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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JATINDER KULLAR et al.,  
Plaintiffs and Respondents,  
v.  
FOOT LOCKER RETAIL, INC.,  
Defendant and Respondent;  
CRYSTAL ECHEVERRIA et al.,  
Objectors and Appellants.

A133156

(City & County of San Francisco  
Super. Ct. No. CGC-05-447044)

This case is before the court for the third time. On the first appeal by parties objecting to the proposed settlement of this class action, we reversed the trial court’s order approving the settlement and remanded to permit the trial court to make an evaluation of the fairness and adequacy of the settlement based on the submission of sufficient information to make an independent determination. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116 (*Kullar I*.) In the second appeal we affirmed the trial court’s subsequent order denying defendant’s motion to disqualify objectors’ counsel. (*Kullar v. Foot Locker Retail, Inc.* (2011) 191 Cal.App.4th 1201 (*Kullar II*.) We now address the objectors’ challenge to the trial court’s re-approval of the proposed settlement following the supplementation of the showing made in support of the settlement. We reject the objectors’ demand for still more evidence and conclude that based on the expanded record, the trial court acted well within its discretion in finding the settlement to be fair, adequate and reasonable.

## **Background**

We quote from our first opinion to describe the contours of the controversy.

“The initial class action complaint was filed in November 2005 by Jatinder Kullar on behalf of all persons employed at any of Foot Locker’s California retail locations subsequent to November 23, 2001, who “were required to purchase and wear shoes of a distinctive design or color as a term and condition of their employment” (the uniform class). The complaint alleged that Foot Locker “requires all persons in its employment to purchase shoes of distinctive design or color (either from Foot Locker or other retailers) as a term and condition of their employment,” without reimbursement, in violation of various provisions of California law. Kullar alleged that “he was required to spend at least \$200.00 on his mandatory work uniforms.” The complaint also alleged that “Foot Locker . . . effectively withholds wages in exchange for Foot Locker’s products to be worn as a work uniform,” in violation of other provisions of the Labor Code. The complaint sought the recovery of “all sums expended on the Foot Locker ‘uniform’ ” as a condition of employment, plus civil penalties and other relief.

“In May 2006, Kullar filed a first amended complaint in which he enlarged the scope of his claims. In addition to the original claims, the amended complaint asserted claims on behalf of a “security check class” of employees, those “who were subject to security searches for which they were not compensated and who, as such, have been denied compensation for all hours worked, the legally-mandated minimum wage, and statutorily mandated meal and rest periods.” The amended complaint alleged that “Foot Locker has, for years, knowingly failed to adequately compensate [these employees] for all wages earned, including premium (overtime) wages, . . . due under the California Labor Code and applicable California Wage Orders, and has knowingly failed to provide said workers with statutorily mandated meal and rest periods . . . .” The complaint also alleged related violations of the Labor Code, including the failure to promptly pay wages due upon termination of employment and the failure to use and provide accurate time records and statements of the hours worked by each employee. The amended complaint sought the recovery of the security check class members’ “loss of earnings, in an amount

to be established at trial,” “various penalties, in an amount to be established at trial,” and other relief. [¶] . . . [¶] . . .

“On October 23, 2006, the parties participated in a successful mediation before an experienced mediator, Mark Rudy, Esq., and in the following weeks produced a “stipulation of settlement,” which they submitted to the court on January 12, 2007, seeking preliminary approval of the settlement agreement. . . .

“As set forth in the amended final stipulation of settlement . . . , a settlement class was defined to include both the uniform class and the security check class but excluding various managerial employees and employees who had worked less than 40 hours during the class period between November 23, 2001 and May 25, 2007. . . . The stipulation recited that according to Foot Locker’s records, there were approximately 16,900 persons in the settlement class,<sup>[1]</sup> most of whom had been employed for relatively short periods of time,<sup>[2]</sup> who in the aggregate had worked approximately 12,485,000 hours. Under the terms of the settlement, Foot Locker agreed to pay up to a maximum of \$2,000,000, inclusive of all costs, attorney fees and settlement expenses, in settlement of all claims. From this amount, the court would be asked to approve attorney fees of \$500,000 and an “incentive award” to Kullar of \$5,000. After considering the costs of notice and administering the settlement, it was estimated that the net recovery available for class members would be \$1,297,709. Class members submitting claim forms are to share this amount based on a formula dependent on the number of hours that the employee worked for Foot Locker during the class period, not to exceed \$2 per hour.” (*Kullar I, supra*, 168 Cal.App.4th at pp. 121, 124.)

