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**ENDORSED
FILED
ALAMEDA COUNTY**

JUN 26 2007

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CLERK OF THE SUPERIOR COURT
By E. Opelski-Erickson, Deputy

LISA CONNELL, et al,

No. RG06-252310

Plaintiffs,

ORDER GRANTING IN PART MOTION OF
PLAINTIFF FOR CLASS CERTIFICATION

v.

Date: June 20, 2006

SUN MICROSYSTEMS, INC., et al,

Time: 10:00 a.m.

Dept.: 22

Defendants.

The motion by Plaintiff Lisa Connell for class certification came on regularly for hearing on June 20, 2007, in Department 22, the Honorable Bonnie Sabraw, presiding. Plaintiff and Defendants appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED that Plaintiff's motion for class certification is GRANTED IN PART.

FACTUAL BACKGROUND

This is a purported class action by level 1, 2, and 3 Systems Support Engineers (SSEs) and level 1, 2, and 3 Technical Support Engineers (TSEs) who are or were employed by Sun Microsystems. Plaintiff alleges that the level 1, 2, and 3 SSEs and TSEs at Sun are non-exempt employees who are entitled to benefits under the California Labor Code and otherwise. Sun asserts that SSEs and TSEs are exempt employees.

1 TSEs. Sun provides technical support by phone and e-mail to its customers. Sun's
2 routine technical support calls are handled by Tier 1 employees. If the Tier 1 employee cannot
3 resolve a problem, then he or she refers the matter to a Technology Service Centers, where a TSE
4 is assigned to assist the customer. TSEs work at the Technology Service Centers and are
5 specialized by type of technology. TSEs provide technology assistance to customers regarding
6 the use of existing Sun systems. TSEs do not design computer hardware, software, or networks.
7 Because each customer problem is different, what TSEs do varies on a day by day and customer
8 by customer basis. In addition, some TSEs work outside a Technology Service Center and have
9 different responsibilities. Sun does not pay TSEs additional compensation if they work outside
10 the normal schedule.

11 SSEs. Sun provides on-site customer support through its Field Service Organization.
12 Sun's routine technical support service calls are handled by field engineers. More complex on-
13 site work is performed by SSEs. SSEs are not specialized by type of technology and are expected
14 to have a thorough knowledge of Sun technology. In their reactive role, SSEs provide
15 technology assistance to customers. In their monitoring role, SSEs assist customers in making
16 sure that systems function properly. Some SSEs act as customer liaisons. Some SSEs are Areas
17 SSEs or Global Fly-and-fix SSEs. Sun pays SSEs additional compensation if they work outside
18 the normal schedule.

19 TSEs and SSEs are have different managers, reporting structures, schedules, and pay
20 structures. (Milan Dec, para 3-6) Plaintiff Connell was a TSE.

21
22 **ASCERTAINABILITY AND NUMEROSITY**

23 Plaintiff proposes a class of all level 1, 2, and 3 SSEs and TSEs at Sun during the relevant
24 time frame. Sun does not contest the ascertainability requirement.

1 The proposed class of TSEs includes 32 level 1 TSEs, 76 level 2 TSEs, and 126 level 3
2 TSEs, for a total of 234 persons in the proposed TSE class. This is sufficiently numerous to
3 warrant a class action.

4
5 COMMON QUESTIONS OF LAW AND FACT - LEGAL FRAMEWORK.

6 Plaintiff's burden on moving for class certification is not merely to show that some
7 common issues exist, but, rather, to place substantial evidence in the record that common issues
8 *predominate*. ... "[T]his means 'each member must not be required to individually litigate
9 numerous and substantial questions to determine his [or her] right to recover following the class
10 judgment; and the issues which may be jointly tried, when compared with those requiring
11 separate adjudication, must be sufficiently numerous and substantial to make the class action
12 advantageous to the judicial process and to the litigants.'" *Lockheed Martin Corp. v. Superior*
13 *Court* (2003) 29 Cal. 4th 1096, 1108. "The ultimate question in [class actions] is whether . . . the
14 issues which may be jointly tried, when compared with those requiring separate adjudication, are
15 so numerous or substantial that the maintenance of a class action would be advantageous to the
16 judicial process and to the litigants." *Lockheed Martin*, 29 Cal. 4th at 1104-1105.

17 It is not necessary that every member of the proposed class be exposed to the allegedly
18 wrongful practice and the practice was either consistently lawful or unlawful as to all members of
19 the class. The Court can certify a class based on a demonstration of partial commonality. *Sav-*
20 *On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, addresses this in several places,
21 stating, "Predominance is a comparative concept," 34 Cal. 4th at 334, that the community of
22 interest requirement does not mandate that class members' claims be uniform or identical, 34
23 Cal.4th at 338, that the "logic of predominance" does not require a plaintiff to prove that a
24 defendant's policy was "either right as to all members of the class or wrong as to all members of
25 the class," 34 Cal. 4th at 338, and "the established legal standard for commonality . . . is
26 comparative," 34 Cal.4th at 339.

