

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/10/11

DEPT. 33

HONORABLE CHARLES F. PALMER

JUDGE M. FAUNE

DEPUTY CLERK

HONORABLE #

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. KINNEY, C.A.

Deputy Sheriff NONE

Reporter

3:00 pm BC424012

Plaintiff
Counsel

NO APPEARANCES

SHANE UPSON
VS
SUR LA TABLE INC

Defendant
Counsel

NON-COMPLEX (10-27-09)

NATURE OF PROCEEDINGS:

COURT'S RULING ON MATTER TAKEN UNDER SUBMISSION

The motion of plaintiffs Shane Upson ("Upson") and David Gronsky ("Gronsky") (collectively, the "plaintiffs") for class certification is GRANTED. The parties are ordered to meet and confer concerning the substance of a case management order, including whether the methodology proposed by Dr. Drogin is appropriate. The court sets a case management conference for June 30, 2011, 8:30 a.m.

Having considered the written and verbal submissions of the parties and the admissible evidence, and having taken the matter under submission, the court makes the following rulings and findings:

Ascertainability

Plaintiffs propose the following class definition: "All California-based store employees who worked at any time during the four years preceding the filing of the complaint up until the present at any retail store in the State of California owned, operated and/or acquired by defendant Sur La Table, Inc. ("SLT")."

SLT does not challenge the ascertainability of the class and the court finds the class definition

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to be clear, utilizing objective language, and that the class is readily identifiable from SLT's records.

Numerosity

The court finds the class sufficiently numerous in that at least 61 putative class members have been identified by plaintiffs.

Typicality

Having reviewed the plaintiffs' declarations submitted in support of the present motion, the court finds that plaintiffs Shane Upson and David Gronsky are typical of the members of the class. SLT's assertion that the Shane Upson and David Gronsky are not typical because his experiences differs from the experiences of the other class members improperly focuses on the specific facts from which the claims and defenses arise. See *Seastrom v. Neways, Inc.* (2007) 147 Cal.App.4th 1496, 1502. The fact that plaintiffs were both discharged by SLT does not necessarily render them atypical.

Adequacy

The court finds Shane Upson and David Gronsky to be adequate class representatives and plaintiffs counsel to be adequate class counsel.

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Commonality and Superiority

"The ultimate question in every [purported class action] is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." Brown v. The Regents of the University of California (1984) 151 Cal.App.3d 982, 989.

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] "A trial court ruling on a certification motion determines 'whether the issues which may be jointly tried, when compared to those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process. [Citation.] Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326.

"Plaintiffs' burden on moving for class certification is not merely to show that some common issues exist, but rather to place substantial evidence in the record that common issues predominate. As we previously have explained, 'this means each member must not be required to

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individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.'" (Citations omitted). Lockheed Martin Corp. v. Superior Court (2003) 29 Cal.4th 1096, 1108.

In making the following findings, the court is guided by the analytic framework and substance of the California Supreme Court's decision in Save-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319.

The court has carefully reviewed the admissible evidence submitted by the parties including, among other things, the declarations of plaintiffs, the declarations of present and former SLT store managers submitted by plaintiffs and SLT, the deposition excerpts of SLT executives and corporate designees, the deposition excerpts of plaintiffs, the deposition excerpts of present and former SLT store managers submitted by plaintiffs and SLT, and the SLT job description for store managers.

There is a conflict in the evidence as to whether store managers in fact spend a majority of their working time on exempt or non-exempt tasks.

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Plaintiffs have submitted 13 declarations of store managers or former store managers testifying that they spend or spent varying percentages of their work time doing tasks generally performed by hourly employees, but all well in excess of 50%. Each of the declarations submitted by plaintiffs, by way of example, specify a list of such tasks which varies somewhat from declaration to declaration. For instance, William Pedrotti, a former store manager of the Farmers Market at the Grove store declared that his job duties consisted of mainly the same tasks that the hourly employees completed and that he spent 70 to 75% of his time on the sales floor setting up displays, maintaining the displays, and making changes on the displays; helping customers, answering questions about products, making product suggestions, making sales, assisting with cleaning; organizing the stock room; working the cash registers to complete sales; restocking shelves, conducting product demonstrations at the store, such as espresso machine demonstrations, knife demonstrations, and food processor demonstrations; and that he frequently made trips to the Grove Farmers Market to purchase produce, such as lettuce, for the product demonstrations.

