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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DANE GARNICA, et al.

Plaintiffs and Respondents,

v.

VERIZON WIRELESS TELECOM, INC., et al.,

Defendants and Respondents,

SAUL DELEON

Objector and Appellant.

A128577

(San Francisco County
Super. Ct. No. 08-476827)

I. INTRODUCTION

Objector and appellant, Saul Deleon, appeals from an order granting final approval of the settlement of a class action lawsuit challenging wage and hour practices of defendants and respondents, Verizon Wireless Telecom, Cellco Partnership and Airtouch Cellular (collectively referred to as Verizon). Deleon argues that the trial court erred in approving this settlement because the release between Dane Garnica, Wendy Johnston, the class represented by Garnica and Johnston (collectively referred to as Garnica or plaintiffs) and Verizon is so broad as to encompass claims that Deleon has brought in another action in Los Angeles County Superior Court and which were not properly valued in this litigation. We disagree and affirm the trial court's order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint and the Amended Complaint*

In June 2008, Dane Garnica filed a lawsuit against Verizon Wireless on behalf of himself and all other similarly situated employees of Verizon. Because Garnica was employed by Cellco Partnership, an entity that does business as Verizon Wireless, in an amended complaint, filed December 3, 2009, Garnica corrected this error and named Cellco Partnership as a defendant. He also added a second class plaintiff, Wendy Johnston, whose employer was AirTouch Cellular, which also does business as Verizon Wireless. We refer to these defendants collectively as "Verizon."

The amended complaint identified two subclasses: first, defendants' hourly employees and, second, defendants' hourly employees who worked overtime hours and were paid an hourly wage and additional compensation in the same week. The amended complaint alleged that defendants "(1) failed to pay all wages due, including overtime wages due, as required by law, and failed to pay wages in a timely manner as prescribed by Labor Code § 204; (2) failed to pay employees overtime in violation of California Labor Code § 1194 and applicable Industrial Welfare Commission Orders; (3) failed to provide accurate wage statements to employees as required by law; failed to maintain payroll records as required by Labor Code §§ 226, 1174(d), and applicable IWC Wage Orders; and (4) failed to pay wages due on termination of employment as prescribed by Labor Code §§ 201-202, et seq."

The complaint contained three causes of action. The first cause of action, failure to pay overtime wages pursuant to Labor Code section 1194, alleges that "[d]uring all relevant periods, Defendants required Plaintiffs and class members to work in excess of 40 hours per week and/or 8 hours per day" and "failed to compensate" them for these hours at the "proper regular rate of pay." The second cause of action is based on Business and Professions Code section 17200 et seq., and alleges that the practices alleged in the complaint are unlawful business practices. The third cause of action seeks the recovery of civil penalties under the Labor Code Private Attorneys General Act of

2004 (Lab. Code, § 2698) (PAGA) for Verizon's "failure to pay overtime wages and failure to provide accurate wage statements . . . ."

B. ***Discovery and Mediation***

Between late 2008 and July 2009, Garnica sought and was provided with pay statements and pay period and payroll reports both for himself and for class members. These records covered the period between April 15, 2006, and October 18, 2008. Garnica also sought and Verizon agreed to make available for questioning "on an informal basis" Verizon employees who were familiar with its "payroll and information systems practices and procedures."

Garnica sought this information to support several contentions regarding Verizon's violations of wage and hour laws. Specifically, plaintiffs contended that "Verizon failed to properly calculate the regular rate of pay (RRP) for class members by failing to include all relevant earnings. Verizon periodically paid Plaintiff and putative class members an hourly wage and other compensation, such as commission, long term incentive pay, and meal period compensation. Plaintiffs contend Verizon failed to properly include such other compensation when calculating Plaintiffs' regular rate of pay, a predicate calculation to determine meal period compensation and overtime wages owed." Plaintiffs also contended that "Verizon failed to pay earned wages when due. Plaintiffs contend this principally occurred due to the following practices by Verizon: 1) calculation of RRP based solely on hourly wages for pay periods when other compensation was also earned; 2) delayed calculation of the correct regular rate of pay for 4 to 6 weeks after overtime wages were earned, a revised wage calculation identified by Verizon payroll statements as an 'FLSA True Up'; 3) further delayed payment of earned overtime wages by failing to pay 'FLSA True Up' amounts 4 to 6 weeks after FLSA True Up calculations are performed; and, 4) failure to timely pay bi-monthly wages due and wages due on termination of employment."

