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ROSALIE NUANES et al., Plaintiffs and Respondents, v. INSIGNIA FINANCIAL GROUP, INC., Defendants and Respondents; MARSHALL G. BEROL, Objector and Appellant.

A115240

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

2008 Cal. App. Unpub. LEXIS 1370

February 20, 2008, Filed

PRIOR HISTORY: [*1]
San Mateo County Super. Ct. Nos. 404228 & 417622.

JUDGES: Siggins, J.; McGuiness, P.J., Horner, J. * concurred.

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: Siggins

OPINION

In this appeal, Marshall G. Berol (Berol), a class member and objector, challenges the trial court's settlement approval of class and derivative claims brought by investors against the general partners and the limited partnerships in which they invested. Berol claims that the named plaintiffs were not adequate class representatives for the derivative claims and that the entire settlement is unfair and inadequate. He also claims the court erred when it denied his motion to intervene. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1

1 We summarize the relevant history of this long-standing litigation from our previous opinion, with the addition of applicable information regarding subsequent events, including the proceedings on remand. (*Nuanes v. Insignia Financial Group, Inc*. (Mar. 21, 2005, A103729) [nonpub. opn.].)

Investors in more than 50 limited real estate partnerships brought both class action and partnership derivative claims [*2] against various general partners and managers and the limited partnerships. The trial court preliminarily approved a settlement, but later vacated its order and disqualified class counsel for misconduct. The court submitted the

appointment of new lead counsel to an arbitrator, who recommended the appointment of William Bernstein of Lieff, Cabraser, Heimann & Bernstein (LCHB) as sole lead counsel. After a hearing the trial court adopted that recommendation. [2]

2 The trial court's order also permitted three other firms, including counsel for appellant, to "work with Lead Counsel as Lead Counsel so directs in prosecuting the case." (*Nuanes v. Insignia Financial Group, Inc., supra*, [nonpub. opn.] [typed opn. p. 2, fn. 2].) LCHB was made responsible for all dealings with defendants' counsel, except to the extent agreed by the parties, and for filing and arguing all pleadings on behalf of plaintiffs and the putative class.

LCHB filed a third amended complaint, asserting derivative claims on behalf of 52 partnerships and direct class claims by individual investors. Defendants demurred and sought dismissal without leave to amend. Defendants argued, inter alia, that the named plaintiffs lacked [*3] standing to bring derivative claims on behalf of certain partnerships in which no named plaintiff held an interest. At the hearing on the demurrer, lead counsel requested permission to add representative plaintiffs for those unrepresented partnerships. The court sustained the demurrer without leave to amend "as to the derivative claims of those partnerships wherein plaintiffs do not own an interest. [Footnote.]" (*Nuanes v. Insignia Financial Group, Inc., supra*, [nonpub. opn.] [typed opn. p. 2].) The court also stated: "Plaintiffs have had ample time to locate and name plaintiffs that have interests in those partnerships for which they presently have none." Plaintiffs' motion for reconsideration was denied. ([Typed opn. p. 3].)

Thereafter, new plaintiffs who are also represented by LCHB, filed a separate complaint alleging derivative claims on behalf of all the partnerships ("*Heller* action or complaint"). [3] Plaintiffs also moved to consolidate this case with *Heller*. Defendants moved to strike the *Heller* complaint, arguing that it was filed to circumvent the court's ruling on the demurrer and for that reason violated the order sustaining the demurrer in this case. The court granted the [*4] motion to strike and the *Heller* complaint plaintiffs appealed. [4]

3 The *Heller* complaint was filed by Dr. Heller, who owned interests in every limited partnership at issue, and Michael G. Clennan, who held interests in two of the partnerships. For the sake of simplicity, we shall hereafter generally refer to Dr. Heller alone as the named plaintiff in the *Heller* action.

4 The *Heller* appeal was partially briefed before further proceedings were stayed pending a potential settlement.

Meanwhile this case proceeded. The plaintiffs moved to certify a class of investors consisting of all persons unaffiliated with defendants who owned units in the partnerships. At the conclusion of the hearing on the certification motion, the court suggested that the parties pursue a settlement. The court said: "It might be fruitful because you guys don't know where I'm going on this. Let's face it, the decision on certification either makes or breaks at least part of this case, right? [P] So with that fear of not knowing where I'm going on this, maybe it will result in some reasonable discussions, I hope." [5] So, the parties began mediation.

