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UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE

NICHOLAS McKEE, Individually )  
and on Behalf of All Other )  
Persons Similarly Situated, )

Plaintiff, )

vs. )

No. 12-cv-01117(SLR)

PETSMART, INC. )

Defendant. )

VIDEOTAPED DEPOSITION OF SHANE BURRIS  
PURSUANT TO RULES 30(B)(6) AND 30(B)(1)

Phoenix, Arizona  
September 17, 2014  
9:01 a.m.

Reported by:  
SHANNON STEVENSON, RPR, CCR  
Certificate No. 50461

1 company relied on this 2004 FLSA compliance in reviewing  
2 the classification of OM positions.

3 MR. VOSS: Right. And we're not going to  
4 disclose what the company may have done in reliance on  
5 legal advice.

6 MS. RUDICH: So, are you waiving your defense,  
7 your good faith and willfulness defense?

8 MR. VOSS: No, absolutely not.

9 MS. RUDICH: You believe that you don't have to  
10 tell what the company relied upon in making its  
11 classification decisions or continuing the classification  
12 of OMs as exempt, but you could still keep your  
13 willfulness and good faith defense?

14 MR. VOSS: Absolutely. This witness has  
15 testified and will continue to testify with respect to  
16 the efforts that have been undertaken by this witness --

17 MS. RUDICH: He's here about 30(b)(6) about  
18 good faith and willfulness.

19 MR. VOSS: Right.

20 MS. RUDICH: He's here for the company.

21 MR. VOSS: Right.

22 MS. RUDICH: So whether he personally or  
23 whether the company did, that's what he's here to testify  
24 on.

25 Q BY MS. RUDICH: Let me ask you: What did the

1 company rely upon in determining whether they were in  
2 compliance with the FLSA for operations manager?

3 MR. VOSS: Object to the question.

4 Mr. Burris, you may answer the question but you  
5 may not disclose what the company may have done in  
6 reliance upon legal advice.

7 THE WITNESS: So, can you bound that by time  
8 frame, please.

9 Q BY MS. RUDICH: Ever. What did the company do  
10 to determine that they were in compliance with the FLSA  
11 as it related to the operations manager position?

12 MR. VOSS: It may be helpful to specify a time  
13 period.

14 Q BY MS. RUDICH: Since 2004.

15 A I can't speak on specifics of what was  
16 necessarily everything that was relied upon prior to my  
17 time. I can tell you that the determination prior to my  
18 time was based on knowledge held by those associates who  
19 were in place at that time that the determination was  
20 made that the operations manager was exempt.

21 Q And how was that determination made?

22 A I would have to make assumptions about how that  
23 determination was made. But I would suspect that the  
24 person who was in charge of compensation at that time  
25 would have had discussions with operations and other

1 people in the organization including field management and  
2 operations management as well as store visits to  
3 determine what the proper classification was.

4 Q That's the only thing?

5 A Again, I wasn't there at that time, so I don't  
6 know specifically what was absolutely relied upon to make  
7 that determination.

8 MR. VOSS: Don't disclose any communications or  
9 reliance upon legal advice.

10 THE WITNESS: I can suppose that those types of  
11 things were relied upon because that is what I would rely  
12 upon in making a classification determination.

13 Q BY MS. RUDICH: So, you wouldn't rely on legal  
14 counsel?

15 MR. VOSS: Object to the question.

16 And don't disclose reliance upon legal advice.

17 MS. RUDICH: I'm not asking what it was.

18 Q BY MS. RUDICH: I'm saying, you would not rely  
19 on legal advice?

20 A Not necessarily.

21 Q You might rely on legal advice?

22 A I might.

23 Q Have you?

24 MR. VOSS: Object to the form.

25 Instruct the witness not to answer that

1 question.

2 MS. RUDICH: You are instructing him not to  
3 answer if he relied on legal advice when determining  
4 whether the operations manager --

5 MR. VOSS: Correct.

6 Q BY MS. RUDICH: You are here today to  
7 testify -- is PetSmart asserting that any violation of  
8 the FLSA is not willful within the meaning of the FLSA?

9 A Yes.

10 Q What's the basis for that defense?

11 A That due diligence was done in order to  
12 determine the exemption status of the FLSA.

13 Q What due diligence was done?

14 A Again, if you are asking time bound around  
15 2005, what would have in my mind been used would have  
16 been interviews and information with the leadership of  
17 operations, the field leadership, store managers, perhaps  
18 talks with other operations managers. That's an  
19 assumption on my part.