1 The determination of how much commonality is enough to warrant use of the class
2 mechanism requires a fact specific evaluation of the claims, the common evidence, and the
3 anticipated conduct of the trial. For example, it can be appropriate to certify a class of women to
4 pursue claims for sex discrimination where an employer has a pattern of denying promotions to
5 women even though not all women were denied promotions. *Stephens v. Montgomery Ward*
6 (1987) 193 Cal.App.3d 411, 416 fn1. In situations where the practice might have affected the
7 members of the class in different ways, the Court can make some limited inquiry into whether the
8 plaintiff has an isolated claim or whether there are numerous similar incidents. *Int'l Bhd. of*
9 *Teamsters v. United States* (1977) 431 U.S. 324, 336 (defining “pattern or practice”). This can
10 take the Court close to a merits analysis. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 332.

11
12 COMMON QUESTIONS OF LAW AND FACT - ANALYSIS.

13 Commonality is determined with reference to the claims asserted. *Hicks v. Kaufman and*
14 *Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 fn 22. At trial, Sun will be required to
15 demonstrate that the employees fall within one or more of the exemptions. Sun has not
16 committed to a certain defense and states that it might defend under one or a combination of
17 exemptions. (Def. Oppo at 30:5-16.) 8 Cal. Code Regs. 11040 contains many subsections and
18 potential exemptions. It is unclear whether California law permits a defense based on a “mixed
19 exemption.” The Court considers how TSEs and SSEs actually spent their time, Sun’s
20 expectations as reflected in its job descriptions, and the common nature of Sun’s decision to
21 classify all TSEs and SSEs as exempt.

22 First, the Court considers how TSEs and SSEs actually spent their time. *Ramirez v.*
23 *Yosemite Water Co.* (1999) 20 Cal. 4th 785, 802 (court “should consider, first and foremost, how
24 the employee actually spends his or her time”). The Court has considered the declarations
25 presented by Plaintiff and Defendant. Plaintiff stresses that although the work of the TSEs and
26 SSEs varied day by day, the declarations demonstrate that the TSEs and SSEs routinely spent

1 over 50% of their time on non-exempt functions. (Pltf Reply at 5 fn 4.) Sun stresses the
2 different work performed each day by each employee. Sun's witnesses also all state that their
3 managers provided little to no oversight or input into how they operated on a daily basis. The
4 Court's review of the TSE declarations suggests that although the work of the TSEs varied, there
5 was a common experience of spending most of the time on solving problems for customers. The
6 Court's review of the SSE declarations suggests that there was greater variety in the nature of the
7 work. In reading the declarations, the Court has focused on the testimony that concerns SSE and
8 TSE levels 1-3.

9 The common or differing nature of the work is crucial to the Court's commonality
10 analysis. As noted in *Dunbar v. Albertson's, Inc.* (2006) 141 Cal. App. 4th 1422, 1431-1432, the
11 Court's focus is on not just the presence or absence of individual issues but the *nature* of those
12 issues and how significant they will be to the conduct of the trial. It is not relevant to class
13 certification whether all of the TSEs and SSEs might win on the merits because they routinely
14 spent over 50% of their time on non-exempt functions and all are non-exempt. It is also not
15 relevant to class certification whether all of the TSEs and SSEs might lose on the merits because
16 their work involves complex and highly technical problem analysis. These are relevant to the
17 merits determinations of each TSE and SSE, but do not address the commonality question posed
18 at class certification.

19 With apologies to General Motors, the Court tries an analogy. Assume five General
20 Motors vehicles that are allegedly defective – (1) a red Chevrolet Cobalt with defective wheels,
21 (2) a yellow Pontiac Grand Prix with defective brakes, (3) a green Hummer H2 with a defective
22 engine, (4) a blue Buick LeSabre with defective seatbelts, and (5) a violet Cadillac Escalade with
23 a defective transmission. Although all five vehicles might be defective and all five owners might
24 prevail at trial, the common fact of some defect would not support class certification. Likewise it
25 would not support class certification if all the vehicles were red or if all the vehicles (Cobalt,
26 Grand Prix, H2, etc.) had the same type of defect (a defective engine). Commonality for

1 purposes of class certification would exist only if the commonality was material to the elements
2 of the claim. Therefore, a class of persons who own Cadillac Escalades of any color or body
3 style might be appropriate if they all had the same transmission model and the claim was about
4 the quality of the transmission. As applied to this case, Plaintiff's merits argument is off the
5 mark because even if all the member of the putative classes (the vehicle owners) might win in
6 individual cases, the evidence would not be common and the class members might not win for
7 the same reasons.

