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4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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7 BEN LOPEZ,

No. C 08-5396 SI

8 Plaintiff,

**FINAL PRETRIAL SCHEDULING
ORDER**

9 v.

10 UNITED PARCEL SERVICE, INC.,

11 Defendant.
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13 On March 30, 2010, the Court held a final pretrial conference in the above captioned matter,
14 which is set for jury trial beginning April 12, 2010. All parties were represented by counsel. The
15 following matters were resolved:

16 1. **Number of jurors and challenges:** There shall be a jury of 8 members. Each side shall
17 have up to four peremptory challenges.

18 2. **Voir dire:** The court will conduct general voir dire, and counsel for each side shall have
19 up to 15 minutes total to question the panel.

20 3. **Jury instructions:** Counsel have submitted certain joint proposed jury instructions, and
21 separate sets of contested instructions. No later than **Thursday, April 8, 2010**, counsel shall submit one
22 complete set of proposed instructions, containing both agreed upon instructions (which shall be so
23 noted), and contested instructions, all in the order in which they should be read to the jury. Where
24 contested instructions are included, they should be annotated both with the proponent's authority for
25 seeking the instruction and the opponent's reason for opposition. Where feasible, competing
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1 instructions addressing the same point shall be included together in the single set of proposed
2 instructions. The final submission shall be filed in hard copy and also submitted to the court on disk,
3 suitable for reading by WordPerfect 10 (Windows) on or before April 8, 2010. The Court will read
4 some substantive instructions, culled from the jointly agreed upon instructions at pages 29-40 of the
5 parties' pretrial submission, immediately before opening statements; **the parties are invited to submit**
6 **a joint proposal as to their text on or before April 8, 2010.**

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8 4. **Trial exhibits:** No later than April 8, 2010, the parties shall submit their trial exhibits,
9 in binders with numbered tabs separating and identifying each exhibit. The court shall be provided with
10 three sets (for the court, the file and the witness) and each side shall provide one set for the other side.
11 To the extent that original documents are to be used as exhibits in the case, they should be included in
12 the set of exhibits for the court.

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14 5. **Timing of trial:** The parties estimated that the trial should take approximately 5 days.
15 Based on this estimate, each side shall have 30 minutes for opening statements; each side shall have
16 12 hours total for presentation of evidence, which includes direct and cross-examination and
17 presentation of all exhibits; and each side shall have up to 45 minutes for closing argument.

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19 6. **Trial schedule:** Jury trials are generally conducted Monday through Thursday; jury
20 trials are generally not conducted on Fridays, although deliberating juries are free to deliberate on
21 Fridays. The trial day runs from 8:30 a.m. until 3:30 p.m., with a 15 minute break at 10:00 a.m., a 45
22 minute break at 12:00 noon and a 15 minute break at 2:00 p.m., all times approximate.

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24 7. **Motions in limine:** The parties filed 12 motions in limine, as follows:

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26 **Plaintiff's motions:**

27 **No. 1: Motion to exclude evidence of UPS expectations re: plaintiff's job performance –**

28 **DENIED:** At trial, UPS must prove that plaintiff met the elements of either the administrative or the

1 executive exemption. Both exemptions require UPS to show that plaintiff was “primarily engaged in”
2 exempt job duties. Plaintiff argues that the Court should focus on how he actually spent his time, and
3 that UPS’s expectations regarding how he should have spent his time are irrelevant unless UPS first
4 shows “actual displeasure” with plaintiff’s performance, citing *Ramirez v. Yosemite Water Co., Inc.*, 978
5 P.2d 2, 13 (Cal. 1999). However, *Ramirez* merely cautioned courts not to rely solely on employer
6 expectations or employee performance, as a myopic focus would permit one party to manipulate the
7 exemption determination. The applicable regulations state that employer expectations are relevant to
8 the exemption determination. *See* Cal. Code Regs. tit. 8, § 11090(1)(A)(1)(e), (1)(A)(2)(f) (“The work
9 actually performed by the employee during the course of the workweek must, first and foremost, be
10 examined and the amount of time the employee spends on such work, together with the employer’s
11 realistic expectations and the realistic requirements of the job, shall be considered in determining
12 whether the employee satisfies this requirement.”).

