. See Thomas, 506 F.3d at 502-03
27 (noting that numerous courts have addressed the issue of whether an "individual store
28 manager in a chain retail operation [] had management as her primary duty," observing that
"all have held that the plaintiff's primary duty consisted of management").

1 hiring is limited to a screening function because of Autozone's use of an interview script and
2 evaluation form. Thus, plaintiffs conclude that they "do not necessarily make hiring
3 recommendations at all, and when they do, they are given no particular weight." Response
4 at 17.

5 We note from the outset that this element of the executive exemption test is
6 disjunctive. Autozone can meet its burden, in other words, by showing that it gives its SMs'
7 suggestions and recommendations for either "hiring, firing, advancement, promotion, or any
8 other change of status" particular weight. 29 C.F.R. § 541.100(a)(4). To determine whether
9 suggestions are given particular weight, we must consider "whether it is part of the
10 employee's job duties to make such suggestions and recommendations; the frequency with
11 which such suggestions and recommendations are made or requested; and the frequency with
12 which the employee's suggestions and recommendations are relied upon." Id. § 541.105.
13 Suggestions can have particular weight "even if a higher level manager's recommendation
14 has more importance and even if the employee does not have authority to make the ultimate
15 decision." Id. The Department of Labor notes that evidence that recommendations are given
16 particular weight

17 could include witness testimony that recommendations were made and
18 considered; the exempt employee's job description listing responsibilities in
19 this area; the exempt employee's performance reviews documenting the
20 employee's activities in this area; and other documents regarding promotions,
demotions or other change of status that reveal the employee's role in this area.

21 Defining and Delimiting the Exemptions for Executive, Administrative, Professional,
22 Outside Sales and Computer Employees, 69 Fed. R. at 22,135.

23 Part of the SM's job duties are to recruit and hire personnel and to complete
24 performance appraisals for each store employee. It is also undisputed that only SMs are
25 trained in hiring procedures, that SMs are evaluated on their recruiting and hiring, and that
26 only SMs have the authority to complete performance appraisals. Nevertheless, plaintiffs
27 argue that they do not make hiring recommendations. They point to the standard interview
28 form that they complete, which they note has no place for SMs to indicate whether they

1 strongly recommend or do not recommend hiring a candidate. The interview form, however,
2 requires the interviewing manager to note a minimum of two reasons for either selecting or
3 rejecting a candidate. DSOF, Young Decl., ex. B at AZ001495. Some of the reasons for
4 rejecting the candidate include "[l]acks professionalism" and "[n]ot customer service
5 focused." Id. Plaintiffs are indeed filling in boxes on a form, but these boxes have meaning
6 and require a judgment call about employment suitability to complete. Plaintiffs' own
7 evidence also contradicts their argument that they never make hiring recommendations. For
8 example, one SM acknowledges that "my [DM] required me to interview at least two
9 individuals per week." PSOF ex. 56, Bolding Decl. ¶ 6d. Plaintiffs also acknowledge that
10 they provide input on hiring. See PSOF ex. 29, Deimel Decl. ¶ 8 ("[w]hile I provide input
11 on hiring and firing issues, ultimately the [DM] makes his own decisions); PSOF ex 42, Rios
12 Decl. ¶ 12 (would recommend potential new hires to DM); PSOF ex. 32, Kolar Decl. ¶ 8
13 (provided input on hiring and firing issues); PSOF ex. 33, Lager Decl. ¶ 8 (same); PSOF ex.
14 34, Lemke Decl. ¶ 8 (same). Other evidence submitted by plaintiffs shows that they are
15 required to recruit on a regular basis: "AutoZone requires that its [SM]s spend several hours
16 a week recruiting new hires." PSOF ex. 40, Padilla Decl. ¶ 3 n.1. It is also undisputed that
17 SMs are required to complete performance appraisals twice a year for their employees.

18 Finally, plaintiffs argue that any hiring recommendations they do give are not relied
19 on by Autozone. To support this statement, they point to one SM who stated that in the year
20 he has worked at Autozone, both people hired at his store were hired by the DM without his
21 input. PSOF ¶ 15(d). Defendant, on the other hand, presented evidence that plaintiff
22 Montoya's DM approved hiring of applicants selected by SMs 80% of the time. DSOF ¶ 22.
23 Despite the dispute over the frequency with which SM hiring recommendations are relied on,
24 there is no dispute that plaintiffs recommend their employees for promotion, and that the
25 DMs consider the performance appraisals plaintiffs submit twice a year when deciding pay
26 increases.

27 Although SMs lack ultimate authority to hire, promote, and issue pay raises, this does
28

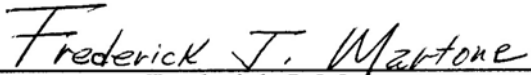
1 not as a matter of law preclude a finding that this prong of the executive exemption is
2 satisfied. It is undisputed that plaintiffs were the sole store employees responsible for
3 interviewing and completing performance appraisals. Plaintiffs' own declarations
4 acknowledge that they provide input as to hiring and firing, although the frequency with
5 which this input is utilized is disputed. Plaintiffs do not dispute, however, that their
6 performance appraisals are relied upon by DMs in deciding pay raises. On balance, we find
7 that Autozone has shown that plaintiffs' suggestions and recommendations as to the "hiring,
8 firing, advancement, promotion or any other change of status" of Autozone employees are
9 given particular weight." 29 C.F.R. § 541.100(a)(4).

10 **VI. Conclusion**

11 It is evident that plaintiffs feel overworked and stifled by Autozone's exacting
12 demands for nationwide uniformity and process. Lack of creativity and overwork may be
13 an undesirable by-product of working for a national chain in a struggling economy, but this
14 does not entitle plaintiffs to overtime pay if Autozone properly classified the SM position as
15 exempt. As discussed above, Autozone has established that the SM position meets each
16 element of the FLSA executive exemption. See 29 C.F.R. § 541.100(a). Accordingly,
17 Autozone is entitled to judgment as a matter of law.

18 **IT IS ORDERED GRANTING** defendants' motion for summary judgment (doc.
19 219). The Clerk shall enter judgment.

20 DATED this 26th day of January, 2012.

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23 
24

 Frederick J. Martone
25 United States District Judge
26
27
28