

**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,**

**Plaintiffs,**

**-against-**

**INDEX NO. 156382/15  
MOTION DATE 09-28-16  
MOTION SEQ. NO. 007  
MOTION CAL. NO. \_\_\_\_\_**

**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 \_\_\_\_\_

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

**Cross-Motion: Yes  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 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [2<sup>nd</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept.1991]). Potential differences in defenses, underlying facts and amount of damages for each individual claim does not preclude certification (Borden v. 400 East 55<sup>th</sup> Street Associates, L.P., 105 A.D. 3d 630, 964 N.Y.S. 2d 115 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [2<sup>nd</sup> 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 [1<sup>st</sup> 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 [2<sup>nd</sup> 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 [1<sup>st</sup> 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 [3<sup>rd</sup> 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:

  
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MANUEL J. MENDEZ,  
J.S.C.

Dated: October 13, 2016

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