8 Second, this Court considers Sun's expectations as reflected in its job descriptions for the
9 TSEs and SSEs. *Sav-on*, 34 Cal.4th at 336-337 (noting common issues such as "the employer's
10 realistic expectations" and "the actual overall requirements of the job"). The job descriptions
11 suggest the degree of autonomy and thus commonality or lack of commonality in the work
12 actually performed. The job descriptions for TSEs suggest that they had very limited decision
13 making ability. Under "Freedom to Act," TSE level 1 states, "[blank]," level 2 states, "Makes
14 decisions within broadly defined practices. Recognizes problem severity and determines when
15 additional resources or escalation is necessary," and level 3 states, "Works under general
16 direction, independently determines and develops approaches to solutions." Gertler Dec., Exh.6.
17 These job descriptions suggest that the jobs had the common factors that they did not require the
18 exercise of discretion and independent judgment. This suggests that "classification based on job
19 descriptions alone [may have] resulted in widespread de facto misclassification." *Sav-on*, 34
20 Cal.4th at 329. In contrast, the job descriptions for SSEs suggest that at levels 2 and 3 they had
21 significant decision making ability. Under "Freedom to Act," SSE level 2 and 3 both state,
22 "Generally able to make difficult decisions which may impact customer operations." Gertler
23 Dec., Exh.6.

24 Third, Sun made a single policy decision to classify all the TSEs and SSEs as exempt.
25 This was done because Sun considered the TSEs and SSEs to be engineers. There is no
26 evidence that Sun ever considered categories of exemptions in making this decision. Some

1 courts have relied on similar employer classification decisions to find there is “absolute
2 commonality” because the classification decision is applied equally to all class members and is
3 therefore consistently lawful or unlawful as to all class members. *Wang v. Chinese Daily News,*
4 *Inc.* (C.D. Cal., 2005) 231 F.R.D. 602, 612-613. The employer’s decision making process is
5 relevant where there is “evidence that deliberate misclassification was defendant’s policy and
6 practice.” *Sav-on*, 34 Cal.4th at 329. There is no evidence in this case of deliberate
7 misclassification. On the facts of this case, Sun’s reasoning is irrelevant to the Court’s decision
8 because the proper classification of an employee will depend on what the employee does, not on
9 Sun’s motivations.

10 Plaintiff has demonstrated that the claims by the level 1-3 TSEs are sufficiently common
11 to permit classwide resolution. There is substantial evidence that the character of the work
12 performed by the level 1-3 TSEs was similar from person to person in that TSEs spent 20-40% of
13 their time on customer communications and 30-50% of their time on research and analysis. The
14 details of what any given TSE did on any given day differed, but the nature of the work appears
15 to be consistent. There were some TSEs who fell outside the above parameters, but not enough
16 to suggest that the claims of the TSEs would not benefit from common treatment. In addition,
17 Sun’s expectations as stated in its job descriptions suggest that the work performed by the level
18 1-3 TSEs was relatively routine. Plaintiff has demonstrated an adequate basis for extrapolating
19 the testimony of the level 1-3 TSE trial witnesses to the class of absent level 1-3 TSEs.

20 Plaintiff has not demonstrated that the claims of the level 1-3 SSEs are sufficiently
21 common to permit classwide resolution. The declarations suggest that the character of the work
22 performed by the level 1-3 SSEs varied materially from person to person. In addition, Sun’s
23 standard job descriptions suggest greater responsibility and thus variation. The Court finds that it
24 would not be appropriate to extrapolate the testimony of the 1-3 SSE trial witnesses to a class of
25 absent level 1-3 SSEs.

1 TYPICALITY AND ADQUACY OF REPRESENTATION.

2 Lisa Connell is an adequate class representative for the TSE class and she has retained
3 competent counsel.

4 Lisa Connell is not an adequate class representative for the SSE class as the work
5 performed by SSEs is different in nature than the work performed by TSEs.

6
7 POLICY CONSIDERATIONS.

8 The TSEs, Sun, and the Court will benefit from a class action by resolving all the claims
9 in a single proceeding.

10 The lack of a class action will not deprive the SSEs of an effective remedy. There is a
11 relatively simple administrative procedure for handling individual claims. Labor Code 98.

12
13 TRIAL MANAGEMENT.

