

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Nicole Lopes et al Plaintiff/Petitioner(s) VS. Kohl's Department Stores, Inc., a Delaware Corporation et al Defendant/Respondent (s)	No. RG08380189 Date: 08/22/2024 Time: 10:55 AM Dept: 21 Judge: Noël Wise ORDER re: Ruling on Submitted Matter filed by Nicole Lopes (Plaintiff) on 07/29/2024
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The Motion for Final Approval of Settlement filed by Nicole Lopes on 07/29/2024 is Granted.

The Court, having taken the matter under submission on 08/20/2024, now rules as follows:

ORDER

The Motion of Plaintiff for final 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 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].)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

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.

On 12/13/23, the court approved a settlement of the suitable seating claims of the LWDA asserted under the PAGA.

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

The motion of plaintiffs for final 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 B 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. 14 Class Members opted out of the release of the Class-B Released Claims, and no Class Members have objected to the Settlement.

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)

APPROVAL OF FEES, COSTS, AND SERVICE AWARD

"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.)

"[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.)

Counsel seeks \$2,141,660.25 in attorneys’ fees and \$858,339.75 in litigation costs, for a combined total of \$3,000,000.

The court starts with its benchmark, then cross-checks with the lodestar, and makes adjustments if the benchmark is significantly different from the lodestar. (Laffitte v. Robert Half Internat. Inc. (2016) 1 Cal.5th 480, 505 [“If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted”].)

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

When using the percentage of recovery approach, this court's benchmark for fees is 30% of a

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

total fund. Courts have benchmarks ranging from 25% to 33%. *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; *Schulz v. Jeppesen Sanderson, Inc.* (2018) 27 Cal.App.5th 1167, 1175.)

The court recently reviewed and reaffirmed its use of a benchmark of 30%. (*Hurtubise v. Sutter East Bay Hosp.* (2021) 2021 WL 11134912.)

The benchmark of 30% of \$7,000,000 suggests fees of \$2,100,000.

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.

Counsel assert they spent 15175 hours on the case. (*Perez Decl.* ¶ 35 [8774 hours]; *Yablonovich Decl.* ¶ 29 [2430 hours]; *Ho Decl.* ¶ 6 [3971 hours].) The court finds that this is reasonable given the lengthy history of the case and the multiple phased trials.

The court finds that a blended rate of \$600 is appropriate for the case. (*Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 708-709 [blended rate of \$550]; *Espejo v. Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 337 [blended rate of \$500/hour]; *569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 438-440 fn 14, fn 16 [blended rate of \$275].) Regarding the amount of the blended rate, the court considers the evidence and its own knowledge and familiarity with the legal market. (*Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 709.) The court takes judicial notice of the rates for counsel in the USAO Fitzpatrick Matrix on “Hourly Rates (\$) for Legal Fees for Complex Federal Litigation in the District of Columbia.” The court takes judicial notice of the Laffey matrix. (<http://www.laffeymatrix.com/>) The court gives little weight to the anecdotal fee awards of other trial judges. Counsel can selectively present fee awards that indicate the highest hourly billing rates.

The court recently reviewed and reaffirmed its use of a blended rate of \$550. (*Harris v. Southern New Hampshire University* (2023) 2023 WL 3605289.)

The court will use a blended rate of \$600 per hour.

This results in a lodestar of \$9,105,000.

The court applies a 1.2 multiplier for risk. 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. With a fee shifting statute, counsel has the risk of proving liability but if counsel proves liability, then the fees shift to the defendant with little to no consideration of the amount of the client's monetary recovery. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1174.) For example, a nominal damage recovery will result in counsel recovering “reasonable attorneys’ fees” that could far exceed the award of damages.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

(Harman v. City and County of San

Francisco (2007) 158 Cal.App.4th 407, 419 [jury awarded plaintiff \$30,300, counsel recovered \$1,113,905.40 in fee-shifted fees]; Heritage Pacific Financial, LLC v. Monroy (2013) 215 Cal.App.4th 972, 1006-1007 [client recovered \$1, counsel recovered \$87,525 in fee-shifted fees].) There was a fee shifting provision. (Labor Code 2699(g)) This results in a multiplier adjusted lodestar of \$10,926,000. This is significantly above what counsel request.

Considering the percentage analysis fees of \$2,100,000 and the multiplier adjusted lodestar fees of \$10,926,000, the court will award fees of \$2,141,660.25. This is what counsel requested. This is close to the court's benchmark. The award of fees is appropriate to compensate counsel in this case, to incentivize the prosecution of meritorious cases, and does not result in an unreasonable windfall to counsel at the expense of their clients.

The court approves costs of \$858,339.75.

The court approves actual settlement administration costs of \$330,000. This is above the \$270,000 amount approved in the preliminary approval. The court approves it because the number of members of the class make this an unusually expensive case for claims administration.

The court approves a service award payment of \$25,000 to Nicole Lopes. The court approves a service award payments of \$20,000, each, to Brian Paradis (deposed), and Isaac Bobadilla (deposed). Plaintiffs provided evidence regarding the nature of participation in the action, including a description of specific actions and the amount of time committed to the prosecution of the case. (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807.)

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.

POSSIBILITY OF A SECOND DISTRIBUTION

The court anticipates that after the initial distribution of funds to the members of the class it might be appropriate to have a second distribution of any residual to the persons who cashed their first checks. The class period of April 4, 2004 to May 16, 2014, suggests that the addresses of many of the class members might be stale and that they will not receive or cash their settlement checks. If the value of the uncashed checks is significant, then the court will be inclined to order a second distribution to the persons who did cash their first checks. (See Del Taco Wage and Hour Cases, JCCP 4904 and Torrez v. Del Taco, 21CV000111, anticipated order of 8/20/24; Williams v. Corovan, RG21085500, Order of 7/9/24; Mendoza v. Prime Now, RG20068286, orders of 5/7/24 and 5/28/24.)

The court ORDERS that in the accounting provided at the conclusion of the first distribution, plaintiffs and the claims administrator are to provide information relevant to the whether a second distribution would be appropriate at that time.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

The court will release the attorney fee holdback at the completion of the complete distribution process.

FURTHER PROCEEDINGS

The Court will set a compliance hearing after the completion of the first 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.

The court ORDERS that at the time of the final accounting that counsel for plaintiff transmit a copy of this order and the final judgment and the final accounting to the Judicial Council. (CCP 384.5; Govt Code 68520.)

Plaintiff may submit a proposed order if necessary. The court will sign any proposed order, which is modified by this order.

Compliance Hearing Re: Final Distribution is scheduled for 02/25/2025 at 01:30 PM in Department 21 at Rene C. Davidson Courthouse.

Clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record.

Dated : 08/22/2024



Noel Wise / Judge

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse