

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

**NAACP NEW YORK STATE CONFERENCE
METROPOLITAN COUNCIL OF BRANCHES,**

INDEX NO. 156382/15
MOTION DATE 09-28-16
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

Plaintiffs,
-against-

**PHILIPS ELECTRONICS NORTH AMERICA CORPORATION,
KONIKLIJKE PHILIPS N.V., NTT DATA, INC., RECALL
HOLDINGS LIMITED, RECALL TOTAL INFORMATION
MANAGEMENT, INC., ADVANCE TECH PEST CONTROL,
and DOES 1-100,**

Defendants,

AND

**MONSTER WORLDWIDE, INC., ZIPRECRUITER, INC.,
INDEED, INC.,**

Joined Defendants.

The following papers, numbered 1 to 10 were read on this Motion for preliminary approval of class settlement, conditional certification of class and approval of notice of settlement:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

<u>PAPERS NUMBERED</u>
<u>1 - 4</u>
<u>5, 6, 7 - 8</u>
<u>9 - 10</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is Ordered that plaintiff's motion for preliminary approval of class settlement, conditional certification of the settlement class, and approval of the proposed notice of settlement, is granted.

Plaintiff brought this class action on behalf of African American residents of the City of New York banned from employment by the defendants because they have a felony conviction. This action seeks a declaratory judgment against the named defendants individually and as representatives of a defendant class of entities that post job openings on the joined defendants' websites. Plaintiff alleges that defendants' practices are unlawful pursuant to the New York City Human Rights Law, and Article 23-A of the New York State Corrections Law. Monster Worldwide, Inc., Ziprecruiter Inc., and Indeed, Inc.'s (hereinafter collectively referred to as "joined defendants") are named as necessary parties solely to further identify the class because their platforms are utilized by the defendant class to disseminate ads that include the blanket felony bans.

Plaintiff alleges that after approximately a month of negotiations, on October 12, 2015, the parties engaged in a full day of mediation with Hunter R. Hughes, a private mediator, culminating in a settlement agreement on April 27, 2016, with Recall Holdings Limited and Recall Total Information Management, Inc. (hereinafter referred to as the "Recall defendants"). Philips Electronics North America corporation, Konikje Philips NV and NTT Data, Inc. (herein after referred to as "defendants") chose not to participate in the proposed settlement.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Plaintiff's motion seeks preliminary approval of class settlement, conditional certification of the settlement class, and approval of the proposed notice of settlement. The proposed settlement seeks to make the Recall defendants representative of the defendant class, and to appoint Ossai Maizad, Esq. and Christopher McNerney, Esq., of Outten & Golden LLP, as counsel for the class as certified. Plaintiff claims that it is willing to pay for an experienced settlement administrator that can be selected by the parties.

CPLR §908 certification for settlement purposes requires that the Court determine whether the settlement is in the best interests of the class members. The same criteria is applied as a class action with additional attention to protect the rights of absent class members that will be bound by the decree (*Jiannaras v. Alfant*, 124 A.D. 3d 582, 1 N.Y.S. 3d 332 [2nd Dept., 2015] *aff'd* 27 N.Y. 3d 349, 52 N.E. 3d 1166, 33 N.Y.S. 3d 140[2016], citing to *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D. 3d 63, 808 N.Y.S. 2d 766 [2nd Dept. 2006]). Objections by those that choose to opt out of the settlement may be taken into consideration (*Hibbs v. Marvel Enterprises, Inc.*, 19 A.D. 3d 232, 797 N.Y.S. 2d 463 [1st Dept. 2005]).

The five criteria that must be met in determining class action status are stated in CPLR §901(a), as follows: "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR §901 and *Small v. Lorillard Tobacco Co.*, 94 N.Y. 2d 43, 720 N.E. 2d 892, 698 N.Y.S. 2d 615 [1999]). Plaintiff argues that all the elements of CPLR §901 are satisfied.

CPLR §901(a)(1), the numerosity requirement, is dependent on the circumstances of each case (*Pesantez v. Boyle*, 251 A.D. 2d 11, 673 N.Y.S. 2d 659 [1st Dept., 1998]). The Court should take into consideration "reasonable inferences and common sense assumptions" of the facts (*Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D. 3d 129, 871 N.Y.S. 2d 263 [2nd Dept., 2008]). A class of approximately forty (40) potential members or larger has typically been deemed sufficient for certification (*Galdamez v. Biordi Construction Corp.*, 13 Misc. 3d 1224(A), 8231 N.Y.S. 2d 347 [N.Y. Sup. Ct., 2006], *aff'd* 50 A.D. 3d 357, 855 N.Y.S. 2d 104 [1st Dept., 2008]).

The numerosity requirement of CPLR §901(a)(1), is satisfied in this action because there are potentially forty (40) defendant class members that have and continue to include no felony job ads on the joined defendants websites. The class is large enough for joinder to be impracticable. Defendants object to the inability to determine the exact size of the class, but this can be rectified through discovery obtained from the joined defendants.

The commonality requirement of CPLR §901(a)(2) is liberally construed and applies to predominance of common issues to members of the proposed class. There is no mechanical test, and factual questions specifically applying to each individual are not fatal to certification (*City of New York v. Maul*, 14 N.Y. 3d 499, 929 N.E. 2d 366, 903 N.Y.S. 2d 304 [2010]).

There are common questions of law and fact for the defendants, more specifically the alleged discrimination that prevents plaintiff's membership from obtaining employment, due to the no felony conviction requirement in the job ads. Each defendants' involvement in creating, posting and disseminating the allegedly discriminatory job ads for the specific period of June 25, 2012 through judgment demonstrates commonality. The job ads and the alleged discriminatory content is the same essential characteristic of the defendants and unnamed defendants class. The Recall defendants as representatives of the defendant class would protect their interests and defenses over that of the plaintiff.

CPLR §901(a)(3), is the typicality of claims requirements, and it applies when the named plaintiffs' claims are derived from the "same course of conduct as the class members claims and are based on the same cause of action" (Pruitt v. Rockefeller Center Properties, Inc., 167 A.D. 2d 14, 574 N.Y.S. 2d 672 [1st Dept.1991]). Potential differences in defenses, underlying facts and amount of damages for each individual claim does not preclude certification (Borden v. 400 East 55th Street Associates, L.P., 105 A.D. 3d 630, 964 N.Y.S. 2d 115 [1st Dept. 2013]).

The typicality and adequate representation requirements of CPLR §901(a)(3) are met by the Recall defendants. The potential defendant class possesses the same interests and potential defenses as the Recall defendants have asserted. There is no conflict of interest because under the terms of the settlement agreement Recall defendants are obligated to protect the interests of the defendant class.

Adequate representation pursuant to CPLR §901(a)(4), requires no conflict of interest between the putative class members and their representatives (Nawrocki v. Proto Constr. & Dev. Corp., 82 A.D. 3d 534, 919 N.Y.S. 2d 11 [1st Dept., 2011]). The adequacy requirement is met because there are no conflicts of interests with the Recall defendants, which are able to assume responsibility for the defendant class and mandated to do so under the settlement agreement. Defendants' objection that there is a conflict of interest, or that there are potentially substantial differences in defenses asserted by the defendant class members, is not substantiated. The factual similarities between the Recall defendants and potential defendant class members in the content and involvement in creating, posting and disseminating the allegedly discriminatory job ads is sufficient similarity for adequate representation.

Pursuant to CPLR §901(a)(5), the parties are required to establish that a class action is the best or most superior method of adjudicating the controversy (Osarczuk v. Associated Universities, Inc., 82 A.D. 3d 853, 918 N.Y.S. 2d 538 [2nd Dept., 2011]). The demonstration that adjudication of issues common to the class will conserve judicial resources and result in disposal of a majority of the claims establishes superiority (Ackerman v. Price Waterhouse, 252 A.D. 2d 179, 683 N.Y.S. 2d 179 [1st Dept., 1998]). Superiority also applies when bringing separate actions for individual class members' claims would not be financially feasible or would result in small recoveries providing no incentive for separate actions (Globe Surgical Supply v. GEICO Ins. Co., 59 A.D. 3d 129, supra).

The superiority requirement of CPLR §901(a)(5), has been met because the proposed settlement will avoid multiple actions and conserve judicial resources resolving the issues common to the defendant class. Proceeding under the settlement class will conserve judicial resources and dispose of the potentially numerous claims from

plaintiff's individual members against the class defendants. The proposed fund will be used to assist plaintiffs members and not as direct payment. Any financial disincentive to asserting claims against individual defendants will be avoided by certification of the class.

Pursuant to CPLR §902, additional factors the Court, "shall consider" in determining whether a lawsuit should be certified a class action are: "(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticality or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action" (CPLR §902 and *Fleming v. Barnwell Nursing Home and Health Facilities, Inc.*, 309 A.D. 2d 1132, 766 N.Y.S. 2d 241 [2nd Dept., 2003]).

The additional factors stated in CPLR §902, do not suggest a different result. There is no economic interest of other defendant class members to avoid this class action under CPLR §902(1). Impracticality or inefficiency of separate actions as stated in CPLR §902 (2) was already addressed in this decision, and is not a block to certification. Defendants and joined defendants vague references to a possibility of other litigation does not, pursuant to CPLR §902(3), avoid the certification of the class. There was no challenged venue under CPLR §902(4). Defendants and joined defendants contentions that pursuant to CPLR §902(5) certification should be denied because of the Recall defendants' inability to manage the individual defendant claims, fails to address the similar legal and factual issues and potentially numerous claims from plaintiff's individual members against the defendant class. Plaintiffs have established they are entitled to class certification pursuant to CPLR Article 9.

The proposed notice of the settlement class pursuant to CPLR §908 is required to be given to all class members, and at minimum should inform the potential members of the class of the pending action, composition of the class, the issues, proposed terms of settlement, the methods of and time to object to the settlement and the date of a fairness hearing, and afford due process protections (In re Colt industries Shareholder Litigation, 155 A.D. 2d 154, 553 N.Y.S. 2d 138 [1st Dept., 1990] affirmed as mod., 77 N.Y. 2d 185, 566 N.E. 2d 1160, 565 N.Y.S. 2d 755 [1991]). The proposed notice of settlement attached to the motion papers (Mot. Exh. B) requires further review to ensure that the preliminary and administrative requirements are met.

The proposed settlement is not collusive or unfair. Plaintiff is entitled to attorney fees as part of the settlement. Plaintiff argues that \$45,000.00 in legal fees, to be paid by each defendant class member with 15 or more employees, as part of the settlement is reasonable, because excess fees and expenses would be subject to cy pres distribution after being placed in a fund for the benefit of the class. Distribution to a fund from which attorney fees and expenses might be obtained has been applied in consumer and civil rights class actions (*Huff v. C.K. Sanitary Systems, Inc.*, 260 A.D. 2d 892, 688 N.Y.S. 2d 801 [3rd Dept., 1999]). Cy pres distribution typically applies to situations involving the payment of funds to a group or organization that benefits the class. Cy pres or fluid class distributions are acceptable when the aggregate class recovery cannot be directly distributed to the individual class members (*Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D. 3d 63, supra at pgs. 73-74). The establishment of a fund paying for legal fees and

expenses distributed by plaintiff, [which consists of fourteen (14) chapters] on behalf of the unidentified membership through an independent administrator, is reasonable.

Accordingly, it is ORDERED that plaintiffs' motion seeking preliminary approval of class settlement, conditional certification of the settlement class, and approval of the proposed notice of settlement, is granted, and it is further,

ORDERED, that the defendant settlement class is approved for settlement purposes only, and subject to the entry of the Final Order and Judgment, after a hearing, and it is further,

ORDERED, that defendants, Recall Holdings Limited and Recall Total Information Management, Inc., are appointed as class representatives, and it is further,

ORDERED, that Ossai Maizad, Esq. and Christopher McNerney, Esq., of Outten & Golden LLP, are appointed as counsel for the class as certified, and it is further,

ORDERED, that plaintiff shall within thirty (30) days from the date of this Order, settle order on notice, of the proposed, "order for preliminary approval of the class action settlement, conditional certification of the settlement class and approval of the notice of settlement, and the proposed notice of settlement of the class action and fairness hearing," which shall be served on opposing counsel, and on the Order Section Clerk in the General Clerk's Office (Room 119), for review and approval, and it is further,

ORDERED, that if the form of the proposed "order for preliminary approval of the class action settlement, conditional certification of the settlement class and approval of the notice of settlement, and the proposed notice of settlement of the class action and fairness hearing," is approved, the Order Section of the General Clerk's Office will forward them to this Court for signature.

ENTER:

MANUEL J. MENDEZ

MANUEL J. MENDEZ,

J.S.C.

Dated: October 13, 2016

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

ATLAS PART 13 OF THE
SUPREME COURT OF THE STATE OF NEW
YORK, HELD IN AND FOR THE COUNTY OF
NEW YORK, AT THE COUNTY COURT
HOUSE THEREOF, ON 12/12/16

Present: Hon. MANUEL J. MENDEZ
J.S.C.

