Case No. E071769

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

WARD A. JOHNSON, ET AL.,
Respondents,

v.

DIAMOND RESORTS MANAGEMENT, INC., ET AL.,
Respondents,

v.

AUTUMN SMITH, ET AL.,
Appellants.

Appeal from the Superior Court of California for the
County of Riverside, Honorable Sharon Waters, Department 10,
Case Nos. RIC1510389 and RICJCCP4923

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL 4th **APPELLATE DISTRICT, DIVISION** 2	COURT OF APPEAL CASE NUMBER: E071769
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: Deepak Gupta (pro hac vice) FIRM NAME: Gupta Wessler PLLC STREET ADDRESS: 1900 L St NW CITY: Washington STATE: DC ZIP CODE: 20036 TELEPHONE NO.: 2028881741 FAX NO.: 2028887792 E-MAIL ADDRESS: deepak@guptawessler.com ATTORNEY FOR (*name*): Ward A. Johnson,Gary Coker, Lisa Evans, and Maria Lourdes Sarabia	SUPERIOR COURT CASE NUMBER: RIC1510389 and RICJCCP4923
APPELLANT/ PETITIONER: Autumn Smith, et al RESPONDENT/ REAL PARTY IN INTEREST: Ward A. Johnson,Gary Coker, Lisa Evans, and Maria Lourdes Sarabia	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Ward A. Johnson, Gary Coker, Lisa Evans, and Maria Lourdes Sarabia

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 12, 2019

Deepak Gupta
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

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APP-008 [Rev. January 1, 2017]

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INTRODUCTION

In 2018, Ward Johnson secured a $2.8 million settlement against his former employer, timeshare company Diamond Resorts International, on behalf of a class of thousands of current and former Diamond Resorts employees. Diamond Resorts agreed to pay this settlement of nearly $3 million to compensate the class for alleged wage-and-hour violations that spanned a seven-year period.

Litigating the case and achieving a favorable outcome for the class was challenging despite the strength of the claims on the merits. With a class of over 3,000 Diamond Resorts employees, class counsel had to review and analyze hundreds of thousands of lines of employment and payroll records for employees with many different job titles and descriptions (some of whom received commissions and some of whom did not), who worked at several different Diamond Resorts vacation properties that were each governed by their own policies and procedures, and who worked over the course of nearly seven years under different managers and policies. A trial would have required class counsel to prepare extensive witness testimony, prepare statistical sampling, and hire experts to testify. And throughout the litigation, Diamond Resorts vigorously contested all of the asserted claims and raised a whole host of defenses that, if proven, would have precluded liability. At every step, the risks were substantial.

Despite all of these obstacles, Johnson and his counsel secured a settlement that provided substantial benefits to class members. The average individual payment to a participating class member under the settlement is over $500, and the highest individual payment is nearly $4,000. The class apparently agreed that this settlement was desirable: Less than 0.5% of the class decided to opt out when given the chance. A similarly small fraction—just nine individuals—objected.

But the objectors here, who were plaintiffs in a separate class-action case against Diamond Resorts, nevertheless contend that the trial court abused its discretion in approving the settlement as fair, reasonable, and adequate. In their estimation, the case was worth tens of millions of dollars more than the class is receiving. That claim is based on the objectors' own valuation—a valuation that relies on inflated interest payments, speculates that the plaintiffs would be granted relief on duplicative claims, and unrealistically assumes that the plaintiffs would face no risks that warrant discounting the claims.

The objectors ignore the reality that a settlement is a *compromise* between the parties and will invariably be lower than some plaintiffs might like. The objectors also ignore that the court's job in approving a settlement is not to second-guess the parties' calculations and come up with its own valuation from scratch. Rather, the court's job is merely to ensure that the settlement is fair, adequate, and reasonable—not the result of collusion.

Finally, the objectors ignore that settlements are entitled to a presumption of reasonableness to prevent courts from unwinding the product of hard-fought negotiation between parties.

Perhaps because the objectors realize that their valuation argument is a non-starter, they raise myriad complaints about the process that led to the settlement. But even a cursory review of these critiques makes clear that they are meritless and do not warrant reversing the trial judge's exercise of discretion in approving the settlement. For example, the objectors argue that class counsel did not adequately investigate the claims in this case and did not provide the court with sufficient information to approve the settlement. But the objectors ignore that class counsel received the *exact same discovery* from Diamond Resorts that the objectors received, and that class counsel provided a detailed analysis of the claims' value to the court multiple times. Similarly, the objectors argue that the class notice was misleading but ignore that it was virtually identical to the settlement agreement it was explaining. And the objectors criticize the release of claims in this case as overbroad while ignoring a multitude of precedents approving similar releases. The rest of the objectors' many arguments are equally unsuccessful and contrary to precedents binding in this Court. In short, the objectors offer nothing to warrant undoing the settlement reached in this case, which will provide concrete relief to the class.

Ultimately, the objectors here simply do not want to accept that both the trial court and the class members concluded that the settlement reached is a fair recovery for the class, as compared with the uncertain prospects offered by ongoing litigation. But that is exactly what happened here. This Court should therefore affirm the trial court's final approval of the settlement.

STATEMENT OF THE CASE

A. Johnson files this class action to obtain relief for Diamond Resorts' violations of California labor laws.

1. Johnson's initial complaint.

Diamond Resorts sells memberships in timeshare vacation properties around California.[1] (2 AA 397.) Ward Johnson worked for Diamond Resorts from February 2013 to December 2015 as a driver—a job that involved driving to and from events designed to sell timeshares, setting up and breaking down advertising materials used at those sales events, and working at sales booths where he would try to sell timeshare memberships. (1 AA 227, 232.)

In January 2017, Johnson filed this action claiming that the company had violated numerous California labor laws. Specifically, he alleged failure to pay wages, including overtime; failure to provide meal periods; failure to provide rest periods; failure to timely pay wages; failure to reimburse

[1] The defendants in this case are Diamond Resorts International Marketing, Inc.; Diamond Resorts International, Inc.; and Diamond Resorts Management, Inc. (2 AA 334.) They are collectively referred to as "Diamond Resorts" or "the defendant" throughout this brief.

expenses; and unfair competition. (See 1AA 226–43.) Johnson claimed that while working at Diamond resorts, he and other employees were regularly required punch out for lunch but continue working, which caused them to be underpaid for time worked. (1 AA 233.) The complaint also alleged that employees were not properly paid overtime for any seventh consecutive day that they worked and that Diamond Resorts required employees to use their cell phones to make business calls but did not reimburse employees for this cell phone use. (*Ibid.*) Further, Johnson alleged that Diamond Resorts did not allow employees to take the rest breaks required by California law. (1 AA 234.) Finally, Johnson claimed that employees were not paid all of their earned wages at the time they were terminated (or within 72 hours after an employee voluntarily left the company) as legally required. (*Ibid.*)

Johnson brought the action on behalf of not just himself, but also "[a]ny and all persons who are or were employed in non-exempt positions, however titled, by Defendants in the state of California within four (4) years prior to the filing of the complaint in this action until resolution of this lawsuit." (1 AA 229.) He also sought to represent a subclass composed of "[a]ll class members who have been employed by Defendant in non-exempt positions within the state of California at any time between January 2014 and the present and have separated their employment." (*Ibid.*)