SLT has submitted 11 declarations of store managers testifying to the effect that they have a great deal of discretion in how they manage their stores, describing the operations of their stores, detailing the tasks that they perform in the course

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of their work as store managers, and describing the characteristics of their stores. A few estimate the percentages of their work time spent performing various managerial tasks and three or four estimate the time spent overall on managerial tasks, ranging from sixty or seventy per cent up to 100%. Only a few of the SLT declarations attempt to quantify the time spent on "non-managerial" tasks, estimating it at less than 50%. In their depositions, five of SLT's declarants effectively testified that they considered all of their working time to be "managerial", including time spent on tasks performed by hourly personnel (e.g., greeting customers, conducting demonstrations, stocking shelves, cleaning rest rooms, etc.) because they were "multi-tasking," i.e., doing managerial work while at the same time as performing non-managerial work. As discussed below, this testimony calls into substantial question the weight to be given the SLT declarations for purposes of determining whether store managers spend a majority of their time performing exempt tasks because, as discussed above and below, under California law, "it would be impossible 'to involve oneself or become occupied' with managerial work while performing other duties." See Division of Labor Standards Enforcement ("DLSE") letter dated January 7, 1993, attached as Exhibit 3 to plaintiffs' Request for Judicial Notice (the "1/7/93 DLSE letter").

With one exception, SLT's declarations do not

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quantify, in hours or percentage, the total amount of time spent by their declarants on a daily, weekly, or monthly basis performing tasks generally performed by the stores' hourly or non-exempt personnel or tasks generally identifiable as exempt, such as working the register or greeting customers. The one exception is Aryan Rida, who testified at her deposition that she spent 20-25% of her time working the cash register, 10-25% of her time selling to customers, 10% or less stocking shelves, 5% of her time or less cleaning, 30% of her time greeting customers, and 10 -15% doing demonstrations for a total of at least 70% of her time doing apparently non-exempt tasks. In any event, the SLT declarations do not directly contest the testimony of plaintiffs' declarants that each of them spent well in excess of 50 per cent of their time performing tasks generally performed by hourly employees.

With respect to the labor budget, the parties agree that SLT has a labor budget which is defined as a percentage of sales and which varies from store to store and by district. Jonathan Schwefel, the President of SLT testified that a certain percentage of the compensation of store managers and a greater percentage of the compensation of district managers was in the form of a bonus and that to qualify for that bonus, one had to meet both the labor budget percentage and the sales goal. The store managers' declarations of plaintiffs and SLT indicate that the

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store managers could request a higher labor budget from the district manager. The declarations submitted by plaintiffs uniformly assert that the district managers generally denied such requests and the effect was that there were chronically not enough hours in the labor budget for non-exempt tasks/positions with the result that the store managers had to perform the non-exempt tasks which the budget did not provide for. SLT's declarations, on the other hand, emphasize the discretion the declarants had to meet all their responsibilities, including the labor budget, and generally minimize the effect of the labor budget on the staffing of their stores. It appears to be undisputed that the work schedules of the individual stores, while proposed by the store managers, were subject to approval by the district manager. There is insufficient evidence before the court to make a determination as to the effect of the labor budget on the number of hours store managers devote to non-exempt tasks. While there is some evidence as to some of the factors which determine the labor budget, e.g. past sales, there is no evidence as to who or what determines the labor budget (except that it is not the store manager), much less whether it results in chronic under-allocation of hours for non-exempt tasks or otherwise requires or influences store managers to devote more of their time to tasks performed by hourly employees. Surprisingly, the court has been unable find any reference in the voluminous papers submitted as to any of these

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questions. While it might be inferred that the labor budget is determined by a computer program or algorithm, there is no direct evidence to that effect. The only evidence as to how the labor budget impacts the allocation of hours for non-exempt tasks to the stores is the testimony of the 13 declarations submitted by plaintiffs that the labor budget restricted their ability to sufficiently staff their stores to perform non-exempt tasks with the result that to meet the labor budget, the declarants had to devote a greater percentage of their time to tasks performed by the hourly employees. This testimony is generally disputed by SLT's declarants, who, as noted, discount the effect of the labor budget on their need to work on non-managerial tasks. The court finds that while the evidence is insufficient to determine presently that the labor budget in fact requires store managers to devote more hours to non-exempt tasks, the evidence is sufficient to determine that the issue of whether it does will be a common issue in litigation of claims of store managers that they have not been paid overtime.

The court finds the following common issues of fact and law: (1) the applicable legal standard for determining whether under California law the executive exemption applies to class members; (2) whether the individual job duties and tasks performed by SLT store managers, as reflected in the uniform job description for all SLT store managers

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or otherwise required of SLT store managers, are exempt or non-exempt duties and tasks; (3) the formula/algorithm or process of determining the labor budget; (4) whether the formula, algorithm, or process by which the labor budget is determined produces district or individual store labor budgets which require or influence store managers to schedule exempt employee hours inadequate to accomplish the exempt tasks, resulting in requiring or influencing store managers to increase the amount of time they personally devote to non-exempt tasks; (5) the extent to which, if any, SLT company-wide policies and procedures eliminate or substantially reduce SLT store manager discretion in carrying out certain job duties and tasks to the extent that such job duties and tasks are rendered non-exempt duties and tasks.