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<sup>1</sup> Subsequent to the court’s preliminary approval of the settlement agreement, Foot Locker filed a declaration stating the class in fact contains 17,966 persons.

<sup>2</sup> According to the stipulation, approximately 14.6 percent of the class members worked for Foot Locker fewer than 80 hours, approximately 33 percent worked fewer than 160 hours, or one month, approximately 52 percent worked fewer than 320 hours, approximately 62 percent worked fewer than 480 hours, approximately 80 percent worked fewer than 1040 hours, or six months, and approximately 91 percent worked fewer than 2080 hours, or one year.

This court overturned the trial court’s initial approval of the proposed settlement because “the settling parties provide[d] essentially no information to explain, much less to substantiate, their evaluation of the magnitude or potential merit of the claims being settled” (*Kullar I, supra*, 168 Cal.App.4th at p. 133), and the court had found the settlement to be acceptable based solely on the competence of counsel and the involvement of an accomplished mediator. We held that the trial court is obligated to make an independent evaluation of the reasonableness of the settlement and that it cannot do so “if it is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.” (*Ibid.*) In remanding, we did “not suggest that the proposed settlement ultimately may not pass muster. We [held] only that the trial court may not finally approve the settlement agreement until provided with sufficient information to assure itself that the terms of the agreement are indeed fair, adequate and reasonable.” (*Ibid.*)

On remand, the trial court received additional submissions from the settling parties indicating the maximum amounts the class could recover on each of its claims and the principal obstacles class counsel perceived to obtaining such recovery. Although the settlement amount is less than 10 percent of what the class would receive if it prevailed in full on each of its claims, class members who have submitted claims will receive about one-third of their maximum recovery. Under the circumstances, including the trial court’s skeptical assessment of the strength of the class claims and the fact that only three members of the class of 17,966 persons objected, the court considered the terms of the settlement to be entirely fair, adequate and reasonable.

### **Discussion**

We reiterate the opening discussion paragraph of our initial opinion in this case: “The settling parties rightly emphasize the limited scope of this court’s review of the trial court’s approval of a class action settlement. Our task is not to make an independent determination whether the terms of the settlement are fair, adequate and reasonable, but to determine ‘only whether the trial court acted within its discretion.’” (*Wershba v. Apple*

*Computer, Inc.* (2001) 91 Cal.App.4th 224, 235.) As observed in *7-Eleven [Owners for Fair Franchising v. Southland Corp.* (2000)] 85 Cal.App.4th [1135] at page 1145, ‘[g]reat weight is accorded the trial court’s views.’ ‘[G]iven that “so many imponderables enter into the evaluation of a settlement” [citation] an abuse of discretion standard of appellate review is singularly appropriate.’ (*Id.* at pp. 1166-1167.)” (*Kullar I, supra*, 168 Cal.App.4th at pp. 127-128; see also, e.g., *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 407-408.)

On remand, the trial court was presented with evidence of the maximum value of each of the class claims. With respect to the potential value of the “uniform claims,” plaintiff presented evidence that the average cost of the shoes class members were required to wear was \$49.57, multiplied by 17,966 class members, produced total potential damages of \$890,574. With respect to the potential value of the claim for unpaid wages arising out of the allegation that class members were not compensated for the time during which they were required to undergo security checks, plaintiff accepted objectors’ assessment, based on time records produced by defendant, that employees experienced an average of 5.36 security checks a day, at an average of three minutes each. Based on the average hourly wage of these employees of \$8.90, this produced total potential damages of \$5,713,060. With respect to the potential value of the missed meal period claims, plaintiff utilized the total number of meal periods to which class members were entitled during the class period as estimated by objectors’ expert. Assuming no meal breaks had been provided, a daily claim of \$6.052 based on an average hourly wage of \$8.90, produced a total damage figure of \$14,495,823. The total of these figures, \$21,099,457, was the amount class counsel concluded was the maximum possible recovery for the class members’ three claims.