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14 **No. 2: Motion to exclude evidence of compensation plaintiff received in addition to his**
15 **salary – DENIED:** Plaintiff seeks to exclude evidence of yearly bonuses and stock awards he received
16 on the ground they are not relevant to the determination of whether he met the salary threshold for
17 exemption. However, UPS does not seek to present evidence of the awards for purposes of calculating
18 plaintiff’s salary or to argue that plaintiff waived his right to overtime by accepting the awards. Rather,
19 UPS seeks to present the evidence in support of its unjust enrichment defense – i.e., that any overtime
20 recovery plaintiff receives in this case should be offset by the bonuses and stock awards, which he
21 received due to his classification as an exempt manager. The evidence is relevant for this purpose.¹

22 Plaintiff relies on two FLSA cases to support his argument that an overtime award cannot be
23 offset by bonuses. *See Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004); *Dunlop v.*
24 *Gray-Goto, Inc.*, 528 F.2d 792 (10th Cir. 1976). Even assuming these FLSA cases are applicable to
25 California law claims, they do not support plaintiff’s position. The employee’s classification was not

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27 ¹ However, contrary to UPS’s suggestion, evidence that plaintiff received these bonuses does
28 not “make it more likely than not that plaintiff performed exempt job duties.” The fact that UPS paid
plaintiff bonuses available only to exempt managers says nothing about whether plaintiff’s classification
was proper, and UPS will not be permitted to introduce evidence of the bonuses for this purpose.

1 at issue in either case, and the employers did not contest that, as a general matter, the employees were
2 entitled to overtime compensation. Rather, in both cases, the courts simply held that, whether by
3 agreement or by unilateral action of the employer, an employer cannot circumvent its FLSA obligation
4 to pay overtime by providing an hourly employee with other benefits. *Ballaris*, 370 F.3d at 913-14;
5 *Dunlop*, 528 F.2d at 794-95. These decisions are not applicable in the context of a misclassification
6 claim. UPS may introduce evidence of the bonuses in the context of its unjust enrichment defense.

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8 **No. 3: Motion to exclude evidence of plaintiff's termination – DEFERRED:** Plaintiff seeks
9 to exclude evidence that he was terminated from employment with UPS. Plaintiff was fired in 2008
10 because he did not have a valid driver's license. At that time, he was employed as an On-Road
11 Supervisor and was required on occasion to drive UPS package cars. The Court DEFERS ruling on the
12 admissibility of evidence of plaintiff's termination pending an offer of proof at trial with respect to the
13 circumstances of his termination and potential cross-examination/impeachment. Until further order of
14 the Court, no party may mention plaintiff's termination during opening statements or otherwise.

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16 **Defendant's motions:**

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18 **No. 1: Motion to exclude evidence of Class Member Information Forms from the *Marlo***
19 **case -- GRANTED in part:** UPS moves to exclude class surveys from the *Marlo* case, the C.D. Cal.
20 case against UPS which included plaintiff as a class member and was later decertified. The surveys
21 contain information regarding hours worked by UPS supervisors who were members of the *Marlo* class.
22 UPS seeks to exclude the surveys on the ground they are irrelevant, prejudicial, and inadmissible
23 hearsay unless offered only for impeachment purposes. As to the forms of all employees except
24 plaintiff, the Court agrees and GRANTS the motion. As to plaintiff's own form, the motion is DENIED,
25 without prejudice to specific objections at trial. Whether the form itself is admissible (with or without
26 redaction) remains to be seen, but plaintiff may testify to its contents and refer to it.

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28 **No. 2: Motion to exclude evidence regarding classification of positions plaintiff did not**

1 **hold – DENIED:** UPS seeks to exclude evidence regarding UPS’s classification of Part-Time
2 Supervisor positions, which plaintiff did not hold during the liability period, on the ground the evidence
3 is not relevant to the classification of plaintiff’s Full-Time Supervisor positions and will cause prejudice
4 and jury confusion. UPS is correct that the classification of other positions is not dispositive of whether
5 plaintiff’s positions were properly classified. However, plaintiff seeks to introduce the evidence to show
6 that he sometimes performed job duties that are typically performed by non-exempt employees. This
7 could be relevant to whether plaintiff was “primarily engaged in” exempt job duties. The motion as
8 framed is DENIED without prejudice to specific objections at time of trial.

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10 **No. 3: Motion to exclude evidence of other wage and hour litigation against UPS –**
11 **DENIED as framed:** UPS seeks to preclude plaintiff from “making any reference to, commenting
12 about, introducing testimony, evidence or documents, or presenting any argument” about other wage
13 and hour cases involving UPS on the ground such evidence is irrelevant, prejudicial, and confusing, and
14 would constitute improper propensity evidence. UPS is correct that plaintiff cannot rely on the other
15 lawsuits for the purpose of proving misclassification, but the motion is overbroad. Plaintiff may refer
16 to other lawsuits for the two specific purposes he has identified: (1) to show that UPS has retained its
17 expert Dr. Strombom in other actions, in order to impeach Dr. Strombom’s credibility; (2) to explain
18 the timing of his actions and to introduce the information in his class member survey from the *Marlo*
19 action, as described above. The motion as framed is DENIED without prejudice to specific objections
20 at time of trial.