2. Johnson engages in discovery.

In April 2017, Johnson served formal discovery requests on Diamond Resorts. (3 AA 825.) He received discovery at the end of May 2017, which included answers to interrogatories; employee handbooks; operating procedure manuals; relevant written policies on timekeeping, pay schemes, meal and rest periods, and bonus and commission structure; and job descriptions and duties. (2 AA 398; 3 AA 826.) Johnson also received his own time and payroll records, along with a one-third sample of time and payroll records for other employees who were part of the putative class. (3 AA 826.) The discovery also included pay stubs, Diamond Resorts' locations in California during the putative class period, and data on the total number of workweeks and average pay rates for employees during the relevant period. (*Ibid.*)

Based on this discovery, Johnson was able to research the applicable law and hire a consultant to assess the documents and determine Diamond Resorts' possible liability to the class. (See 2 AA 380, 382, 398–99.) This information allowed the parties to have "numerous meet and confer sessions" between April and August 2017. (2 AA 398).

3. Johnson seeks coordination with the *Smith* action and joins the named plaintiff in the *Sarabia* action to his complaint.

Around the same time that Johnson served formal discovery requests on Diamond Resorts, he also filed a petition for coordination with the Judicial

Council, in which he sought to coordinate his case with another class action—the *Smith* action—that alleged similar labor-law claims against Diamond Resorts. (2 AA 397.) Specifically, the *Smith* plaintiffs alleged claims for unpaid overtime, unpaid meal-period premiums, unpaid rest-period premiums, unpaid minimum wages, final wages not timely paid, and unreimbursed business expenses—just as Johnson did. (1 AA 187–204.) In addition, the *Smith* plaintiffs brought claims that Diamond Resorts did not timely pay wages during employment, provided wage statements that did not comply with California law, failed to keep requisite payroll records, violated sections of the California Business & Professions Code, as well as derivative claims under California's Private Attorneys General Act of 2004. (*Ibid.*)

Smith had initially been filed in 2015, but the trial court in that case stayed discovery before any formal exchange occurred. (2 AA 396; 3 AA 825.) At the end of 2016, the parties in *Smith* engaged in an informal exchange of documents and data in anticipation of mediation.[2] (3 AA 825.) All of the documents given to the *Smith* plaintiffs prior to mediation were provided to the *Johnson* plaintiffs a few months later, during the discovery process. (3 AA 826.)

[2] The *Smith* plaintiffs and Diamond Resorts attended mediation sessions on March 15, 2017 and May 4, 2017, but were unable to reach a settlement. (3 AA 825–26.)

In June 2017, the Riverside Superior Court Presiding Judge held a hearing and determined that coordination of the *Johnson* and *Smith* actions was appropriate. The petition for coordination was granted, and in July 2017, a coordinating judge was assigned and the cases were assigned a single case number under the title "Diamond Resorts Wage and Hour Cases." (2 AA 397.)

On August 3, 2017, a third class action complaint was filed by Maria Lourdes Sarabia against Diamond Resorts alleging similar wage-and-hour violations. (3 AA 702.) The defendant filed a notice of related case with the trial court on September 20, 2017. (1 AA 283–85.) Sarabia eventually joined and became a named plaintiff in the *Johnson* case. (See *infra*.)

B. Johnson and Diamond Resorts reach a settlement agreement.

After the exchange of formal and informal discovery and numerous meet-and-confer sessions, Johnson and Diamond Resorts attended mediation on August 23, 2017 with experienced employment class-action mediator Robert Coviello. (2 AA 399, 3 AA 826.) During the mediation, the parties were aware of all of the claims that had been brought in *Smith* and *Sarabia* and were in possession of all the documents that had been provided to those plaintiffs. (3 AA 826.) No settlement was reached during the mediation, but the parties left with a settlement proposed by the mediator. (2 AA 399.) The parties

continued to negotiate after the mediation, and on September 1, 2017, they agreed to the mediator-proposed settlement. (*Ibid.*)

Once they had agreed on terms, Johnson and Diamond Resorts stipulated to filing an amended complaint that would result in a global settlement. (See 1 AA 290.) The amended complaint included claims for failure to pay wages including overtime wages, failure to provide meal breaks, failure to provide rest breaks, failure to timely pay wages, failure to timely furnish accurate itemized wage statements, failure to keep requisite payroll records, failure to reimburse expenses, unfair competition, and penalties under PAGA. (2 AA 332–59.) These claims were brought on behalf of a class as defined in Johnson's initial complaint and on behalf of a subclass defined as "[a]ll class members who have been employed by Defendant in non-exempt positions within the state of California at any time between September 2013 and the present and have separated their employment." (2 AA 337.) The amended complaint also added several named plaintiffs: Gary Coker, Lisa Evans, and Maria Lourdes Sarabia. (2 AA 332.)

The proposed settlement provided for a total common fund of $2.8 million, from which Diamond Resorts would make individual settlement

payments and pay reasonable attorney's fees and other costs.[3] (2 AA 424.) Class members would participate in the settlement unless they submitted a form opting out. (2 AA 437–38.) Then, to calculate each class member's payment, the settlement administrator would use a complex formula that would assign a multiplier between 1.05 and 1.35 (depending on the years in which the class member was employed by Diamond Resorts) to the number of workweeks the class member had worked. (2 AA 432.) Based on this formula, the parties estimated that class members would recover between $12.14 and $3,836.00, with an average recovery of $550. (2 AA 410.)

In exchange for individual payments, class members were required to release all of the claims alleged (or which could have been alleged) in Johnson's amendment complaint. This encompassed all claims for

- unpaid straight time and overtime wages, including state wage and hour laws and the Industrial Welfare Commission Wage Orders;
- failure to provide legally required meal breaks;
- failure to authorize and permit legally required rest breaks;
- failure to issue properly itemized wage statements;
- failure to keep requisite payroll records;

[3] The settlement stipulation provided that, subject to court approval, $130,000 of the settlement would be allocated to PAGA penalties (with 25% going to the class and 75% going to the Labor Workforce Development Agency), $19,000 would pay the settlement administrative costs, class counsel would receive $933,333 in fees and up to $25,000 to pay actual costs, and named plaintiffs would receive an enhancement of $7,500 each. (2 AA 425–26, 431.)

- failure to promptly pay all wages due during employment and at the time of an employee leaving Diamond Resorts;
- failure to reimburse expenses,
- all related claims for Unfair Competition or Business Practices under California's Business and Professions Code or similar laws;
- claims for penalties under PAGA;
- interest;
- penalties, premium pay, litigation costs, attorneys' fees, restitution, and equitable relief; and
- all other claims that could arise from the facts or causes of action pled in the amended complaint for the time period from August 28, 2011 through the end of the class period.

(2 AA 442.) The stipulated settlement agreement also included an appeal waiver, which prevented any class member who did not "timely submit an objection" to the settlement from filing any post-judgment or appellate proceeding. (2 AA 441.)