5 At the April 2002 class certification hearing, the parties discussed [*5] a separate federal action pending in Colorado "that raise[d] a common law fraud claim in connection with the litigation settlement tender offers." Shortly thereafter, the federal court found that individual issues predominated in that case and denied class certification.

After multiple mediation sessions, the parties in this case and in *Heller* sought the trial court's approval of a settlement of all class and derivative claims. [6] Under the terms of the settlement, in exchange for their dismissal of all claims with prejudice, class members would receive tender offers for their partnership interests, independent property appraisals for each partnership property, and a portion of a $ 9.9 million settlement fund divided among all class members after payment of attorney fees and half of the costs of the independent appraisals. Defendants also agreed not to claim a portion of the expenditures for the defense of the lawsuits from the partnerships.

6 The attorneys signed the stipulation of settlement on December 20, 2002.

Before agreement was reached on the settlement, a fourth amended complaint was filed in this case by plaintiffs who owned units in a small minority of the 44 partnerships whose [*6] derivative claims were covered by the settlement. Approximately 117,000 individuals had interests in the various partnerships when the cases were settled. In approving the settlement, the court certified a settlement class as provided in the stipulation for settlement: " 'Settlement Class' means all Persons who own Units in one or more of the Partnerships as of the date of execution of this Stipulation of Settlement, as well as their successors and/or assigns, but excluding the Defendants and all other Released Persons." (*Nuanes v. Insignia Financial Group, Inc., supra,* [nonpub. opn.] [typed opn. pp. 3-4].) The court preliminarily approved the settlement in April 2003.

In May 2003, Berol, a class member who owned units in three partnerships, filed detailed objections to the settlement. At about the same time, this court revested the trial court with limited jurisdiction over the *Heller* matter "for the express purpose of hearing, considering, and acting on the parties' petition for review and approval of the proposed settlement . . . ." (*Nuanes v. Insignia Financial Group, Inc., supra,* [nonpub. opn.] [typed opn. p. 4].) At the final approval hearing, Berol contended, inter alia, that [*7] there had been inadequate representation of the derivative claims of those partnerships in which none of the named plaintiffs in this case owned an interest, for this reason class members had received inadequate notice relating to the derivative claims, and the settlement was unfair and inadequate. The trial court approved the settlement and Berol appealed.

In March 2005, this court decided Berol's appeal, vacated the approval, concluded the record was not adequate to permit meaningful appellate review, and remanded for further proceedings before the trial court on the adequacy of representation of the derivative claims in settlement negotiations. In July 2005, we decided the *Heller* appeal and reversed the order striking the complaint, concluding that "[t]he fact that the plaintiffs in *Heller* and *Nuanes* were represented by the same counsel did not justify the dismissal of the *Heller* action," and that the ruling on the demurrer in *Nuanes* "did not . . . preclude the filing of a new action by separate plaintiffs who did have standing to assert those claims." (*Heller v. Insignia Financial Group, Inc.* (July 28, 2005, A098329) [nonpub. opn.] [typed opn. p. 6].) The trial court conducted a [*8] hearing on the remand in this case in February 2006, and concluded that the derivative claims were adequately represented in the settlement negotiations. The proposed settlement was again approved. Berol again timely appealed. [7]

7 We have granted respondents' unopposed request for judicial notice of the records in the related prior appeals in *Nuanes* and *Heller*.

DISCUSSION

A. Standards that Guide Our Review

Court approval of class action settlements is required to prevent fraud, collusion or unfairness to the class, and the trial court must determine the settlement is fair, adequate and reasonable. (*Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1800-1801*.) The purpose of this requirement is to protect class members whose rights may not have been given due regard by the negotiating parties. (*Ibid.*) When we review a decision approving a class action settlement, we determine whether the trial court acted within its discretion, and we do not reweigh the evidence nor substitute our notions of fairness for those of the trial court. (*Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 234-235*; *7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1144-1146*.)