After obtaining evidence from Verizon regarding these contentions, counsel "undertook a careful, detailed analysis of this data to assess class member claims and to estimate class wide loss arising from Verizon's policies and practices." Counsel also

"perform[ed] a detailed regular rate of pay, delayed wage payment, and wage statement loss analysis to estimate class loss."

On July 15 and August 22, 2009, Garnica and Verizon participated in private mediation before Mark Rudy, "a well-respected mediator with significant experience in wage and hour class actions." "[A]fter adversarial, arms length negotiations," Garnica and Verizon reached a settlement, which they formalized in a Stipulation of Settlement and Release between Plaintiffs and Defendants (Settlement Agreement).

C. ***The Settlement Agreement***

The Settlement Agreement recites the "desire of the Parties to fully, finally, and forever settle, compromise, and discharge all disputes and claims existing between them based on, arising out of, or related to the Lawsuit and causes of action alleged therein. To achieve a full and complete release of Defendants (and the Releasees as defined below) of such disputes and claims, the Parties intend that the execution of the Stipulation of Settlement by the Class Representatives shall effect a release by each Class Member . . . and that the release includes in its effect all claims based on, arising out of, or related to the causes of action alleged in the Lawsuit, referred to herein as the Settled Claims . . . ."

The Settlement Agreement discloses that the "Parties have engaged in informal discovery, including the exchange of extensive payroll data, other personnel data, and compensation plans from 2006 through 2009. The Parties also participated in a conference in which a payroll specialist described Defendants' payroll process and answered Class Counsel's questions. Class Counsel performed a thorough study of the law and facts relating to the claims asserted in the Lawsuit and concluded, based on their investigation and pre-mediation analysis, and taking into account the sharply contested issues, the expense and time necessary to pursue the action through trial, the risks and costs of further prosecution of the Lawsuit, the uncertainties of complex litigation, and the substantial benefits to the Class Members and the State of California, that a settlement with Defendants on the terms set forth herein is fair, reasonable, adequate and in the best interests of the Class Members."

Garnica and Verizon agreed that their settlement "encompasses the following claims ('Settled Claims') as set forth in the Lawsuit: Any and all claims for the following: (i) unpaid or untimely compensation (including, but not limited to, minimum wages and overtime compensation and other premium wages); (ii) waiting time penalties for late payment of wages due upon termination of employment; (iii) restitution for unpaid compensation and wages; (iv) any other statutory penalties, liquidated damages or other premium compensation related to said unpaid or untimely wages or compensation; (v) actual damages, statutory damages or statutory penalties associated with inaccurate wage statements; (vi) premium wages, actual damages, statutory damages, or statutory penalties related to said unpaid or untimely compensation and overtime wages, (vii) punitive or exemplary damages related to any of the foregoing claims; and (viii) any action under the Labor Code Private Attorneys General Act . . . related to all disputes and claims existing between them based on, arising out of, or related to the Lawsuit and causes of action alleged therein. These claims include, without limitation: (a) claims based on Labor Code sections 201, 202, 203, 204, 226, 510, 1174, 1194, and 1197; and (b) any penalties or liquidated or statutory damages available under any provision of law based upon violations of those sections (including without limitation Labor Code §§ 203, 210, 558, 1174.5, 1175, 1194, 1194.2, 1197.1, 1199, 226(e), 226.3, and 2699.5), (c) any relief under Business & Professions Code section 17200 *et seq.* premised on violations of the aforementioned Labor Code sections; and (d) claims for attorneys' fees, interest and costs related to any such claims as set forth in the Lawsuit."

The parties also agreed that they would release Verizon and its related entities from "all disputes and claims existing between them based on, arising out of, or related to the Lawsuit and causes of action alleged therein, including any and all claims arising out of or related to the following: (i) unpaid or untimely compensation (including, but not limited to, minimum wages and overtime compensation and other premium wages); (ii) waiting time penalties for late payment of wages due upon termination of employment; (iii) restitution for unpaid compensation and wages; (iv) any other statutory penalties, liquidated damages or other premium compensation related to said unpaid wages or