Under the settlement agreement, the parties agreed that if more than 10% of the class opted out of the settlement, Diamond Resorts had the option to terminate the settlement. And if the total number of workweeks worked by class members exceeded the estimate (137,000) by 5%, the plaintiffs would have the right to terminate the settlement agreement. (2 AA 438–39.) The proposed settlement agreement also detailed notice, opt-out, and objection procedures. (2 AA 435–38.)

In support of the settlement, the parties provided declarations and a memorandum explaining how they had arrived at the value of the settlement. For example, Johnson's counsel had determined that the failure to pay overtime was likely worth $1,302,546. (2 AA 402.) In arriving at this number, counsel had first used the discovery provided to determine that there were approximately 3,023 class members who worked approximately 137,000 workweeks during the class period at an average wage of $11.88 and an overtime rate of $17.82. (*Ibid.*) Counsel further calculated that on average, employees worked one half hour of unpaid overtime per shift and that the total value of the overtime claim could thus be calculated by multiplying "(overtime rate of $17.48) X (0.5 per shift) X (approximate 148,000 shifts)." (*Ibid.*) But the parties also acknowledged that there could be significant obstacles to proving the defendant's liability at trial on the overtime claim. The defendant argued that it did not know that employees were working off the clock, which would preclude liability under California law. (*Ibid.*) The defendant also argued that it had produced time sheets, which are prima facie evidence of hours worked, and that the plaintiffs would thus have to meet a burden of establishing that the timesheets were inaccurate. (2 AA 407.) Further, Diamond Resorts argued that any overtime worked other than what the time sheets reflected was "de minimis," which would not cause liability. (2 AA 402.)

The parties provided similar calculations of the value of each claim in the case, as well as any likely difficulties that the plaintiffs might face in proving each of the claims to a jury at trial. (2 AA 403–10.) Based on all of the claims, Johnson approximated that the realistic, recoverable liability of Diamond Resorts was about $11,679,614. (2 AA 406.) But the parties also acknowledged that a class action of over 3,000 class members presented uncertainty that the class would be certified, and remain certified, through trial. (2 AA 410–11.) Although the plaintiffs were confident that the claims were amenable to class resolution, counsel acknowledged that the defendant was aggressively pressing that there were individual questions and defenses that would preclude the class-action mechanism in this case, including variations in "worksite practices from job to job and supervisor to supervisor," "customers' needs and requirements and the attendant differences in Class Member job duties as a result thereof," and "experiences" related to "not only meal and rest periods, but entitlement to overtime pay as well." (2 AA 411.) As a result, both parties concluded that a settlement of $2.8 million was a fair and reasonable settlement that ensured a meaningful payment to class members while avoiding the costs and risks of continued litigation.

C. The *Smith* plaintiffs intervene to object to the proposed settlement, but the trial court grants preliminary approval.

After Johnson and Diamond Resorts filed a motion with the court for preliminary approval of the settlement, the *Smith* plaintiffs moved to intervene

in the *Johnson* case for the purpose of opposing the settlement. (2 AA 531–49.) The trial court held a hearing on April 26, 2018 on the motion to intervene. (RT 6.) The court granted intervention, reasoning that it would be preferable to hear any objections to the settlement prior to granting preliminary approval so that class notice would only have to be sent one time. (RT 6–7, 19.)

The trial judge told the parties that she was inclined, based on the evidence already presented, to approve the settlement as fair, reasonable, and adequate. (RT 6–7.) However, she highlighted several issues with the settlement documents that required fixing before she would grant preliminary approval. (RT 15.) First, Judge Waters noted that the definition of the class was incorrect because it did not include the whole class period extending back to 2011. (RT 6.) Second, the court ordered plaintiff's counsel to file a supplementary declaration stating that, although none of the named plaintiffs had worked for Diamond Resorts between 2011 and 2013, counsel had researched the policies and potential claims for that period before settling with the defendant. (RT 8, 15.) While the trial judge required further development of that information, she acknowledged that the defendant had given "the exact same information" to both the *Smith* and *Johnson* plaintiffs and deemed this fact relevant to the adequacy of the *Johnson* plaintiffs to represent the class. (RT 7–8.)

Third, the trial court suggested that the class notice was "perhaps . . . a little too legally dense for people with a high school education." (RT 15.) The court commended the parties for explaining in the class notice that there was another related class action (the *Smith* action) also pending but told the parties to add a sentence to the notice alerting class members that "if you stay a member of this class, you won't be able to participate in those class actions." (RT 15–16.) The court ordered the parties to submit a supplementary declaration and revised class notice that corrected the problems it had identified during the hearing.

Following the hearing, Johnson's counsel submitted a supplemental declaration elaborating on his investigation into class members' claims against Diamond Resorts for the period from 2011 to 2013. (4 AA 976–78.) He explained that he had received all operative policies that Diamond Resorts had in place since August 2011 related to "timekeeping, pay schemes, meal and rest periods, vacation policies, job descriptions and duties," as well as employee handbooks and payroll records for that same period. (4 AA 978.) He stated that he had reviewed and analyzed all of this information in valuing the claims involved in the lawsuit. (*Ibid.*) The supplemental declaration also included as an attachment a revised notice to be sent to class members that used less formal legal language and explained more prominently what would happen if class members did not opt out of the settlement. (See 4 AA 980–87.)

The parties also filed a joint stipulation amending the complaint to define the class as "[a]ny and all persons who are or were employed in non-exempt positions, however titled, by Defendants in the state of California from August 28, 2011 until resolution of this lawsuit" and the subclass Johnson represented as "all class members who have been employed by Defendant in non-exempt positions within the state of California at any time between August 28, 2012 and the present and have separated their employment." (4 AA 1001.)

The *Smith* plaintiffs opposed preliminary approval of the settlement. (4 AA 1005–22.) In support of their opposition, they included their own calculations valuing the claims against Diamond Resort at over $45 million. (4 AA 1035.) The calculation included over $20 million in nine stacked PAGA penalties, which are awarded only at the court's discretion, and nearly $8 million in interest on the class's overtime and meal- and rest-break claims. (*Ibid.*) The *Smith* plaintiffs justified this difference in valuation, despite receiving the same discovery from Diamond Resorts, by suggesting that they had acquired "information gathered from . . . other sources" that they did not identify, as well as conducting unexplained "extrapolations" from the data. (4 AA 1031.)

Before a hearing on preliminary approval, Johnson and Diamond Resorts amended the class notice for a second time and amended the objection form to remove certain private information of any objector. (4 AA

1036–64.) The additional changes to the class notice clarified the consequences of opting out of the settlement and explained that the *Smith* plaintiffs had become plaintiffs in the action but objected to the settlement. (4 AA 1040, 1043, 1046.)