Where [*9] there is no state precedent to help guide our review, we are urged to apply principles of federal law that control the management of class actions. [8] (*Green v. Obledo (1981) 29 Cal.3d 126, 146-147*.) These standards and considerations apply equally to our review of a settlement of derivative claims. (*Robbins v. Alibrandi (2005) 127 Cal.App.4th 438, 449*.) With these principles in mind we will address Berol's specific objections to the settlement.

8 *Rule 23 of the Federal Rules of Civil Procedure* (28 U.S.C.) pertains to class actions and *rule 23.1* pertains to

derivative suits. Those rules and the cases that implement them will aid our analysis in this case.

B. Heller's Adequacy as a Representative Plaintiff in the Derivative Action

Berol's primary argument for reversal is based upon Heller's alleged inadequacy as a representative plaintiff on the derivative claims. He argues Heller was subject to a unique defense that would not have affected other potential plaintiffs, and for this reason Heller's prosecution of the derivative claims was necessarily compromised. The argument is based upon the trial court's order that struck Heller's complaint because the court considered it to be an attempt [*10] to evade the earlier ruling in this case sustaining the defendant's demurrer to derivative claims. Berol does not argue that Heller was subject to a unique defense due to his interaction with the defendants or due to any peculiarity of his investments in the defendant partnerships. Nor does he argue that there was any antagonism between Heller and other investors.

Under California law a derivative plaintiff must own an interest in the partnership at the time of the challenged transaction and at the time he or she files suit. (*Pacific Lumber Co. v. Superior Court (1990) 226 Cal.App.3d 371, 376*; see also *Kauffman v. Dreyfus Fund, Inc. (3d Cir. 1970) 434 F.2d 727, 735* [shareholder of mutual funds who sues derivatively on behalf of those funds does not have standing to bring class derivative action on behalf of other funds similarly situated].) There is also a requirement that the plaintiff and plaintiff's attorneys be adequate representatives for the interests of the other investors in the partnerships. (*Heckmann v. Ahmanson (1985) 168 Cal.App.3d 119, 128-129* [representative assumes a fiduciary duty to the other shareholders with respect to the derivative claims]; see also *Fed. Rules Civ. Proc., rule 23.1,* [*11] 28 U.S.C. ["The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."].) "Adequacy of representation is a question of fact, to be raised and resolved in the trial court in the usual manner." (*Harris v. Palm Springs Alpine Estates, Inc. (9th Cir. 1964) 329 F.2d 909, 914*.)

The burden of proving that the named plaintiff in a derivative action is inadequate is placed on the party challenging the representation. (See *Smallwood v. Pearl Brewing Company (5th Cir. 1974) 489 F.2d 579, 592, fn. 15*; *Fradkin v. Ernst (N.D. Ohio 1983) 98 F.R.D. 478, 484*.) Moreover, whether the lead plaintiff is subject to unique defenses is but one factor to be considered in determining whether the plaintiff is an adequate representative. (*Fireside Bank v. Superior Court (2007) 40 Cal.4th 1069, 1090*.) "Professors Wright and Miller indicate the salient features of such analysis when they state: 'Perhaps the most important element to be considered [in determining the fairness and adequacy of a derivative plaintiff's representation] is [*12] whether plaintiff's interests are antagonistic to those he is seeking to represent. . . . Defendant must show that a serious conflict exists and that plaintiff could not be expected to act in the interests of the other shareholders because doing so would harm his other interests.' [Citations.] If, from the foregoing, a rule might be synthesized, it is: when a derivative plaintiff demonstrates to the court an intent and desire to vigorously prosecute the underlying corporate claim and when he has engaged competent counsel to assist in that endeavor then, absent either a conflict of interest which goes to the forcefulness of the prosecution or the existence of antagonism between the plaintiff and other shareholders arising from differences of opinion concerning the best method of vindicating the corporate claim, the representation requirement of [the applicable federal standard] is met." (*Sweet v. Bermingham (S.D.N.Y. 1975) 65 F.R.D. 551, 554*, fn. omitted; see also *Jannes v. Microwave Communications, Inc. (N.D. Ill. 1972) 57 F.R.D. 18, 22-23*.)