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22 **No. 4: Motion to exclude testimony or other evidence regarding “excessive hours” or**
23 **“work-life balance”: – GRANTED:** UPS seeks to prevent plaintiff from testifying that he was
24 “overworked” or lacked “work-life balance” during his employment with UPS because such evidence
25 will be unduly prejudicial. UPS does not oppose the introduction of evidence detailing the specific
26 number of hours plaintiff worked, as such evidence is indisputably relevant to this case. UPS objects
27 to the specific use of the above terms, which it characterizes as “opinion” which is prejudicial and
28 inflammatory. The Court agrees that plaintiff’s opinions about whether his hours were “excessive” or

1 whether his work/life balance was inappropriate are irrelevant and excludable. Nothing in this order
2 prevents plaintiff from testifying to facts concerning the number of hours worked or the types of training
3 he received at UPS.

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5 **No. 5: Motion to exclude plaintiff's "subjective belief and/or opinion that he was a**
6 **nonexempt employee, that he should have been reclassified, or that UPS should have paid him any**
7 **additional premium for long hours or missed meal periods or rest breaks"** – **GRANTED:** UPS
8 seeks to exclude testimony or other evidence of plaintiff's beliefs or opinion regarding his classification
9 or his meal and rest breaks claims. The Court agrees that such opinions would be irrelevant and not
10 proper under FRE 702. However, plaintiff can testify regarding his actual experience as a UPS
11 employee, including the number of hours he worked and the nature and division of his tasks.

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13 **No. 6: Motion to exclude "me too" testimony or other evidence regarding non-parties'**
14 **duties, hours, and meal/rest breaks – GRANTED in part:** UPS seeks to preclude plaintiff from
15 putting on "me too" witnesses to testify about their (mis)classification, overtime hours, and missed meal
16 and rest breaks. The Court agrees that evidence that other employees were misclassified, standing alone,
17 would be irrelevant. However, if UPS offers evidence to the effect that plaintiff was not performing his
18 job in accordance with UPS's expectations, it would be relevant that other employees who held the same
19 positions performed in the same way, consistent with expectations.

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21 **No. 7: Motion to exclude evidence and argument concerning any witness or document that**
22 **was not identified in the parties' initial disclosures or timely supplements thereto – DENIED:** UPS
23 objects to use of specific documents (Bates numbered PL-LOPEZ-81 through PL-LOPEZ-171) because
24 of late identification. The challenged documents were produced by UPS to plaintiffs in the *Marlo*
25 litigation and were used in the *Marlo* litigation, which went to trial on May 5, 2009. Defendants have
26 not demonstrated prejudice due to late identification. UPS also seeks to exclude three witnesses who
27 were not mentioned in plaintiff's initial disclosures: Carolina Gomez, Denise Cibotti, and Janelle
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1 Willis.² According to UPS, it had no notice that plaintiff intended to call these witnesses until he
2 disclosed their names in March 2010, four months after the close of discovery. Plaintiff counters that
3 his delay was justifiable because his witnesses did not agree to testify until just recently due to fear of
4 reprisal by UPS. More fundamentally, these witnesses are UPS' own present or former employees and
5 may therefore be interviewed at any time. If, as defendant suggested at the pretrial conference, one or
6 more of these witnesses refuses to talk to UPS prior to trial, UPS may take such witnesses' deposition.

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8 **No. 8: Motion to exclude evidence and argument that UPS waived the Motor Carrier Act**
9 **defense by paying overtime to its hourly drivers – GRANTED:** Plaintiff argued in his brief in
10 opposition to UPS's summary judgment motion that UPS waived its Motor Carrier Act ("MCA")
11 defense by paying overtime to its hourly drivers. The summary judgment order found that plaintiff's
12 waiver argument was "unsupported." UPS now moves to exclude evidence or argument to the effect
13 that UPS waived its MCA defense by paying overtime to its hourly drivers. The motion is granted
14 because UPS cannot have waived its MCA defense with respect to plaintiff by paying overtime to its
15 hourly drivers, who are subject to a CBA between UPS and the Teamsters' Union. Plaintiff himself
16 admits that he was situated very differently from the hourly drivers, driving package cars only on "rare
17 and infrequent occasions."

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28 ² UPS's motion initially named a fourth witness, Andromeda Brooks, but UPS later filed a
supplemental declaration stating that Ms. Brooks' identity was revealed during plaintiff's deposition.

IT IS SO ORDERED.


SUSAN ILLSTON
United States District Judge