These figures gave the benefit of every doubt to maximizing the numbers. For example, these figures utilize 2,395,212 as the number of total shifts worked by class members. However, that number was derived from payroll records for the period from November 15, 2001 through May 25, 2007, although the class period begins November 23, 2001. The number of meal periods to which class members were entitled was derived

by applying to the total number of shifts worked by class members during the class period the percentage of shifts that were estimated to have been six hours or more, since shorter shifts did not require a meal break. Objectors asserted this percentage to be 68 percent, which is the percentage used in the computations above, although defendant's 10-K Statement filed with the Securities and Exchange Commission states that only 37 percent of defendant's labor force work full-time shifts. An expert declaration submitted by defendant calculated this percentage as approximately 42.9 percent. Moreover, this declaration also calculated 530,068 fewer shifts than calculated by objectors' expert (253,237 rather than 783,305 shifts) for which time cards did not depict a meal period punch and which therefore "could be consistent with a missing meal punch, but which is not necessarily indicative of a missed meal period." And based on the premise of 37 percent full time workers, class counsel concluded that class members experienced an average of only 1.37 security checks per day, rather than the 5.36 used to calculate the maximum possible recovery.

Objectors complain that many of these figures are not supported by competent evidence. But while evidence that would be admissible at trial in many instances has not been provided, the supporting materials do provide a sufficient basis to make intelligent estimations. The task of the court is not to try the case, but to ensure that there is a reasonable basis for settlement. As we stated in our prior opinion, citing *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d 448, 462, "While the court is not to try the case, it is 'called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and *the exercise of business judgment* in determining whether the proposed settlement is reasonable.' ' ' (Kullar I, *supra*, 168 Cal.App.4th at p. 133.) Moreover, where competent evidence was lacking, class counsel utilized objectors' higher and potentially inflated numbers to assess defendant's maximum possible exposure.

The explanation of the "relevant risk factors" that class counsel advised the court it had considered in making its evaluation was far from ideal. Rather than providing a

thoughtful analysis of any of the issues and of the likelihood of prevailing on those issues, counsel in numerous documents repeated this litany of risks:

- “ • The great discretion afforded trial courts in electing to grant or deny class certification, and the resultant possibility that this Court would deny certification of any of the proposed classes, resulting in no recovery whatsoever for those unnamed class members;
- “ • Defendant’s likely argument that it should not be held liable for any unreimbursed uniform claims because the shoes required to be worn by the class members did not qualify as “uniforms” under Title 8 California Code of Regulations, § 11070, subdivision 9(A) which, if successful, would result in no recovery for the class for this claim;
- “ • Defendant’s likely argument that, even if found liable for unreimbursed expenses, SCA’s estimation of \$0.228/per day of damages was excessive insofar as it assumed every single class member actually purchased shoes, rather than wearing a pair they already owned which met Defendant’s uniform requirements;
- “ • Defendant’s likely argument that the unpaid wage claims are subject to the affirmative defense that the time is “*de minimus*” as a matter of law and, accordingly, Defendant should not be held liable which, if successful, would result in no recovery for the class on this claim;
- “ • Defendant’s likely argument that, even if found liable for unpaid wages, SCA’s estimation of \$2.3852/per day of damages was excessive insofar as it assumed every class member actually experienced an unpaid security check every single time they possibly could have entered or exited the store, rather than periodically remaining in the store or simply not having a security check performed during any given entry or exit;
- “ • Defendant’s likely argument, based on the numerous conflicting state and federal court decisions, that it was only required to “provide” meal periods to its employees and, accordingly, Defendant should not be held liable for Plaintiff’s

meal period claims which, if successful, would result in no recovery for the class on this claim;

- “ • Defendant’s likely argument that, even if found liable for unpaid wages, SCA’s estimation of \$6.052/per day of damages was excessive insofar as it assumed every single class member actually experienced an unpaid security check which interrupted with their meal period every single time they were eligible to receive a meal period, rather than periodically remaining in the store or simply not having a security check performed during any given meal period.”

And counsel stated that it had considered these potential defenses:

- “ • Punitive Damages: Defendant’s likely argument that recent cases, such as *Brewer v. Premier Golf Properties*, 168 Cal. App.4th 1243 (2008), which have held punitive damages of any kind are not available in conjunction with the types of claims plead by Plaintiff;
- “ • Labor Code § 203: Defendant’s likely argument that Plaintiff could not show its actions to be “willful” thereby entitling the class to a recovery under this statute;
- “ • Labor Code § 226: Defendant’s likely argument that Plaintiff could not show that there was an “injury” entitling the class to a recovery under this statute.”