To the extent Berol's arguments challenge the propriety or ability of the *Heller* plaintiffs to settle the derivative claims while the *Heller* appeal [*13] was pending, we find nothing improper about or inadequate with the settlement for that reason. In the first place, "[t]he specific danger a unique defense presents is that the class 'representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class.' " (*Fireside Bank v. Superior Court, supra, 40 Cal.4th at p. 1090*.) That did not happen here. The record shows that the *Heller* efforts were directed to giving the derivative plaintiffs a voice and a place in this litigation. Success should not be held against them. We also find no infirmity in the fact that the settlement was agreed upon at a time when most of the derivative claims were on appeal and not pending before the trial court. As plaintiffs point out, even though the *Heller*

action was on appeal, defendants were subject to the threat that derivative litigation could be filed in other jurisdictions. Moreover, cases frequently settle when appeals are pending, and, even then, settlements are highly favored. (See *Union Bank of California v. Braille Inst. Of America, Inc. (2001) 92 Cal.App.4th 1324, 1331*.) We will not subject this settlement to heightened scrutiny or declare [*14] it infirm just because it was agreed upon while the *Heller* appeal was pending.

With the clarification provided in the trial court's order approving the settlement on remand from our earlier opinion in this case, and in light of the reinstatement of Heller's complaint while the remand was pending, we have no difficulty finding that he was an adequate representative plaintiff for the derivative claims. Heller owned units in each of the defendant partnerships for the duration of this case totalling an investment of approximately $ 2.7 million. His attorneys are highly experienced and were found qualified by the court. Moreover, Heller vigorously prosecuted the derivative claims through his successful appeal. We discern nothing in this record to indicate that Heller had a conflict of interest that impaired his desire or ability to prosecute the derivative claims or that reveals any antagonism between Heller and other shareholders.

With the benefit of our experience deciding the *Heller* appeal from the motion to strike, we also fail to see how the defense asserted in the motion to strike was a valid defense that was particularly unique to Heller. It is unclear to us how Heller's inability [*15] to file a separate derivative complaint did not similarly affect any other investor coming into this litigation who wished to employ the same counsel and consolidate their action with this one. We agree with the trial court that Heller was not subject to a unique defense, especially after the defense that Berol claims was unique to Heller was determined to be without merit in the appeal. Moreover, the defense that Berol argues is unique to Heller seems also to turn upon LHCB's involvement in the litigation. We know of no case disapproving a representative plaintiff due to a unique defense premised upon the plaintiff's selection of counsel. Indeed, there was no such valid defense here. There is substantial evidence to support the court's conclusion that Heller was an adequate representative for the derivative claims and the court did not abuse its discretion in doing so.

C. Fairness of the Settlement

Berol also raises two challenges that go to the fairness and adequacy of the settlement. He argues that the order approving the settlement should be reversed because the class and derivative claims were settled for inadequate consideration. He also claims that lead counsel and the trial court [*16] did not sufficiently consider the interests of absent class members. We disagree with both arguments.

"A trial court must approve a class action settlement agreement and may do so only after determining it is fair, adequate, and reasonable. [Citation.] It is vested with a broad discretion in making this determination. [Citation.] In exercising its discretion, that court should consider relevant factors, which may include, but are not limited to the strength of the plaintiffs' case, the risk, expense, complexity and duration of further litigation as a class action, 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 class members to the proposed settlement. At the same time, the trial court should give '[d]ue regard . . . to what is otherwise a private consensual agreement between the parties.' [Citation.] Such regard limits its inquiry ' "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 [*17] a whole, is fair, reasonable and adequate to all concerned." ' [Citation.] The trial court operates under a presumption of fairness when the settlement is the result of arm's-length negotiation, investigation and discovery that are sufficient to permit counsel and the court to act intelligently, counsel are experienced in similar litigation, and the percentage of objectors is small. [Citation.] Ultimately, the court's determination is simply ' " 'an amalgam of delicate balancing, gross approximations and rough justice.' " ' " (*In re Microsoft I-V Cases (2006) 135 Cal.App.4th 706, 723*, citing *Dunk v. Ford Motor Co., supra, 48 Cal.App.4th at pp. 1800-1801*.)