20 Q What did you do to educate yourself as to the  
21 basis for that -- for PetSmart's -- for PetSmart's  
22 assertion that the violation of FLSA was not willful?  
23 You're here to testify regarding those. You are not here  
24 to make assumptions, you are here to identify on behalf  
25 of PetSmart and you were under an obligation to educate

1 telling you is that I know Ralph had worked on reviewing  
2 the exemption statuses of operations managers sometime in  
3 the time frame, the 2005, 2006, and the outcome of his  
4 review was an exemption status of exempt for operations  
5 managers.

6 Q BY MS. RUDICH: Have you ever spoken to Ralph  
7 Marong about the classification of operations managers?

8 A Gosh. I can't say that I have specifically  
9 spoken to Ralph about the specific job of operations  
10 manager. I have spoken to Ralph when I came into the  
11 organization about their typical processes and how they  
12 work with other teams and with what other teams they work  
13 when determining job descriptions, classifications,  
14 et cetera.

15 MS. RUDICH: Just mark that last -- we're going  
16 to call the judge as soon as the judge is available about  
17 the question about reliance. The one where -- I'll ask  
18 it now so that we get it.

19 Q BY MS. RUDICH: Did PetSmart rely on the 2005  
20 review of operations managers in California in  
21 determining whether operations managers were properly  
22 classified as exempt?

23 MR. VOSS: Object to the question.

24 Instruct the witness not to answer.

25 Q BY MS. RUDICH: Did PetSmart rely on the 2011,

1 2012 exempt management time study in determining whether  
2 or not operations were properly classified?

3 MR. VOSS: Object to the question.

4 Instruct the witness not to answer that  
5 question because it impliedly discloses attorney-client  
6 privilege communications.

7 Q BY MS. RUDICH: Did PetSmart rely on the 2010  
8 FLSA compliance review of the operations manager position  
9 in determining whether or not operations managers were  
10 properly classified?

11 MR. VOSS: What's the document?

12 MS. RUDICH: It's on the privilege log, Andrew.

13 MR. VOSS: Can I see it?

14 I instruct the witness not to disclose any  
15 purported reliance on privileged communications between  
16 the company and counsel relative to the exemption status.

17 MS. RUDICH: Relative to the 2010 compliance  
18 review of operations -- FLSA compliance review of  
19 operations manager position?

20 MR. VOSS: Correct. The witness is not to  
21 disclose whether or not the employer relied upon the  
22 advice of counsel with respect to the exemption status  
23 because we are not waiving that privilege.

24 MS. RUDICH: I understand that.

25 Q BY MS. RUDICH: So, were you aware of FLSA

1 of conformity.

2 MS. RUDICH: I understand his answer, Andrew.

3 You can answer it.

4 Q BY MS. RUDICH: They're classified as exempt  
5 based upon what their duties and responsibilities are;  
6 correct?

7 A Yes.

8 Q And you know what their duties and  
9 responsibilities are based upon what you just testified  
10 about, your conversations with people in the organization  
11 including legal as well as document -- as well as your  
12 own visits; correct?

13 MR. VOSS: Object to the form of the question.  
14 Don't disclose communications you've had with legal.

15 MS. RUDICH: I'm not asking --

16 THE WITNESS: My understanding includes  
17 numerous things, including personal observation as well  
18 as discussions I've had with various people in the  
19 organization including store operations, human resources,  
20 legal, finance, field operations.

21 Q BY MS. RUDICH: And you based your decision to  
22 continue classifying them as non-exempt based on these  
23 conversations; correct?

24 MR. VOSS: Object to the form of the question.  
25 Instruct you not to disclose by implication or otherwise



1 any communications you had with legal.

2 THE WITNESS: Based on all of the input that I  
3 have, yes. There was never a decision to further review  
4 operations managers exemption classification.

5 Q BY MS. RUDICH: Right.

6 A And we have maintained the classification as  
7 exempt consistently since my tenure with the company.

8 Q And based upon all the input you just testified  
9 about?

10 A Yes.

11 Q And the job description for all operations  
12 managers lists the same group of primary duties for them;  
13 correct?

14 A Correct.

15 Q Now, I want to ask you to look at Paragraph 7.  
16 You said that -- it's your understanding that PetSmart  
17 engaged outside counsel to conduct a privileged analysis  
18 of the operations manager position for compliance with  
19 California's wage and hour law; correct?

20 A Yes.

21 Q How did you come to understand that?

22 A By conversations with legal counsel.

23 Q And how did you come to understand that outside  
24 counsel prepared a privileged memorandum addressed to  
25 PetSmart's in-house counsel memorializing its analysis?