The court finds the following individual issues of fact and law: (1) the calculation of actual overtime hours; (2) the individual work activities by individual SLT store managers during the class period.

The court finds by a preponderance of the evidence that that the common issues predominate and that a class action is superior to alternative means for a fair and efficient adjudication of this litigation. It is undisputed that SLT classified its store managers as exempt without exception and relied solely on the job title and job description

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in defining store managers as exempt and which are non-exempt. It is further undisputed that that SLT has had no compliance program to determine if individually or as a group its store managers spent or spend a majority of their time on exempt tasks. In this regard, the court notes that in Mora v. Big Lots, Inc. (2011) 194 Cal.App.4th 496, Arenas v. El Torito Restaurants, Inc. (2010) 183 Cal.App.4th 723, and Keller v. Tuesday Morning, Inc. (2009) 179 Cal.App.4th 498, three cases relied upon by SLT at the hearing on this motion, the defendants successfully resisting class certification submitted to the court, in addition to the declarations of putative class members, some form of compliance program results or verification study indicating that the putative class or substantial portions of the putative class spent more than 50% of their time performing non-exempt tasks. In Big Lots the defendant submitted an expert report and observation study of 40 randomly selected store managers over a full workweek; in Arena, defendants submitted evidence that they had twice conducted surveys of their managers' in order to determine their exempt or non-exempt status as a group and the surveys indicated that while the time spent on exempt functions varied from manager to manager, they all exceeded 50%; and in Keller, defendants submitted the declaration of an expert to the effect that the managers there performed primarily management work based on videotapes of two store managers during their work shifts. The absence of such a

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verification study in the present case is significant because, as discussed above and below, SLT's declarations, to the extent they contest the declarations submitted by plaintiffs to the effect that all 13 declarants spent more than half their time engaged in tasks performed by hourly personnel, must be discounted because of the declarants' reliance on multi-tasking as a basis for determining a task to be managerial.

Moreover, it is undisputed that no store manager has ever received overtime compensation and it appears from the declarations of the store managers submitted by plaintiffs and SLT that store managers frequently work in excess of forty hours per week.

The court's finding is further based on the representative evidence of the declarations of the 13 former store managers submitted by plaintiffs asserting that each of them spent more than 50% of their time working on tasks performed by hourly employees. While this assertion is contested by the declarations of store managers submitted by SLT, for the reasons discussed above, the court discounts the testimony of those declarants that they spent more than 50% of their time on "managerial tasks" because of the deposition testimony that at least five of the SLT declarants understood and believed that because they were managers engaging in multi-tasking, time spent by them on tasks performed by hourly personnel was managerial. This

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understanding is contrary to California law which is to the effect that one may not be "engaged in" activities which are managerial while at the same time doing a non-exempt task. 1/7/93 DLSE Letter, p.6. More specifically, in the present context, the 1/7/93 DLSE Letter provides, at p.7:

"Any time taken away from production or sales work and devoted to any managerial work is considered managerial work and must be counted. However, the employee may not be 'engaged in' two jobs at once. Thus, a worker employed in a manager position who simply answers a question while continuing to perform production or sales work is not 'engaged in' managerial duties, but is 'occupied or involved in' production work."

Conclusion

Based on the facts and law discussed above, plaintiffs' motion for class certification is granted.

Plaintiffs' request for judicial notice is GRANTED.

Rulings on Plaintiffs' Evidentiary Objections.

- (1) OVERRULED
- (2) OVERRULED
- (3) OVERRULED

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- (4) SUSTAINED
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- (6) OVERRULED
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- (67) SUSTAINED
- (68) OVERRULED
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- (89) SUSTAINED
- (90) OVERRULED.

Rulings on SLT's Evidentiary Objections

SLT's objections are not numbered and are in a format which would create a substantial burden on the court to make its rulings. Accordingly, the

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court is not ruling on individual objections, but states that it has relied on admissible evidence only in making its rulings in this matter. Counsel is referred to California Rule of Court 3.1354 for an example of a format which makes it possible for the court to rule on written objections efficiently.

The Clerk shall give notice by U.S. Mail.


**CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER**

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 6/13/11 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 6/13/11

John A. Clarke, Executive Officer/Clerk

By: _____


M. Faune

<p align="center">MINUTES ENTERED 06/10/11 COUNTY CLERK</p>

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/10/11

DEPT. 33

HONORABLE CHARLES F. PALMER

JUDGE

M. FAUNE

DEPUTY CLERK

HONORABLE
#

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. KINNEY, C.A.

Deputy Sheriff

NONE

Reporter

3:00 pm

BC424012

Plaintiff

Counsel

SHANE UPSON

NO APPEARANCES

VS

Defendant

SUR LA TABLE INC

Counsel

NON-COMPLEX (10-27-09)

NATURE OF PROCEEDINGS:

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MINUTES ENTERED 06/10/11 COUNTY CLERK