1. *Adequacy of Consideration*

The gravamen of this challenge is that the claims were settled too cheaply in light of their gross dollar value. But the problem with Berol's argument is that he does not take into account the uncertainty of litigation or the degree of probability plaintiffs would prevail. As the trial court said, appellant's $ 300 million evaluation "must be discounted by the probability of recovery in light of 'risks inherent in the litigation.' "

"The fact that a proposed settlement may only amount to a fraction of the [*18] potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." (*City of Detroit v. Grinnell Corporation (2d Cir. 1974) 495 F.2d 448, 455*.) The settlement here creates a fund of $ 9.9 million to cover costs of litigation, attorneys fees, appraisals and distributions to the plaintiff class. The plaintiffs also have the opportunity to tender their partnership interests for sale with the benefit of the results of a neutral appraisal for each partnership property. The defendants agreed to cap the amount of reimbursement they can seek from the various partnerships for fees and costs they incurred in this litigation. They may seek to have $ 1.5 million reimbursed from the partnerships and they waive any further indemnity. [9] At the time of settlement this was estimated to be a waiver of the defendants' right to seek $ 1.5 million. Even though the dollar amount of this settlement was far less than appellant's estimate of the value of the claims, there was ample reason for the trial court to conclude the amount of the settlement was adequate.

> 9 Berol also says this indemnity is inadequate because the partnership agreements specify [*19] differing obligations to indemnify the defendants, yet the settlement agreement treats them all the same. This is exactly the kind of meddling in the trial court's discretion that we are not inclined to entertain on appeal from an order approving a settlement involving 117,000 class members who invested in 44 limited partnerships.

Neither the trial courts, nor we, are required to ensure that a settlement maximizes the value of relinquished claims with mathematical precision. (*Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at p. 250* ["the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances"]; *7-Eleven Owners for Fair Franchising v. Southland Corp., supra, 85 Cal.App.4th at p. 1150* ["the merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the operative word is 'settlement' "]; *Linney v. Cellular Alaska Partnership (9th Cir. 1998) 151 F.3d 1234, 1242* [" 'it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement [*20] is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators' "].) As we said, the trial court discounted the monetary value of plaintiffs' claims in light of the risks they faced in litigation. We are not in a position to second guess the trial court on this factor. As the trial court observed in the order approving settlement, the general likelihood that plaintiffs prevail in derivative actions is "extremely small." (See *In re Pacific Enterprises Securities Litigation (9th Cir. 1995) 47 F.3d 373, 378* and fn. 4 [citing statistics].)

But the full measure of this settlement is not just its monetary value. We agree with the trial court that the appraisals of partnership property afford plaintiffs an added benefit in responding to the tender offers for their partnership interests. While Berol correctly points out that tender offers were made for partnership interests before this settlement, he makes no serious challenge to the conclusion that neutral appraisals required by the settlement may aid the plaintiffs who will consider whether any tender offer is sufficient to warrant acceptance.

We are also unpersuaded that the defendants' [*21] waiver of their rights to seek more than $ 1.5 million indemnification from the partnerships for costs of defense is the only measure of consideration arising out of the derivative claims. True enough, indemnification of the defendants would be a charge against the partnerships in absence of the waiver, but the class plaintiffs benefit from the waiver just as much as the partnerships. If anything, this challenge points out that all the claims were for the benefit of the limited partner investors, and that we should consider the adequacy of consideration supporting settlement as a whole and not bit by bit as urged by appellant. We also agree with counsel for the plaintiffs/respondents who pointed out in oral argument that settlement consideration for the derivative claims flowing to the plaintiff class rather than the partnerships was desirable in this case because it avoided conferring benefit upon the defendant general partners. When it discussed the Heller plaintiffs' adequacy to serve as representative

plaintiffs, the trial court made an observation that equally applies to our review of the consideration supporting settlement. "The interests of the Partnerships and the Settlement [*22] Class are aligned. The parties with the only real interest in the derivative claims, the limited partners in the Partnerships, and the class members for the class claims are exactly the same group of investors."