Despite the generality of counsel’s explanation, the trial judge demanded additional supplementation to what class counsel initially provided after remand, and then made clear that he had made his own informed evaluation of the merits of the case and the reasonableness of the settlement figure. It is apparent that the court considered it highly unlikely that the class would recover anything close to the maximum amounts claimed:

“I have reviewed the further material submitted by [class counsel] regarding the settlement, which I think has gone well beyond the defects that I recognized as being troubling last time, and think that the numbers set forth in [class counsel’s] further supplemental declaration are by anybody’s stretch of the imagination a fair analysis of a best case scenario and perhaps an impossibly best case scenario, putting the . . . potential recovery in the neighborhood of \$21 million. [¶] I think that the assumptions that are

made in those figures based largely on the objectors' claims as to what might be going on here in terms of the potential recovery, I think that's a well overblown figure but it's a good one to work with. And using even that number, it is my tentative view that the settlement is fair, adequate and reasonable. [¶] . . .

“Among the problems I see are fact questions regarding what was the nature of the security checks and how often did they occur, and how long did each one take? There's a very generous calculation of the value of the security checks in [class counsel's] declaration.

“The question of the shoes at \$49.57 per pair I think has with it a very strong risk that shoes would not be viewed to be a uniform in the context of this case. There are, I think, risks that if this were to go to trial, somebody would see that these shoes, which are Foot Locker type athletic shoes and not specialty purpose shoes such as steel-toed boots or ski boots or swim fins or something else, these may very well be shoes that would be viewed as not a uniform and something within a normal worker's wardrobe, especially the type of people who work in Foot Locker stores. So I think using that figure times the number of potential claimants is very generous and has to be discounted because of the risk.

“I think there's a huge risk here about whether a class could be certified. The number of hours claimed on missed lunch periods, allegedly missed lunch periods and breaks is the subject of something that's going on in the Supreme Court right now, both in terms of what is the obligation of the employer to provide this and, I think more focused for this case, whether or not the reasons that workers don't take the required times are something that is amenable to class disposition and whether that then becomes a predominant question which is better individually done and therefore not susceptible to class certification. There's a risk on that.

“I'm also mindful of the very small number of class members who turned in claims. Now, [objectors' counsel] urged me previously to look at the total number of claimants rather than the number of claims. I think I can consider all factors and weigh them in as I see fit. [¶] We're talking about a situation where we can be relatively assured

that virtually all the class members got actual notice. . . .” “We got 90 percent of some 18,000 people we can fairly say got the notice. This isn’t a question of people hopefully reading it in a newspaper or seeing it posted on the locker room wall or something, this is actual mailings to people. And of that, 1500 and some made claims. The class doesn’t seem that concerned with the terms of the settlement so as to either opt out or object. They knew about it, and as far as the vast majority of the class members, this was acceptable. [¶] . . .

“I also think the Court of Appeal authorized me to consider and give weight to the fact that this settlement was originally negotiated by capable, experienced counsel with the help of an experienced well-trusted mediator. . . . [¶] . . . [¶] . . .

“In terms of the risks and the possibility of defenses, there were great risks, some of which I put on the record before. The risks that I identified on the record were risks that the shoe component would fit within the statutory definition of uniforms, the risk that a class would get certified, especially in light of cases pending in front of the Supreme Court right now, the risk that the wage-hour issues in this case, whether they are susceptible to class determination or whether they require individual proof, and whether that would predominate. [¶] . . .

“In taking the conservative numbers given to me in the most recent declarations from [class counsel] of the settling people, the class members who made a claim, they’re getting about 34 percent of their claim. Now that’s a good result, given the risks. Even if we were to take everybody, non-settling and settling, it’s about ten percent, maybe a little bit less of the total maximum claim, but that’s within the ballpark given the risks here, which I’ve already articulated.”

We are satisfied that the trial court thoughtfully discharged its obligation to evaluate the reasonableness of the settlement, that its conclusions were based on information sufficiently reliable for settlement purposes, and that based on the information before it approval of the settlement was well within the proper exercise of the trial court’s discretion.

**Disposition**

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Jenkins, J.