On June 6, 2018, the trial court held a hearing on the motion for preliminary approval of the settlement. The court acknowledged the intervenors' opposition but informed the parties that it was "still inclined to find there's sufficient evidence to conclude that the settlement is fair and reasonable and adequate." (RT 32.) But the trial judge again concluded that the settlement agreement required several minor changes before she could approve it. First, she determined that the settlement agreement's appeal-waiver provision was improper and stated that she would not approve the settlement agreement until the waiver provision was taken out. (RT 35.) Next, she identified an inconsistency in the definition of the employer's payroll taxes that had to be fixed before the settlement could be approved. (RT 35–36.) Third, she noted that the parties did not tell the class what the net settlement would be and that that value should be included. (RT 36–37, 40.) Fourth, she pointed out that the class notice told the class the highest expected payment and average payment but not the lowest expected payment, and she told the parties to add that information to the class notice. (RT 37.)

The court also told class counsel that the attorney's fees and named-plaintiff bonus would be lower than what the parties had agreed to. Judge

Waters explained that before calculating attorney's fees, she would deduct from the settlement amount the employer's share of payroll taxes because that amount provides no benefit to the class. (RT 36.) She also told the parties that she would not give $7,500 per named plaintiff in this case because the named plaintiffs hadn't had to sit for depositions and that she would likely award $1,500. (RT 37–38.)

The trial judge also told the parties that she was concerned that the class notice was still somewhat legalistic but that she did not think it could be simplified further. (RT 38.) She suggested adding a statement that no class had been certified in any of the pending cases but otherwise thought the notice properly summarized all of the pending cases against Diamond Resorts. (RT 37–38.) Counsel for the *Smith* plaintiffs agreed that the class notice correctly described the other lawsuits. (RT 38.)

The parties subsequently filed an amendment to the settlement agreement and a revised class notice that made the changes required by the trial court. (4AA 1083–1115; 5 AA 1157–74.) On July 2, 2018, the court granted preliminary approval of the settlement. (5 AA 1176–82.)

D. After class notice is distributed and the settlement is administered, less than 0.5% of class members opt out and nine or fewer class members object.

The settlement administrator mailed class notice to 3,205 class members on August 1, 2018. (5 AA 1330.) The notice included detailed instructions on how to participate in, opt out from, or object to the settlement.

(5 AA 1334–40.) Out of 3,205 class members notices sent, only 130 were ultimately deemed undeliverable. (5 AA 1331.)

Only 11 out of 3,205 class members—or 0.37% of the total—submitted requests to opt out of the settlement. (*Ibid.*) Nine class members filed objections. (*Ibid.*) Three of those class members are named plaintiffs in the *Smith* case. They advanced the same objections that the *Smith* plaintiffs had raised, and the trial court rejected, before the court granted preliminary approval of the settlement. Most of the remaining six objectors did not actually appear to be objecting to the settlement. For example, one objector wrote as the reason for objection: "I was terminated from Diamond Resort AKA Palm Canyon Resort & Spa." (5 AA 1347.) Another wrote that Diamond Resorts "forced me to clock out my lunch without taking my lunch and clock out my shift and return to finish my work for up to 3 hours a day over time without receiving payment of those hours and my lunch too." (5 AA 1353.) The only one of these six objectors who stated a basis for objecting wrote that "[t]he class action should go further back in time. I worked for DRI since 2005 to 2011 & again during the 'class period.'" (5 AA 1350.)

The remaining class members received payment based on the calculation method in the settlement agreement. The lowest payment

received by a class member will likely be $1.29[4] and the highest will be $3,899.50. (5 AA 1332.) The average payment to a class member is $507.52. (*Ibid.*)

E. Johnson provides a detailed analysis of the facts, legal claims, and the likely value of the case.

Once administration of the settlement was complete and the objection deadline had passed, Johnson moved for final approval of the settlement. Class counsel informed the court that the settlement "offers a guaranteed, significant value to the Class Members that fairly and reasonably accounts for the very real risks of litigation" and that the settlement "is within the range of approval, and is fair, reasonable, and adequate and is in the best interests of the Class in light of all known facts and circumstances and the expenses and risks inherent in litigation and certification." (5 AA 1224.) This analysis was supported by class counsel's "great deal of experience in wage and hour class action litigation" as evidenced by a laundry list of representative class-action cases included in class counsel's declaration. (5 AA 1236–41.)

[4] During the hearing on preliminary approval of the settlement, the court questioned why the lowest payment was expected to be so low. (RT 37.) The defendant's counsel explained that there were probably class members who had only worked for Diamond Resorts for one day before quitting because they "hated [the job] or didn't like it or loved it and decided they didn't want to do it," and that these members would receive a very small payment. (*Ibid.*)

Once again, class counsel included in his declaration a detailed valuation and risk analysis of the claims in the case. (5 AA 1226–34.) We briefly recount some of this analysis for the Court's benefit.

- **Overtime claims:** After analyzing timekeeping and payroll records for over 1,000 class members, class counsel determined that Diamond Resorts' potential liability for overtime payments was $ 1,302,546. This number was based on the class average overtime rate of $17.48, an estimated half hour of overtime worked per shift, and approximately 148,000 shifts worked during the class period. (5 AA 1226–27.)

- **Meal periods:** Analysis by class counsel's consultant showed that 24% of all meal breaks were either short or late. But class counsel determined that Diamond Resorts' "realistic exposure" for this claim was relatively low—about $1,736,728—because the defendant had written policies and training on meal breaks that correctly stated the law in California and because Diamond Resorts argued that employees were allowed to arrange their work in the way they saw fit and often voluntarily waived their first meal breaks. (5 AA 1227.)

- **Rest periods:** Class counsel calculated the value of the rest period claim as $3,614,483, based on 1,949 commissioned employees who worked approximately 68,534 workweeks during the class period. But class counsel warned that, in his experience, rest-period claims are difficult to prove on a classwide or PAGA basis because employers are not required to maintain records of whether rest breaks were provided. Class counsel also recognized that succeeding on this claim would require distinguishing a number of cases decided by California courts. (5 AA 1228.)

- **Unreimbursed expenses:** Class counsel determined that the realistic value of this claim was $384,927.50. This value was limited to the 1,692 class members whose job descriptions provided a basis to conclude that they could potentially use their phones during work. Class counsel then multiplied by .05 (assuming 5% of the employee's total phone use was work-related), a $50 average monthly phone bill, and 79 months in the total class period. Class counsel also acknowledged that this

claim would face the obstacle that Diamond Resorts had a reimbursement form that employees were supposed to use to be reimbursed for any personal phone usage and argued that it *did* reimburse the class members for any work use on their personal phones. (5 AA 1230.)

- **PAGA derivative claim:** Class counsel recognized that any PAGA penalties would be dependent on the underlying claims succeeding. He also exercised caution because the value of PAGA penalties is at the court's discretion, and courts have sometimes awarded only "nominal" penalties. As a result, he conservatively valued the PAGA derivative claim as $1,074,200. (5 AA 1230.)

Class counsel also determined that some claims had an effective value of zero. For example, the claim under Labor Code § 1174 was given no value because that section does not create a private right of action, and Diamond Resorts had presented timekeeping records for one-third of the class that would make it difficult to prove that its timekeeping was inaccurate. (5 AA 1229.) Similarly, class counsel assigned the unpaid vacation claim a value of zero because Diamond Resorts had a recorded practice of paying vested vacation with an employee's last paycheck, and there was little to no evidence suggesting that Diamond Resorts was regularly not paying the entirety of this vacation. (5 AA 1230.)