In this light, we view the settlement as a whole and not piece by piece. (See *Officers for Justice v. Civil Service Com'n, Etc. (9th Cir. 1982) 688 F.2d 615, 625* ["The court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit 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"].) When we do, we cannot say consideration supporting the settlement is so wanting that the trial court abused its discretion in concluding it was adequate.

Berol claims that the releases to be signed by settling plaintiffs are overly broad and by their terms release defendants from future wrongs they commit after the date of the settlement agreement. But any possible confusion over the meaning of the release was rectified in [*23] a stipulation filed in the trial court that makes clear the parties intend to release defendants only for wrongs committed up to the date of the settlement agreement and not beyond. [10] This objection has no merit.

> 10 The court found "that the plain language of the release provision only releases claims that could have been brought prior to the execution of settlement. . . . To make this abundantly clear, the parties entered a stipulation on January 6, 2006, reinforcing the plain language of the December 20, 2002 Stipulation." The January 2006 stipulation regarding the scope of the release states: "WHEREAS, Objector Berol has taken the position that the Stipulation of Settlement releases all claims arising through the Effective Date and uses that position as a basis to challenge the settlement contained therein; and [P] WHEREAS, the Parties disagree with Berol's construction of the Stipulation of Settlement, but wish to avoid any doubt being raised about the scope of the release contained therein; [P] IT IS HEREBY STIPULATED BY THE PARTIES THAT: [P] The stipulation of Settlement does not, and never did, release claims of any nature arising after December 20, 2002, the date the Stipulation [*24] of Settlement was executed."

2. *The Interests of Absent Class Members*

Berol weaves through his briefs a theme that the interests of absent class members were disregarded by Heller and his counsel in negotiating and seeking approval of the settlement. He says that Heller was not sufficiently involved in the settlement process and was not a typical class member. He argues that counsel abandoned the interests of plaintiffs in seeking approval of the settlement. He also says the court disregarded absent class members by uncritically reviewing and approving the settlement. We are unpersuaded.

Berol, in rather conclusory fashion, argues that Heller was not meaningfully involved in the negotiations leading up to settlement. This, he argues, shows that Heller did not adequately represent absent class members and instead that this was an attorney driven settlement. Berol premises this argument upon a misreading of *In re California Micro Devices Securities Litigation (N.D. Cal. 1996) 168 F.R.D. 257*. Contrary to Berol's characterization, *Micro Devices* does not require an "adversarial inquiry" into the adequacy of a representative's participation. Rather, in *Micro Devices* the court had reason to [*25] question the suitable participation of lead plaintiffs from the factual showing made by plaintiffs in support of the settlement. There is no similar factual showing in this record.

The record in this case indicates that investors were well aware of their ability to protest an inadequate settlement. They did so in 1999 and those objections were the precursor to the appointment of current class counsel. When investors received notice in 2003 of the settlement presented for our review, only 129 class members out of 117,065 opted out, and only 8 objected to settlement. The trial court properly observed that the small number of objectors was a factor suggesting the settlement in this case is fair, adequate and reasonable. (See *Marshall v. Holiday Magic, Inc. (9th*

Cir. 1977) 550 F.2d 1173, 1178.) Berol now argues that the numbers of investors who opted out and objected in 2003 is meaningless because they did so before our decision in *Heller* and the earlier appeal in this case. But he provides no authority that suggests the parties had a duty to provide new class notice following our remand in this case for a further settlement hearing. Berol says it is speculative to assume class members [*26] would react to notice of the 2006 fairness hearing as they did in 2003, but we think it is just as speculative to assume they would not.

