

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

<p>Nicole Lopes et al Plaintiff/Petitioner(s) VS. Kohl's Department Stores, Inc., a Delaware Corporation et al Defendant/Respondent (s)</p>	<p>No. RG08380189 Date: 12/11/2023 Time: 9:00 AM Dept: 21 Judge: Evelio Grillo ORDER re: Hearing on Motion - Other Other Motion for Preliminary Approval of Class Action Settlement filed by Nicole Lopes (Plaintiff) on 11/14/2023</p>
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Prior to the hearing, the Court issued a tentative ruling, which was not contested and was affirmed as set forth below.

The Motion for Preliminary Approval of Settlement filed by Nicole Lopes on 11/14/2023 is Granted.

The Motion of Plaintiff for approval of class and PAGA settlement of wage, wage statement, and other claims is GRANTED.

CASE BACKGROUND

On 4/4/08, plaintiff Lopes filed this case asserting Labor Code violations related to a failure to provide suitable seats on behalf of a class and on behalf of the LWDA under the PAGA. The extensive background in this case is stated in the Orders of 7/27/22, 9/15/22, 11/9/22, and 6/27/23.

The trial has proceeded through four phases. On 9/17/15, Judge Carvill issued a statement of decision on Phase 1. On 11/17/15, Judge Carvill issued an order regarding an accounting of time records, which appears to be Phase 2. On 1/11/16, Judge Carvill issued a statement of decision on Phase 3 dismissing the derivative claims related to wage statements and waiting time penalties. On 4/28/16, Judge Carvill issued a statement of decision on Phase 4. There was a motion for summary adjudication in 2018-2019, but little activity 2019-2022. On 7/6/22, the court granted plaintiff's request to vacate the 1/11/16 statement of decision on Phase 3 to the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

extent it is inconsistent with *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93. (See generally Order entered on 9/15/22 [summary of case].)

On 7/27/22, the court set the trial for phase 5 for 5/15/23. On 11/9/22, the court continued the trial for phase 5 to 8/14/23.

On 11/14/23, plaintiffs filed a motion for approval of the suitable seating claims that plaintiffs asserted on behalf of the LWDA under the PAGA.

On 11/14/23, plaintiffs filed a separate motion for preliminary approval of a class action settlement of Labor Code claims regarding overtime pay, missed rest periods, and wage statements (non-suitable seating claims) that plaintiffs asserted on behalf of the class.

THE SETTLEMENT OF THE CLASS AND LWDA CLAIMS FOR NON-SUITABLE SEATING CLAIMS

The motion of plaintiffs for preliminary approval of class action settlement and PAGA settlement regarding overtime pay, missed rest periods, and wage statements (non-suitable seating claims) is GRANTED.

The complaint alleges various Labor Code claims.

The case preliminarily settled for a total of \$7,000,000.

The settlement agreement states there will be attorneys' fees of up to \$3,000,000 (42.8%), costs of up to \$25,000, service award of \$25,000 to Nicole Lopes and \$20,000, each, to Brian Paradis, and Isaac Bobadilla \$10,000 to each plaintiff, settlement administration costs of up to \$270,000, and a PAGA payment of \$200,000 (net of \$150,000). After these expenses, the amount available to be distributed to the Class would be \$ 3,465,000. Assuming that there are an estimated 100,000 Class Members, the average payment per Class Member would be \$34.65.

The settlement divides the class into two parts. The Class A claims are the class claims that were certified by the Court on May 16, 2014. The settlement allocates 60% of the total to the Class A claims, which is \$2,079,000 after fees and other expenses. The Class B claims are the class claims that were not certified by the Court on May 16, 2014. The settlement allocates 40% of the total to the Class A claims, which is \$1,386,000 after fees and other expenses. The class period for both Class A and Class B is April 4, 2004 to May 16, 2014.

The motion makes an adequate analysis as required by *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116.

The proposed class notice form and procedure are adequate.

The proposed class is appropriate for class certification.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

The scope of the named plaintiff release is appropriate. (Agt para 72) The agreement for the named plaintiff may include a Civil Code 1542 waiver and a release of “individual PAGA claims.”

The scope of the PAGA release is appropriate. (Agt para 57) The agreement releases the LWDA’s claims. The agreement does not release claims by the Aggrieved Employees.