compensation; (v) actual damages, statutory damages or statutory penalties associated with inaccurate wage statements; (vi) premium wages, actual damages, statutory damages, or statutory penalties, related to said unpaid or untimely compensation and overtime wages, (vii) punitive or exemplary damages related to any of the foregoing claims; and (viii) any action under the Labor Code Private Attorney General Act . . . related to any of the foregoing. These claims include, without limitation: (a) claims based on Labor Code sections 201,202, 203, 204, 226, 510, 1174, 1194, and 1197; and (b) any penalties or liquidated or statutory damages available under any provision of law based upon violations of those sections (including without limitation Labor Code sections 203, 210, 558, 1174.5, 1175, 1194, 1194.2, 1194.5, 1197.1, 1199, 226(e), 226.3, and 2699.5), (c) any relief under Business & Professions Code section 17200 *et seq.* premised on violations of any or all of the aforementioned Labor Code sections; and (d) claims for attorneys' fees, interest and costs related to any such claims (Settled Claims)."

Under the terms of the Settlement Agreement, Verizon was required to establish a gross settlement fund of $5 million dollars to be distributed among class members and the State of California "to settle all claims for penalties and liquidated damages, including all PAGA claims, and all claims for interest; and (2) a settlement amount allocated to the payment to Class Members for alleged unpaid wages . . . ." Four million two hundred thousand dollars of the total gross settlement fund was to be paid "for all penalty and interest claims in the Lawsuit, including but not limited to claims under the PAGA." The remainder of the gross settlement fund was to be paid to class members with unpaid wage claims. Finally, class counsel was entitled to receive an amount to be determined by the trial court for its fees and costs.

D. ***Application for Order Granting Preliminary Approval of Settlement***

On November 12, 2009, Garnica filed an application for an order granting preliminary approval of the settlement. This application was accompanied by the lengthy declaration of class counsel reciting the extensive discovery and investigation conducted concerning the class's claims. It also very specifically describes the class's claims. Counsel represented to the court that it was plaintiffs' contention that Verizon failed to

calculate the class members' "regular rate of pay," or RRP, correctly because it did not include all relevant earnings. Such earnings included periodic payments to the class "commission, long term incentive pay, and meal period compensation." Because Verizon did not include these amounts in its calculation of the class's regular rate of pay, it therefore did not pay the correct amount for overtime wages and meal period compensation, which were based on the regular rate of pay. This failure to pay the correct amount of overtime wages amounted to a failure to pay earned wages when due. In addition, the class also contended that Verizon delayed paying wages when due because it delayed calculating the correct regular rate of pay for a four to six week period of time referred to by the parties as an "FLSA True Up," and then failed to pay these wages by failing to pay the "FLSA True Up" amounts for four to six weeks after this calculation was performed. Finally, Verizon failed to timely pay bi-monthly wages due and wages due on termination of employment.

On December 8, 2009, the trial court granted plaintiffs' application for preliminary approval of the settlement and the settlement-related documents. The trial court concluded that the settlement was "fair, adequate and reasonable," and that it appeared to be "the product of arm's length and informed negotiations . . . ." The trial court also approved the proposed plan for providing the class with notice.

Notices were mailed on December 24, 2009, to the 15,952 class members, along with a claim form and a request to be excluded from the settlement. Of the class members who responded, 245 requested an exclusion and 6,244 class members submitted timely claim forms.

E. ***Objections to the Settlement***

Two class members objected to the settlement. One of these objectors was appellant Deleon and the other was Michael Aleman. Deleon and Aleman argued that the settlement should not be approved because the release entered into by the class members might also release claims made by Deleon and Aleman in Los Angeles County Superior Court.

F. ***Final Approval and Judgment***

On March 19, 2010, the trial court granted plaintiffs' application for final approval of the class action settlement. The court also entered judgment on the same date.

The court found that the settlement was the result of class counsel's "meaningful discovery and investigation" and "serious, informed, non-collusive, adversarial, and arm's length negotiations" with Verizon. The court concluded that "the terms of settlement in all respects are fair, adequate, and reasonable." The court noted that it reached this conclusion after considering "evidence presented regarding the strength of the Plaintiffs' case, the risk, expense and complexity of the claims presented, the likely duration of further litigation, the amount offered in settlement, the extent of investigation and discovery completed, and the experience and views of Class Counsel."

The court also noted that it had overruled the objections brought by Deleon and Aleman, and incorporated into its order by reference the court's explanation for its reasons for doing so contained in the transcript of the hearing. We quote in its entirety the court's thorough statement of its reasons for overruling these objections.