Ultimately, class counsel calculated Diamond Resorts' likely liability as $11,679,614 with a maximum exposure of over $20,000,000. (5 AA 1231.) The total settlement amount thus represents 24% of Diamond Resorts' realistic possible exposure. He reasoned that this amount was fair and reasonable given the litany of specific defenses and general challenges to certifying a class

in this action as described above. Class counsel also reasoned that going to trial would be "an expensive, complex and time-consuming process" that would require "establish[ing] a significant amount of witness testimony, pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other evidence in order to evaluate and present arguments at both class certification and trial." (5 AA 1226, 1241.) In class counsel's opinion as an experienced class-action litigator, certification and trial would likely "span several additional years and require the dedication of extensive resources." (5 AA 1241.) As a result, the settlement provided a fair, reasonable, and adequate recovery for the class that would avoid the risks and impending heavy costs of litigating such a complex class action. (*Ibid.*)

F. The trial court denies objections and grants final approval of the settlement.

At the fairness hearing, the trial court stated that, based on the briefing from all sides, it was "inclined to grant final approval of the settlement." (RT 44.) The trial judge further stated that she would reduce attorney's fees to $898,710 based on the net settlement minus the employer's share of payroll taxes. (*Ibid.*) And she intended to award a class representative enhancement of $2,500 to Mr. Johnson and $1,500 to the other named plaintiffs. (*Ibid.*) Before entering judgment to that effect, she offered the objectors a final chance to speak.

The objectors' counsel argued that class notice was deficient (RT 46), but the court concluded that notice was adequate and gave class members "detailed information about the settlement" (RT 49.) In reaching this conclusion, the court reasoned that the class notice provided was far more detailed than the standard postcard that is issued in many class-action settlements and that "between the notice that was given, the directions to the Court if they want to read the settlement, [and] the telephone numbers of all counsel, including the objecting attorney's telephone number," class members had been given "more than ample" avenues to have any questions about the settlement answered. (RT 49.) And, the court reasoned, only one class member improperly filled out both an objection and an opt-out form, which suggested that class members understood the settlement and how to exercise their right to stay in, object to, or opt out of the settlement. (*Ibid.*)

Counsel for the objectors also repeated her arguments that Johnson and class counsel had not adequately investigated the claims being settled. (RT 51.) In response, class counsel referred to the extensive discussion of the "substantial investigation" conducted, the fact that "the evidence that has been presented or provided to us is the same that's been provided to plaintiffs in intervention," and the lengthy analysis of the claims' values provided in class counsel's declaration. (RT 51–52.) Diamond Resorts' counsel emphasized that the settlement was based on the proposal of an experienced,

neutral mediator. (RT 52.) Based on this exchange, the court concluded that its initial decision to the grant final approval would stand.

Before the final approval hearing ended, objectors' counsel requested that the court "make formal findings, a formal Statement of Decision stating the factual and legal basis for ten separate points listed at the end of our opposition to the motion for final approval." (RT 53.) The trial court asked whether there was any case law suggesting that an objector is entitled to a written statement of decision on a motion, and objectors' counsel responded that no such case law exists. (*Ibid.*) The court denied the request.

On October 31, 2018, the court issued an amended order granting final approval of the settlement and judgment in the case. The court concluded that the terms of the settlement were "fair, reasonable and adequate in all respects," and that the settlement "was made in good faith and in the best interests of the parties." (7 AA 1952–60.)

STANDARD OF REVIEW

The questions "whether a settlement was fair and reasonable, whether notice to the class was adequate, [and] whether certification of the class was proper . . . are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234–35 (*Wershba*).) This Court's 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.'" (*Kullar v. Foot Locker*

Retail, Inc. (2008) 168 Cal.App.4th 116, 128 (*Kullar*) (citation omitted).) A reviewing court's inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (*Dunk*).) When reviewing approval of a settlement, "[g]reat weight is accorded the trial judge's views" because the trial judge "is exposed to the litigants, and their strategies, positions and proofs" and "is aware of the possible legal bars to success." (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1145 (*7-Eleven Owners*) (citation omitted).)

ARGUMENT

I. The trial court properly concluded that the settlement is fair, reasonable, and adequate.

The objectors give this Court no reason to upset the trial court's correct conclusion that the settlement reached between the parties is fair, reasonable, and adequate. They do not dispute that the settlement offers concrete benefits to the class and fair substantive terms. And the objectors conveniently ignore the fact that less than one percent of the class objected to or opted out of the settlement.

Instead, the objectors assert that Johnson failed to conduct sufficient investigation and present evidence to the court to approve the settlement. In

so arguing, the objectors ignore the fact that Johnson received the *very same discovery* that the objectors also received and used this as a basis to value the claims. They also ignore the extensive, detailed explanation that class counsel gave to explain the value of the class claims. Instead, they quibble over whether the explanation could have been *more* detailed and whether the objectors would have valued some claims higher than class counsel did. Neither is an appropriate basis to overturn the settlement. The objectors also claim, baselessly, that the settlement was the result of a collusive reverse auction, disregarding class counsel's extensive experience litigating wage-and-hour class actions and the role that a neutral mediator played in proposing the agreed-upon settlement figure.

At bottom, the settlement reached is fair, reasonable, and adequate, and none of the objectors' flurry of criticisms provide a sound reason for this Court to disturb the trial court's approval of the settlement.

A. The presumption of fairness applies in this case.

Courts presume that a settlement is fair when four conditions are met: "(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Kullar, supra,* 168 Cal.App.4th at p. 128.) That presumption applies here.

The objectors do not challenge the third factor—that class counsel has extensive experience litigating California wage and hour class-action suits. And although the objectors assert without support that the nine class members who objected and the eleven class members who opted out of the settlement represent "a significant number of class members" (Opening Br. 48), it is plain that the percentage of objectors is small. Less than one-half of one percent of the class opted out of the settlement, and only nine individuals objected to the settlement.[5] The handful of objecting and opting-out class members here is similar to the numbers in *7-Eleven Owners*, in which the court concluded that the presumption of fairness applied. (*7-Eleven Owners, supra,* 85 Cal.App.4th at p. 1153 (concluding that the fourth factor was satisfied where 80 class members out of 5,454 opted out and 9 class members objected to settlement).)

The objectors' main arguments are that the settlement did not result from arms-length negotiation and that Johnson did not conduct sufficient investigation or provide the trial court with enough information to make an informed decision. But both contentions are baseless. As described below, the parties provided the trial court with detailed analysis based on the exact same

[5] In fact, as described above, only one of the objecting class members who was not represented by objectors' counsel even gave an explanation that was clearly an objection to the settlement. And that reason—that he wanted the class period to extend farther back—is impossible to satisfy because of the applicable statute of limitations.

information possessed by the objectors, and the settlement was the product of a mediation.

B. Johnson conducted extensive discovery, resulting in thorough analysis of the valuation of the class's legal claims, which the trial court considered.