The trial court also relied upon class counsel's support of settlement as a factor in determining the settlement was fair, reasonable and adequate. (See *Dunk v. Ford Motor Co., supra, 48 Cal.App.4th at p. 1801*.) Berol argues the court's reliance upon this factor was misplaced because counsel was "contractually bound to support the Settlement." But the provision in the agreement to which Berol refers does not require counsel to do any such thing. Instead, it sets forth the circumstances where counsel can disavow the agreement based upon the results of "Confirmatory Discovery" to be conducted on the factual bases for the agreement. [11] Moreover, the terms of the agreement apparently provided plaintiffs an opportunity to disavow the settlement following our decision in the first appeal in this case where we vacated the trial court's approval. The settlement agreement provides that if the trial court's approval is "materially modified or reversed . . . then this Stipulation shall not be cancelled and terminated if all parties to this Stipulation, within [*27] thirty (30) days from the date of such occurrence, provide written notice to all other parties hereto of their intent to proceed with this Stipulation . . . ." Plaintiffs arguably could have terminated the agreement upon our vacatur of the 2003 decision approving settlement, but instead, at a time when they were aware of appellant's objections, they proceeded with their 2005 motion for supplemental findings in order to secure court approval. Plaintiffs were not contractually obligated or duty bound to do so, and the record does not reflect they sought confirmation of settlement for any reason other than in the exercise of their considered judgment that settlement remained the best option.

> 11 Under section 2.3 of the Stipulation of Settlement entitled "Confirmatory Discovery," AIMCO agreed to make available for deposition the person most knowledgeable about certain topics, and to complete the production of related documents. Section 2.3 further provided: "This Settlement may not be terminated based on the confirmatory discovery unless such discovery reveals by a preponderance of the evidence that this Settlement is not fair, adequate, and reasonable. If Lead Counsel and counsel for AIMCO [*28] cannot reach agreement as to whether the Settlement may be terminated as a result of the confirmatory discovery, the Hon. Margaret J. Kemp shall, upon motion made by Class Counsel, conduct a hearing to determine whether termination is appropriate."

Berol's final point in support of his argument that the court did not do enough to protect absent class members is premised upon the fact that the court's 2006 order and judgment finally approving the settlement was prepared by plaintiffs' counsel. He says the trial court's whole cloth adoption of the order shows that the court did not independently evaluate the fairness of the settlement. In light of the record of these proceedings, and in the absence of any showing that the trial judge abdicated his responsibility, we will not conclude that the court did not act independently because the judgment and order were prepared by counsel. (See *J. H. McKnight Ranch, Inc. v. Franchise Tax Bd. (2003) 110 Cal.App.4th 978, 984* [court's request that party prepare statement of decision "virtually all" of which was adopted by court "creates no inference that [court] has failed to engage in a thoughtful weighing of the evidence"]; cf. *In re Community Bank of Northern Virginia (3d Cir. 2005) 418 F.3d 277, 306-308, 318-319* [*29] [remanding for further consideration of adequacy of class representation in light of various factors including potential for collusion, lack of "[any] formal discovery . . . whatsoever," and "enormous" legal fee offered by defendants, after trial court entrusted class counsel to prepare findings during "an *ex parte* closed door session held *before* the settlement hearing, when counsel for Appellants were not present" and where the court's own memorandum "reflect[ed] poorly on [its] familiarity with the facts and substantive nature of the case before it"].) [12]

> 12 We also reject the suggestion in Berol's reply brief that we should apply the statute that prohibits adoption of an order prepared by a party when a court rules on a new trial motion to the circumstances presented here (see *Code Civ. Proc., § 657*); again, Berol provides no authority to support such a theory.

3. *Other Factors that Bear Upon the Court's Settlement Approval*

a. Extent of Discovery and Litigation

The trial court concluded that "the litigation of four demurrers, a class certification motion, and various motions to compel" as well as discovery that included "inspection and analysis of . . . hundreds of thousands of pages [*30] of documents produced by the Defendants," and the "depositions of several class representatives and AIMCO's person-most-knowledgeable on several central issues] has been sufficient to permit the parties to evaluate the liability and damages aspects of this case." The court also determined that "[r]equiring the parties to have obtained more discovery given the array of fundamental legal challenges facing Plaintiffs' cause would not have been materially productive."