"First, as to the objections made by Michael Aleman, the Court concludes that Mr. Aleman did not submit a timely objection to the settlement. The objection made by Mr. Aleman was not made by him acting individually or in pro per. That objection was in fact signed only by Matthew Theriault, who in each of his two declarations identified himself merely as counsel for Mr. Deleon. The Court knows from the first paragraphs of Mr. Theriault's declarations and from the cover page of the objections that Mr. Theriault and his firm were not counsel for Mr. Aleman in making objections, and neither Mr. Theriault nor his firm purported to be acting as counsel for Mr. Aleman in making the objection. Therefore, no counsel effectively made an objection for Mr. Aleman. It follows that Mr. Aleman has not submitted a timely objection because, under the law, he has made no objection at all. Support for that proposition is found in the Court of Appeal's decision in the case of *McMillan v. Shadow Ridge at Oak Park Homeowner's Association,* 165 Cal.App.4th 960, where the court, at page 966, reiterated the longstanding rule in California that, 'The attorney of record has the exclusive right to

appear in court for his client and neither the party himself nor another attorney should be recognized by the court in the conduct or disposition of the case.' Applying the quoted language to this case, Mr. Aleman had no attorney of record at the time of his so-called objection and he himself did not make any objection.

"Second, apart from Mr. Aleman's failure to timely object, the Court overrules the asserted objections by both objectors on the merits. The objectors misread the scope of the release in that they characterize it as being broader than a fair reading of its language would permit. For example, . . . they say that 'under the terms of the *Garnica* Settlement Agreement, all claims for compensation would be released, including all claims for premium wages and all penalties thereon.' However, in the words of the settlement agreement, the scope of the released claims is those that are 'based on, arising out of, or related to the Lawsuit and causes of action alleged therein.' Those words, including the word 'and,' make it clear that the released claims must meet each of two tests. The first test is that the claims are based on, arise out of, or are related to the *Garnica* lawsuit. The second test that must be met is that the released claims must be based on, arise out of, or be related to the causes of action that are alleged in the *Garnica* lawsuit. It follows that claims that are not based on, do not arise out of, or are not related to the specific causes of action alleged in the *Garnica* case are not released by reason of the settlement.

"Turning to the specific causes of action alleged in *Garnica*, as set forth in the amended complaint of December 3, 2009, the first cause of action is for failure to pay overtime wages pursuant to Labor Code section 1194. The charging allegation in support of that cause of action is that the defendants failed to compensate the plaintiffs and class members for overtime hours that they worked at the proper regular rate of pay. The second and third causes of action are brought under other statutory provisions, but in each case, as made clear by paragraphs 20 and 25 of the amended complaint, they are expressly derivative of the alleged failure to pay for overtime hours worked at the proper regular rate of pay. The lead-in language to these paragraphs makes this point clear, as each one states, 'The policies, acts and practices heretofore described were and are an unlawful business act or practice . . . .' The only additional alleged violation of law is

found in the allegation that the failure to compensate for overtime hours at the proper regular rate resulted in a failure to provide accurate and timely wage statements. In other words, the allegations in the amended complaint are relatively narrow. The objectors agree with this characterization, contending in their opposition brief . . . that the only claim pled in the amended complaint is for a failure to properly calculate the regular rate. Therefore, because the allegations in the amended complaint are narrow, so is the scope of the release, since it purports to release only those claims based on, arising out of, or related to the causes of action alleged in this case.

"As previously noted, the released claims, in the words of the settlement agreement, are limited to those which are 'based on, arising out of, or related to the Lawsuit and causes of action alleged therein.' Also as previously noted, the connector word 'and' means that both conditions must be met for a claim to be released. It is true that this quoted language is followed by the word 'including' and a list of various included matters. By definition, the word 'including' means that the preceding description of released claims sets the outer parameters of what is being released, therefore we are back to the proposition that the released claims are limited to those that are based on, arise out of, or are related to the specific causes of action in the *Garnica* amended complaint, which, as previously mentioned, are quite narrow."

Counsel for plaintiffs as well as counsel for Verizon approved – with no objection as to either form or substance -- the court's final approval order, which included the court's statement from the bench rejecting Deleon's objections.