The objectors raise three types of challenges to class counsel's analysis, all of which fail.

First, the objectors repeatedly ignore class counsel's supporting documents and assert that class counsel "provided no legal, factual, or other basis for computing" the value of each claim. (Opening Br. 38.) But these claims simply cannot be reconciled with the record. Class counsel reviewed extensive discovery in this case, which he used to calculate the realistic liability that Diamond Resorts faced. This included formal written discovery, payroll and time records for over 1,000 class members—which consisted of hundreds of thousands of lines of data and information, management trainings, and handbooks and other written policies that related to each of the class claims and that was in effect at any point from 2011 through 2017. (2 AA 398.) In addition, class counsel received class data lists with class members' dates of employment, job titles, pay rates, earning, compensation for commissions, and bonuses. (*Ibid.*) Based on this raw material, class counsel had to determine the average base salary of the class, the average overtime salary, the total number of shifts worked, the total number of weeks worked, the average unpaid overtime worked, the percentage of meal breaks not

given, the amount of rest periods not given, and other quantities used to value the class's claims. (2 AA 398–401.)

Class counsel used this discovery to value the legal claims in light of Diamond Resorts' potential defenses, as well as the risks and costs of litigation. This valuation was based on information derived from discovery and counsel's long-time experience litigating wage-and-hour class actions. And class counsel provided the trial court and the objectors with a description of the discovery materials and over ten pages of detailed summaries of his valuation analysis at both the preliminary-approval stage and the final-approval stage. (See 2 AA 398–411; 5 AA 1222–41). These summaries lay out the liability estimates for each claim and explain the likely obstacles that the plaintiffs would face in litigating each of the claims and the general risks and costs the plaintiffs would face at the certification and trial stages. Altogether, these summaries demonstrate that class counsel had thoroughly analyzed the data provided by Diamond Resorts and was aware of the obstacles at trial that would require discounting the claims' values.

Second, the objectors dispute the value that class counsel gave to the claims, arguing that the objectors would have assigned them a higher value. (See, e.g., Opening Br. 38 (arguing that class counsel placed too much weight on the defendant's defense that it had meal-break policies that complied with California law because not all Diamond Resorts properties had such written policies); *id.* at p. 39 (arguing that class counsel should have assigned a value

to the claim for failure to maintain payroll records because "civil penalties of up to $500 per employee could be recovered through PAGA").) But neither the trial court nor this Court are tasked with deciding whether the parties *could have* valued the claims higher—the question is only whether the settlement was fair and whether it was within the trial court's discretion to approve it. "Settlement is the offspring of compromise; the question [courts] address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1027, *overruled on other grounds by Achziger v. IDS Prop. Cas. Ins. Co.* (9th Cir. May 9, 2019) 2019 WL 2060253); *Kullar, supra,* 168 Cal.App.4th at pp. 127–28 ("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.'").)

Third, the objectors complain that class counsel could have produced *more* explanation for his valuations. For example, the objectors argue that in calculating the unpaid wages claim, class counsel did not provide the "violation rate or the number of class members for whom the claim was valued." (Opening Br. 38.) Similarly, they argue that class counsel did not explain his legal basis for limiting the rest-period claim to commissioned employees. (Opening Br. 39.) As an initial matter, the objectors are simply wrong. Class counsel explained the exact formula he had used, "$1,302,546 =

(overtime rate of $17.48) X (0.5 per shift) X (approximate 148,000 shifts)" (2 AA 402; 5 AA 1226), and he derived the number of shifts worked and the amount of unpaid overtime per shift from the *same data provided to the objectors*. And class counsel based his valuation of the rest-period claim on the legal theory of rest-break periods that was successful in *Vaquero v. Stoneledge Furniture LLC* (2017) 9 Cal.App.5th 98, which applies only to employees who work on commission. (2 AA 403–04; 5 AA 1228).

But more importantly, the objectors cite no precedent suggesting that courts should reject a settlement unless the parties have justified *every* detail of how they quantified claims. Assessing the value of each claim is an imperfect science that requires experienced lawyers to use their judgment to calculate the value of things that are unquantifiable, such as the difficulty of challenging the defendant's evidence, whether claims could be proved for the entire class or only a part of the class, proving the defendant's scienter, and maintaining a certified class. "Ultimately, the [trial] court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." (*7-Eleven Owners, supra,* 85 Cal.App.4th at p. 1145 (alteration in original) (quoting *Dunk, supra,* 48 Cal.App.4th at p. 1801)).) And courts' micromanagement of how claims are valued would contravene California's clear policy of "voluntary conciliation and settlement . . . especially . . . in complex class action litigation." (*Id.* at p. 1151 (citation omitted); see also *Dunk,*

supra, 48 Cal.App.4th at p. 1801 ("Due regard should be given to what is otherwise a private consensual agreement between the parties.").)

In support of their claim that the parties did not adequately support their valuation, the objectors rely heavily on *Kullar*, *supra,* 168 Cal.App.4th 116. (See Opening Br. 32–37.) But that case only highlights the adequacy of class counsel's performance here. In *Kullar*, the parties provided "essentially no information to explain, much less to substantiate, their evaluation of the magnitude or potential merit of the claims being settled." (*Kullar, supra,* 168 Cal.App.4th at p. 133.) In particular, "absolutely no discovery was conducted" on the plaintiffs' meal-period claim, "[n]o declarations were filed in support of the settlement indicating the nature of the investigation that had been conducted," "no analysis was provided of the factual or legal issues that required resolution," and "[n]o time records were produced in discovery." (*Id.* at pp. 128–29.) In sharp contrast to *Kullar*, class counsel here received voluminous discovery on all claims, including hundreds of thousands of lines of data related to timekeeping. Class counsel also filed numerous declarations detailing his investigation and providing the court with a detailed analysis of the factual and legal issues on every class claim as part of his valuation. And the trial court meaningfully evaluated this information, requiring class counsel to file supplemental declarations to ensure that he had adequately investigated the claims for the entire class period. (RT 7–8, 15, 17.) The trial court thus had sufficient information to conduct an "independent evaluation"

of the settlement's fairness, and the trial court fulfilled this obligation. (*Kullar, supra,* 168 Cal.App.4th at p. 130.)

C. The settlement was the product of arms-length negotiating by experienced litigators, not collusion or a reverse auction.

Having failed to show that Johnson inadequately investigated the case or provided insufficient information to the trial court, the objectors resort to suggesting that the settlement amounts to a collusive reverse auction. (Opening Br. 51–53.) This claim is baseless and wrong.

The settlement reached by Johnson and Diamond Resorts has no hallmarks of collusion or a reverse auction. The parties reached their settlement through mediation with an experienced mediator, and the ultimate value of the settlement was proposed by the mediator himself. This is strong evidence of a fair, arms-length negotiation, and a reviewing court "should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct." (*Kullar, supra,* 168 Cal.App.4th at p. 129.)