Berol challenges these conclusions with a general complaint that there was insufficient discovery directed to the derivative claims, but he makes no showing that this alleged shortcoming had an effect on the settlement. Berol also claims that plaintiffs' agreement to support settlement if the confirmatory discovery validated their assumptions and analysis was an "unheard of" concession. Defendants counter that such a provision is common and "[t]his would be true in any number of settlements." Berol's point is without merit. He failed to raise this as a challenge to the settlement in the 2003 approval proceedings. He cites no authority that requires a court to disapprove a settlement because one of its terms requires plaintiffs [*31] to support the agreement if discovery proves the settlement to confirm plaintiffs' analysis and assessment of the case. We also fail to see how a provision requiring plaintiffs to support the agreement if discovery confirms the advisability of their decision to settle is an indicator of any coercion or infirmity in the agreement. (See *7-Eleven Owners for Fair Franchising v. Southland Corp., supra, 85 Cal.App.4th at p. 1150* [" ' "formal discovery is not a necessary ticket to the bargaining table" where the parties had sufficient information to make an informed decision about settlement' "].)

b. Complexity, Expense, and Duration of Litigation

The court stated that it was "aware based on presiding over four demurrers and a class certification hearing that the issues in this litigation are complex," and "would require expert testimony on factually complicated issues regarding the valuation of properties located throughout the country as well as potential[] application of the law of several states . . . ." After considering "the uncertainties of predicting the outcome of complex litigation such as [this and] the merits of the Defendants' potential defenses," the court concluded "that further [*32] proceedings against the Defendants would be protracted, complex and expensive, and might not result in substantially greater recovery for the Settlement Class and the Partnerships given the significant benefits provided by the Settlement." The court therefore concluded it was "desirable and in the best interests of the Settlement Class and the Partnerships to settle and release their claims against the Defendants, in exchange for the substantial benefits they would receive as a result." The court did not abuse its discretion in so ruling. (See *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at p. 250* ["[c]ompromise is inherent and necessary in the settlement process"].)

Berol argues the court's complexity analysis was flawed because the court considered and discussed only the complexity of class claims as they bore upon certification. But the court was using the prior demurrers and the class certification motion as its framework for the complexity of issues generally presented in the litigation. We agree with defendants who point out that the derivative claims were particularly complex, and that "the property management fees claim alone would require a very complicated analysis [*33] of market rates for fees in multiple geographic areas on an annual basis. And whatever the 'other fees' Mr. Berol posits may have been, the complexity of proving them for dozens of partnerships is self-evident." Berol has not shown that the court abused its discretion in the manner it considered the complexity of the case as a factor in its evaluation of the fairness of the settlement.

D. *Denial of the Motion to Intervene*

Berol argues it was error for the trial court to deny his motion to intervene filed after this case was remanded in 2005. But intervention requires "timely application." (*Code Civ. Proc., § 387, subd. (b)*.) Berol's application was untimely and only made after he sought to disqualify the trial judge and the court struck his disqualification motion. No

miscarriage of justice has been shown. (See *City and County of San Francisco v. State of California (2005) 128 Cal.App.4th 1030, 1036*.)

CONCLUSION

Many of Berol's arguments would require us to sift through the evidence and record in order to reach qualitative determinations on the merits of the underlying claims. But when courts review settlements, " 'Neither the trial court nor this court is to reach any ultimate conclusions [*34] on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.' [Citation.] In other words, 'the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits.' " (*7-Eleven Owners for Fair Franchising v. Southland Corp., supra, 85 Cal.App.4th at p. 1145*.) As we said earlier: "Ultimately, the court's determination is simply ' " 'an amalgam of delicate balancing, gross approximations and rough justice.' " ' " (*In re Microsoft I-V Cases, supra, 135 Cal.App.4th at p. 723*, citing *Dunk v. Ford Motor Co., supra, 48 Cal.App.4th at p. 1801*.) Here we have reviewed the record " ' "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." ' " (*In re Microsoft I-V Cases, supra, at p. 723*.) Based upon our review, we are fully confident that the trial court did not abuse its discretion when it approved [*35] this settlement in 2006.

DISPOSITION

The order approving the settlement is affirmed.

Siggins, J.

We concur:

McGuiness, P.J.

Horner, J. *

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.