14 The Court's ultimate concern is whether it can extrapolate findings from the trial
15 witnesses to the absent class members while protecting the due process rights of all the parties.
16 To achieve that end, the Court can devise "pragmatic procedural devices" and "innovative
17 procedural tools" to structure a trial that provides significant benefits to the parties and the Court.
18 *State of California v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460, 471. If the Court has concerns
19 about trial management, the Court can consider at the class certification stage how the case can
20 be tried effectively. *Washington Mutual Bank v. Superior Court* (2001) 24 Cal. 4th 906, 923
21 ("the presentation must be sufficient to permit the district court, at the time of certification, to
22 make a detailed assessment of how the difficulties posed by the variations in state law will be
23 managed at trial").

24 Plaintiff did not address the issue of trial management. If the case proceeds to trial the
25 Court is tentatively not inclined to have a class trial on a limited set of common issues followed
26 by individualized hearings where individual TSEs could make claims. *Sav-on*, 34 Cal.4th at 339-

1 340; *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 360-361. A class trial on a
2 limited set of common legal issues would not appear to be particularly beneficial if even after
3 resolving the common issues, every member of the alleged class would still be required to litigate
4 numerous and substantial questions determining his or her individual right to recover. *Dunbar*,
5 141 Cal. App. 4th at 1431-1432. If adversarial individualized hearings are required, then the
6 class action is not providing any efficiencies given that Labor Code 98 already provides hearings
7 that are supposed to be a “speedy, informal, and affordable method of resolving wage claims.”
8 *Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 947. There is little point in substituting
9 a Court supervised adversarial hearing procedure for the legislatively created adversarial
10 administrative procedure.

11 The Court is tentatively inclined to have a class trial that takes an overall aggregate
12 approach to both liability and damages and can somehow determine what total damages Sun
13 might owe to the class taking into account the possibility that only some TSEs may have been
14 non-exempt some of the time. *Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 746-
15 753 (discussion of trial management and use of statistics to prove damages). The Court could
16 then supervise a subsequent nonadversary procedure to make sure the right amounts of money (if
17 any) is distributed to the right TSEs. *In re Cipro Cases I & II* (2004) 121 Cal. App. 4th 402, 417.

18 In the near future counsel for Plaintiff will be required to present a trial plan that protects
19 the interests of the absent class members and Sun and provides benefits to the Court. The Court
20 will consider any reasonable proposals for innovative trial management. See, e.g., Orders dated
21 9/13/06, 11/29/06, and thereafter in *Rafiqzada v. U.S. Bank*, Alameda Case #2001-035537.

22
23 **CLASS DEFINITION.**

24 The Class is defined as: “All persons who, at any time from January 25, 2002, through
25 June 20, 2007, were (1) employed by Sun Microsystems, (2) worked primarily at a Sun
26

1 Microsystems facility located in California, and (3) held the positions of Technical Support
2 Engineer Level 1, 2, or 3.”

3
4 EVIDENCE

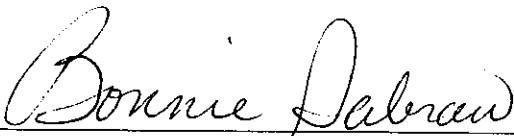
5 The Court has considered all the declarations submitted, as well as the exhibits attached
6 thereto. The Court’s consideration of the evidence is limited to the motion for class certification
7 and should not be construed as an indication of admissibility in future motions or at trial.
8

9 FURTHER PROCEEDINGS

10 The Court sets a case management conference for July 24, 2007, at 2:00 pm. The CMC
11 statements must address and make specific proposals regarding (1) whether class notice should
12 be required; (2) the content and distribution of class notice, (3) payment of the cost of class
13 notice, and (4) when class notice should be sent. Counsel should meet and confer on these issues
14 before filing their CMC statements. The Court anticipates issuing an order on class notice
15 following the next CMC.

16 The Court also anticipates discussing (5) how much additional discovery is necessary to
17 prepare for trial, (6) motion practice, (7) trial scheduling, and (8) trial structure.
18

19 Dated: June 25, 2007



Judge Bonnie Sabraw

Case Title/No.: **CONNELL VS. SUN MICROSYSTEMS, INC.**
RG06252310

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the Alameda County Superior Court and not a party to this cause. I served this ORDER GRANTING IN PART MOTION OF PLAINTIFF FOR CLASS CERTIFICATION by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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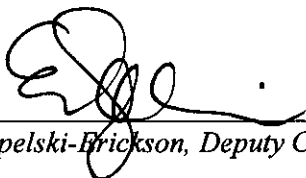
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Dated: June 26, 2007

Executive Officer/Clerk of the Superior Court

By



Elizabeth Opelski-Brickson, Deputy Clerk