The parties had no contact before the filing of the *Johnson* complaint (3 AA 825), and the objectors have no evidence to demonstrate that such impermissible collusion occurred. Instead, they point only to the fact that the complaint in *Johnson* was filed two years after the complaint in *Smith* to suggest

that the settlement was not an arms-length deal. (Opening Br. 52–53.) But the timing of the suit proves nothing—the objectors don't even claim that Johnson knew about the *Smith* action when he filed his complaint. What's more, the objectors mischaracterize the state of their litigation. When Johnson filed his complaint, the *Smith* action had been pending for two years with discovery stayed the entire time and with no visible progress. Even the informal exchange of information between the *Smith* plaintiffs and Diamond Resorts did not occur until the end of 2016—nearly two years after the complaint was filed. The parties in *Smith* had not yet attended mediation when Johnson filed his complaint. Unlike the *Smith* plaintiffs, Johnson vigorously litigated his claims, serving discovery within three months of filing a complaint. The fact that Johnson negotiated a settlement with Diamond Resorts after eight months of litigation while the *Smith* plaintiffs had not reached settlement after more than two years does not suggest impropriety; rather, it demonstrates that Johnson's counsel was proactive in litigating the case, most critically in exchanging discovery early to move the case forward.

The objectors' assertion that the settlement resulted from a reverse auction is equally specious. There is no evidence that Diamond Resorts "pick[ed] the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court w[ould] approve a weak settlement." (*Negrete v. Allianz Life Ins. Co. of N. Am.* (9th Cir. 2008) 523 F.3d 1091, 1099 (*Negrete*).) To the contrary, Johnson's counsel is an experienced wage-and-hour class-action

litigator who has regularly secured large judgments and settlements for his clients. (See 5 AA 1236–41.) And the settlement he negotiated with Diamond Resorts was fair and provided concrete benefits to the class members, including an average payment to class participants of over $500 and payments as a high as $3,899.50. (5 AA 1331–32.) The class overwhelmingly agreed that the settlement was fair: only 20 out of 3,205 class members opted out or objected to the settlement. (*Ibid.*) Class members chose to participate in the settlement even after class counsel provided them with detailed notice about the parallel *Smith* class action, the *Smith* plaintiffs' objections to the settlement, and contact information of the *Smith* plaintiffs' attorney.

Put simply, there is "no evidence of underhanded activity in this case." (*Negrete, supra,* 523 F.3d at p. 1099.) The trial court considered and properly rejected the objectors' arguments about supposed collusion or a reverse auction. In so doing, it recognized that Johnson had adequately represented the class's interests by reaching a fair settlement that provided them with significant compensation for their claims. This decision was well within the trial court's discretion, and this Court should not disturb the trial court's ruling.

D. Even if the presumption of reasonableness did not apply, the settlement here was fair, adequate, and reasonable.

As explained above, the settlement in this case is presumptively fair, adequate, and reasonable. As a result, this Court does not need to start from

scratch and assess whether the value of the settlement is appropriate. But even if this Court *did* step into the role of the trial court and assess the fairness of this settlement on a blank slate, it would find the settlement entirely fair, adequate and reasonable.

All of the factors courts generally consider when evaluating a settlement—"the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement" (*Dunk*, *supra,* 48 Cal.App.4th at p. 1801)—support the adequacy of the settlement.

Although the plaintiffs had strong claims, there was a great deal of risk associated with the litigation. The defendant had timekeeping records that would be prima facie evidence against the plaintiffs' primary claims, as well as formal policies and trainings that instructed managers to comply with the relevant labor laws. (2 AA 402, 407). The defendant also argued that it had no reason to know about any labor-law violations, and that the plaintiffs would have had the burden at trial of proving the required scienter. (2 AA 405, 407–09). There was also a significant risk that the class might not remain certified through trial—the defendant argued that there were many individualized inquiries that would dominate at trial, including variation from resort to

resort, job to job, and supervisor to supervisor with respect to entitlement to overtime pay, whether meal and rest breaks were available, and whether employees had business expenses that could be reimbursed. (See 2 AA 411.)

The expense, complexity, and duration of litigation likewise militate in favor of the settlement. Because the class size was so large, class counsel estimated that he would need to present a significant amount of evidence at trial, including witness testimony, statistical evidence, sampling evidence, expert testimony, and more. (5 AA 1241.) This would also include significant costs that would come out of any final judgment, including experts' fees and attorneys' fees for all of the additional hours worked to argue for class certification and to prepare for trial. (See *ibid.*) The case involved nine different claims that each involved its own set of evidence, so the undertaking for class counsel was substantial.

And the class members' reaction to the settlement demonstrates that it was reasonable. Of more than 3,200 class members, only eleven opted out and nine objected. Over 3,000 class members chose to stay in the settlement and receive their settlement payment. That is overwhelming approval by the class, and it suggests that the class was satisfied with the payment received.

The settlement reached between Johnson and the defendant is presumptively reasonable. But even without that presumption, the settlement is clearly fair: all of the relevant criteria demonstrate that the settlement reached is fair, adequate, and reasonable.

II. The trial court did not err by approving a settlement that resolved claims stretching back to 2011.

The objectors next attack the trial court's approval of the settlement by asserting that Johnson and Diamond Resorts could not agree to settle claims from 2011 to 2013 because that period was outside the statute of limitations applicable in the *Johnson* case. (Opening Br. 47.) They contend that, under U.S. Supreme Court precedent, a class action tolls the statute of limitations period for any later-brought *individual* claims but not claims brought as a class action. (*Ibid.* (citing *American Pipe & Constr. Co. v. Utah* (1974) 414 U.S. 538, and *China Agritech, Inc. v. Resh* (2018) 138 S.Ct. 1800).) This argument assumes that parties are legally barred from settling class claims if the named plaintiff could not bring the claim himself. But that is not the law.

Johnson and Diamond Resorts were allowed to settle claims for any period of time regardless of the applicable statute of limitations: unless a statute of limitations is jurisdictional, it is merely an affirmative defense that the defendant can waive. (*People v. Williams* (1999) 77 Cal.App.4th 436, 457–58 (*Williams*).) The objectors cite no case law holding that the statutes of limitations governing the claims here are jurisdictional. In fact, the California Supreme Court has held provisions of the California Labor Law non-jurisdictional and subject to equitable tolling. (See *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 107–09.) Federal courts interpreting California law have likewise concluded that PAGA's statute of limitations is non-jurisdictional.

(See *Williams v. Veolia Transp. Servs., Inc.* (C.D. Cal. June 28, 2012) 2012 WL 12960640 at *5.) This is consistent with the default rule that under California law, a statute of limitations in civil cases is non-jurisdictional. (*Williams, supra,* 77 Cal.App.4th at pp. 457–58.)

In agreeing to settle claims dating back to 2011, Diamond Resorts waived the statute of limitations for settlement purposes. The trial court explained this to the objectors' counsel at the hearing on objectors' motion to intervene, stating that there was nothing "improper" about the parties agreeing to a global settlement extending back to 2011 as long as Johnson proved that he could "adequately represent a class that goes back in time to 2011 and assuming [class counsel has] done adequate investigation and valued those claims adequately."[6] (RT 22.) And here, Johnson adequately represented the class dating back to 2011. Class counsel analyzed all of the relevant discovery extending back to 2011 and filed a declaration specifically addressing that issue at the trial court's instruction. (4 AA 976–78.) In fact, despite the flurry of criticisms the objectors are currently leveling at the settlement, they do not argue that Johnson was an inadequate representative for class members who worked for Diamond Resorts before 2013.