NAACP New York State Conference
Metropolitan Council of Branches,

Plaintiff,

v.

PHILIPS ELECTRONICS NORTH AMERICA
CORPORATION, KONINKLIJKE PHILIPS
N.V., NTT DATA, INC., RECALL HOLDINGS
LIMITED, RECALL TOTAL INFORMATION
MANAGEMENT, INC., ADVANCE TECH
PEST CONTROL, DOES 1-100

Defendants, individually
and on behalf of a
Defendant Class,

and

MONSTER WORLDWIDE, INC.,
ZIPRECRUITER, INC., INDEED, INC.,
Joined Defendants.

Index No. 156382/2015

~~PROPOSED~~ ORDER GRANTING
PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT, CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASS,
AND APPROVAL OF THE PROPOSED NOTICE OF SETTLEMENT

The above-entitled matter came before the Court on Plaintiff's Motion for Preliminary
Approval of Class Action Settlement, Conditional Certification of the Settlement Class, and
by *notice of motion dated June 2, 2016 and supporting papers thereto,*
Approval of the Proposed Notice of Settlement ("Motion for Preliminary Approval").
Now upon motion of Ogletree Deakins, P.C., attorney for defendant Philips, it is

I. **PRELIMINARY APPROVAL OF SETTLEMENT**

ORDERED that:

1. Based upon the Court's review of the ~~Memorandum of Law in Support of~~
Plaintiff's Motion for Preliminary Approval, the supporting Affirmation of Ossai Miazad
("Miazad Aff."), and the exhibits attached thereto, the Court grants preliminary approval of the
settlement memorialized in the Settlement Agreement and Release ("Settlement Agreement"),

attached to the Miazad Aff. as Exhibit A.

2. The Court concludes that the proposed Settlement Agreement is within the range of possible settlement approval, such that notice to the Defendant Class is appropriate.

3. The Court ~~finds~~ ^{Further concludes} that the Settlement Agreement is the result of extensive, arm's-length negotiations between counsel well-versed in the prosecution of civil rights class actions, and that the proposed settlement has no obvious deficiencies.

II. CONDITIONAL CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS

4. The Court ~~finds~~ ^{Further concludes} that this action satisfies all of the prerequisites of New York Civil Practice Law and Rules ("CPLR") 901, as well as the CPLR 902 factors.

5. The Court certifies the following defendant class under Article 9 of the CPLR, for settlement purposes only ("Settlement Class"):

Companies that are "private employers" within the meaning of the NYCHRL and have posted job postings on Monster, ZipRecruiter, and/or Indeed that explicitly bar applicants from applying for jobs if they possess felony convictions in violation of the NYCHRL from June 25, 2012, through preliminary approval of the settlement.

6. ^{and the court directs that} The non-settling named defendants (namely, Philips and NTT Data Inc.) are ~~excluded~~ ^{severed} out from the Defendant Class for purposes of this settlement, and Plaintiff's litigation against them will not be impacted by this settlement.

III. CLASS NOTICE

7. The Court approves the proposed Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing, attached as Exhibit B to the Miazad Aff., and directs its distribution, ^{as the Court holds that:}

8. CPLR 908 requires that "[n]otice of the proposed . . . compromise [of a class action] shall be given to members of the class in such manner as the court directs."

And the court further concludes that:

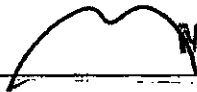
9. The content of the Notice fully ^{complies} ~~comply~~ with due process. The Notice describes the terms of the settlement, informs the defendant class about the injunctive relief and attorneys' fees, information about opting out or objecting to the settlement, and provides specific information regarding the date, time, and place of the final approval hearing.

IV. CLASS ACTION SETTLEMENT PROCEDURE

10. The court hereby adopts the following settlement procedure:

- a. Within ten (10) days of receiving the class list, the settlement administrator will mail notices to the Defendant Class;
- b. Defendant Class Members will have forty-five (45) days to opt out of the settlement or object to it;
- c. Plaintiff will file motions for final settlement approval and attorneys' fees and costs at least one week in advance of the fairness hearing; and
- d. The Court will hold a final approval hearing on _____ at _____, m., at _____, Room 209 at the Supreme Court of the State of New York, located at 71 Thomas Street, New York, New York.

Enter:



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

DO NOT POST