The scope of the class release is appropriate. (Agt para 55, 56.) The scope of the class release must be limited to the claims arising out of the claims in the complaint where the named plaintiffs are typical and can adequately represent the class. (Amaro v. Anaheim Arena Management, LLC (2021) 69 Cal.App.5th 521, 537-538.) The release of claims by the class is limited by the "factual predicate rule." (Hesse v. Sprint Corp. (9th Cir. 2010) 598 F.3d 581, 590.) (See also Hendricks v. Starkist Co (N.D. Cal. 2016) 2016 WL 692739 at * 2-4 [Denying motion for final approval of class settlement because scope of release overbroad].)

The Court notes and approves of the plan to distribute the settlement funds with no claims process.

The unclaimed funds will be distributed to Justice Gap Fund maintained by the State Bar of California. This is consistent with CCP 384. Counsel has not provided a declaration in support of the motion that provides the information required by CCP 382.4. A declaration is not required given the public entity nature of the recipient. (Agt para 61)

The Court will not approve the amount of attorneys' fees and costs until the final approval hearing. The Court cannot award attorneys' fees without reviewing information about counsel's hourly rate and the time spent on the case. This is the law even if the parties have agreed that Defendants will not oppose the motion for fees. (Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438, 450-451.)

"Because absent class members are not directly involved in the proceedings, oversight to ensure settlements are fair and untainted by conflict is the responsibility of both the class representative and the court." (Mark v. Spencer (2008) 166 Cal.App.4th 219, 227.)

"In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. ... [T]horough judicial review of fee applications is required in all class action settlements and the fairness of the fees must be assessed independently of determining the fairness of the substantive settlement terms." (Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 555-556.)

The court sets out its standard analysis below. Counsel may address that analysis in the fee application.

The Ninth Circuit’s benchmark is 25%. (Laffitte v. Robert Half Internat. Inc. (2016) 1 Cal.5th 480, 495.)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

This court's benchmark for fees is 30% of the total fund. (Laffitte v. Robert Half Internat. Inc. (2016) 1 Cal.5th 480, 495; Schulz v. Jeppesen Sanderson, Inc. (2018) 27 Cal.App.5th 1167, 1175; Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 557 fn 13; Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43, 66 fn 11.)

When cross-checking with the lodestar/multiplier, the court will evaluate the lodestar based on reasonable fees that would have been charged at hourly rates and then apply a multiplier. The multiplier includes contingent fee risk and other factors.

When considering risk, the court considers there is less risk in a case with fee shifting statutes because counsel's potential fees are not limited by and coupled to the monetary recovery. "The law does not mandate ... that attorney fees bear a percentage relationship to the ultimate recovery of damages in a civil rights case." (Harman v. City and County of San Francisco (2007) 158 Cal.App.4th 407, 419.) (See also Heritage Pacific Financial, LLC v. Monroy (2013) 215 Cal.App.4th 972, 1006-1007.)

When counsel for the class file their motion for fees, they should consider the following: (1) counsel are seeking fees of \$3,000,000 (42.8%), which is substantially above the court's benchmark; (2) the class period is April 4, 2004 to May 16, 2014, and the settlement will not be final until approximately April 2024, and the delay in bringing the case to a conclusion is a disservice to the members of the class given the probability that many, if not most, have moved in the past 10-20 years and the delay means that the distribution of settlement proceeds might not reach them; (3) there must be some explanation of how time was allocated between the settlement of the suitable seating claims and the settlement of the other claims.

The Court will not decide the amount of any service award until the final approval hearing. Plaintiff must provide evidence regarding the nature of his participation in the action, including a description of his specific actions and the amount of time he committed to the prosecution of the case. (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807.) The court's standard service award is \$7,500.

The Court ORDERS that 10% of any fee award to be kept in the administrator's trust fund until the completion of the distribution process and Court approval of a final accounting.

The Court will set a compliance hearing after the completion of the distribution process and the expiration of the time to cash checks for counsel for plaintiff and the Administrator to comply with CCP 384(b) and to submit a summary accounting how the funds have been distributed to the class members and the status of any unresolved issues. If the distribution is completed, the Court will at that time release any hold-back of attorney fees.

The court will sign the proposed order, which is modified by this order. Plaintiff must reserve a hearing for the motion for final approval.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

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The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated : 12/11/2023



Evelio Grillo / Judge