[6] At the time of the hearing, counsel for the objectors agreed with the trial court's explanation of the law, stating that the parties' use of a class period going back to 2011 was only relevant because "it confirms that intervention would be appropriate, because it's not going to cause a distortion or enlargement of the issues." (RT 22.)

Put simply, there is no legal or factual support for the objectors' assertion that the period covered by the settlement was improper.

III. The class notice provided class members with more than sufficient notice.

The objectors next argue that the entire settlement should be invalidated because the class notice allegedly contained inconsistent details on the claims to be released. (Opening Br. 49–50.) But the notice provided to the class contained detailed, accurate information about the release of provisions and far more information than is required under California law. The trial court correctly concluded that the notice "fairly apprise[d] the class members of the terms of the proposed compromise and of the options open to dissenting class members" as required. (*Trotsky v. Los Angeles Fed. Savings & Loan Ass'n* (1975) 48 Cal.App.3d 134, 151–52.)

The notice provided to class members correctly stated the claims that they would release if they participated in the settlement. It correctly explained that participating class members would release all claims "asserted in this Action or which could have been asserted in this Action related to the facts and claims asserted in this Action." (5 AA 1338.) The notice then listed in detail what was released, including each of the nine claims asserted in the action; "interest, penalties, premium pay, litigation costs, attorneys' fees, restitution, and equitable relief"; and other claims that could have been brought in the action but were not. (*Ibid.*) The language used in the class

notice is nearly identical to the release-of-claims provision in the settlement agreement itself. The class notice uses 153 words to describe the claims being released, and only 5 of these words differ from the settlement agreement's notice-of-release provision.[7] (Compare *ibid.*, with 5 AA 1262–63.) The notice therefore clearly stated what claims would be released in the settlement by stating them nearly verbatim.

Nevertheless, the objectors argue that class members could have been confused because, just above this description of the claims released, the class notice says: "In exchange for participating in the Settlement and receiving a Settlement Payment You Will Release Your Labor Code Claims Against Defendants." (Opening Br. 50; 5 AA 1338.) But this brief summary of the type of claims generally affected by the settlement was not misleading, particularly when a full list of the affected claims was clearly listed in the same paragraph. And, as the trial court reasonably concluded, the class notice provided ample information on how class members could get answers if they were confused about the settlement, including its release of claims. (RT 49 ("[B]etween the notice that was given, the directions to the Court if they want to read the

[7] The two changes are minor and do not change the meaning of the release in any way. First, the class notice describes the first claim as a claim "for unpaid *wages* and overtime wages" whereas the settlement agreement describes the claim as one "for unpaid *straight time* and overtime wages." (Compare 5 AA 1338, with 5 AA 1263.) Second, the class notice gives the date of the end of the class period (July 2, 2018), while the settlement agreement lists the end of the class period as "the date the Court grants preliminary approval . . . of the settlement." (Compare 5 AA 1338, with 5 AA 1263.)

settlement, [and] the telephone numbers of all counsel, including the objecting attorney's telephone number" class members had been given "more than ample" avenues to have any questions about the settlement answered).) Objectors also argue that the class notice did not explain "whether claims under the FLSA" were being released and did not "identify the papers comprising the operative settlement agreement." (Opening Br. 50–51.) But the objectors have cited no case law suggesting either that parties must identify any statutes or claims that were not part of a lawsuit but might be affected by its settlement or that identifying the operative complaint is a key component of class notice.

In short, class notice was sufficient to satisfy the requirements of due process and alert the class about the release of their claims.

IV. The settlement agreement's release of claims is not overly broad.

Although framed as a challenge to class notice, the objectors also argue that the release of claims in the settlement agreement itself was overly broad. (Opening Br. 50–51.) The objectors claim, without citation to a single precedent that supports their position, that the release is overly broad because it releases any claims which could have been asserted in the action. (Opening Br. 51.) But the scope of the release of claims here is well within the bounds that California courts regularly approve.

The parties' settlement agreement released all claims alleged in the amended complaint in *Johnson*, as well as any claims that could have been brought in the action. (5 AA 1262–63.) "A general release—covering 'all claims' that were or could have been raised in the suit—is not uncommon in class action[s]." (*Villacres v. ABM Indus. Inc.* (2010) 189 Cal.App.4th 562, 588 (collecting cases).) And courts have recognized that a broad release is particularly appropriate where (as here) a settlement is non-reversionary because the defendant "is giving something in return for the broader release" of claims both brought and that could have been brought. (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 411.)

Despite the objectors' unsupported assertions, the settlement agreement contained a standard release of claims that has been repeatedly accepted by California courts. The trial court was well within its discretion to approve the settlement agreement as written, and this Court should not second-guess that exercise of discretion.

V. The trial court was not required to issue specific findings before approving the settlement.

Having failed to prove that the settlement itself was deficient in any way, the objectors last argue that the settlement approval must be undone because the trial court did not issue formal written findings of fact. (Opening Br. 53.) The trial court was not required to do so. The "general rule" under California law is that statements of decision are only required after a trial; no

statement of decision is required for a ruling on a motion, "even if the motion involves extensive evidentiary hearings and the resulting order is appealable." (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660.) The objectors made no argument and provided no authority to the trial court to diverge from that general rule in this case. (See RT 53 (The Court: "Did you provide any law that says you're entitled to a statement of decision on a ruling on a motion?" Ms. Chang: "No, your Honor." The Court: "Request is denied.").) The objectors repeat that same error to this Court, failing to explain why the trial court was required to issue written findings of fact and failing to cite any case law in support of that position. This Court should decline the objectors' invitation to unwind the hard-fought and valuable settlement reached in this case based on an unsupported assertion that the trial court should have memorialized its reasoning on paper.

CONCLUSION

The settlement reached in this case was the result of diligent investigation, analysis, and negotiation between class counsel and the defendant. The agreement confers substantial monetary benefits on class members. And the trial court considered detailed information and analysis before correctly concluding that the settlement was fair, reasonable, and adequate. This Court should affirm the final approval of that settlement.

Respectfully submitted,

/s/ Deepak Gupta

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief contains 10,988 words including footnotes, and was prepared in 13-point Baskerville type. I have relied on the word count of the computer program used to prepare this brief.

July 12, 2019

/s/ Deepak Gupta
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PROOF OF SERVICE

I, Deepak Gupta, hereby certify that at the time of service, I was at least 18 years of age and not a party to this action. My business address is Gupta Wessler PLLC, 1900 L Street NW, Suite 312, Washington DC 20036, and my email address used to e-serve is deepak@guptawessler.com. I certify that on July 12, 2019, I served this brief on the below interested parties via the Fourth District Court of Appeal's TrueFiling 3.0 system:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 12, 2019 /s/*Deepak Gupta*
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