G. *Motion for Reconsideration*

On March 29, 2010, Deleon filed a motion for reconsideration. He argued that two new facts should compel the court to reconsider its earlier order. First, he contended that, in his pending case in Los Angeles County, counsel for Verizon had argued that the *Garnica* release should have collateral estoppel effect on his (Deleon's) claims in that court. Second, he contended that the notice approved by the court in *Garnica* was inadequate because it did not inform the class of his pending lawsuit in Los Angeles County Superior Court.

On April 30, 2010, the court denied that motion. The court held that the first argument regarding statements made about the *Garnica* release were "irrelevant" to the court's approval of the settlement. The trial court pointed out that "[c]ounsel's interpretation of the release cannot change it." With regard to Deleon's second contention that notice to the class was inadequate, the court found that this argument was not a new fact or circumstance. Rather, the purported inadequacy of notice to the class was before Deleon well before he filed motion for reconsideration and, therefore, was forfeited because he had not brought it earlier.

This timely appeal followed.

III. DISCUSSION

A. *Standard of Review*

We review Deleon's argument that the trial court erred when it approved the Settlement Agreement for an abuse of discretion. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1809 (*Dunk*).) "We do not substitute our notions of fairness for those of the trial court or the parties to the agreement. [Citation.] 'To merit reversal, both an abuse of discretion by the trial court must be "clear" and the demonstration of it on appeal "strong." ' " (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723.) " 'To the extent that it appears the trial court's decision was based on improper criteria or rests upon erroneous legal assumptions, these are questions of law warranting our independent review.' " (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 60.) " 'To merit reversal, both an abuse of discretion by the trial court must be "clear" and the demonstration of it on appeal "strong." ' " (*In re Microsoft I-V Cases, supra*, 135 Cal.App.4th at p. 723.)

B. *Approval of the Class Action Settlement*

1. *General Principles*

The trial court did not abuse its discretion when it approved the Settlement Agreement. As our colleagues in Division One of this District explained: "The trial court has broad discretion to determine whether a class action settlement is fair and reasonable. (*Dunk*[, *supra*,] 48 Cal.App.4th [at p.] 1801 . . . .) Our review on appeal is limited to

determining whether the record discloses a clear abuse of discretion by the trial court. (*In re Microsoft I-V Cases*[, *supra*,] 135 Cal.App.4th [at p.] 723.) When the following facts are established in the record, a class action settlement is presumed to be fair: '(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.' (*Dunk*, at p. 1802.)" (*Chavez v. Netflix, Inc.*(2008) 162 Cal.App.4th 43, 52-54 (*Netflix*).)

2. *The Dunk Factors*

Applying the principles set out in *Dunk*, we conclude that the trial court was well within its discretion in approving the Settlement Agreement. With regard to the first of the four *Dunk* factors, the record supports the court's finding that the Settlement Agreement was the result of arm's-length bargaining between the parties. The presence of a neutral mediator "helps to ensure that the proceedings were free of collusion and undue pressure." (*D'Amato v. Deutsche Bank* (2d Cir.2001) 236 F.3d 78, 85.) Here, plaintiffs and Verizon engaged in two mediations with Mark Ruby, an experienced and respected counsel. It was through these arm's length mediation sessions that the Settlement Agreement was reached.

Second, our review of the record indicates that class counsel conducted a thorough investigation of the factual basis for the plaintiffs' claims, claims that were specifically described by class counsel in his declaration accompanying the application for approval of the Settlement Agreement. This application also made the court aware of the strengths and weakness of the plaintiffs' case, and delineated the considerable discovery and analysis conducted by class counsel in evaluating its claims, involving as it did the review of numerous documents related to plaintiffs' claims regarding the improper calculation and reporting of the regular rate of pay. As in *Netflix*, "[b]y the time the settlement was reached, all of the critical facts regarding" Verizon's "disputed policies and practices were on the table. The trial court's finding that 'investigation and discovery [were] sufficient to allow counsel and the court to act intelligently' was thus well supported by the record." (*Netflix, supra,* 162 Cal.App.4th at p. 53.)

Third, there is no evidence in the record that class counsel and counsel for Verizon were anything other than experienced in this type of case.

Fourth, and finally, of the 15,592 potential class members, 6,244, or 40 percent of the class, returned timely claim forms. Only 245 class members requested exclusion and only 2 class members made any objections, only one of which was validly filed, that of Deleon. The very small percentage of objectors also supports the court's approval of the Settlement Agreement.

3. *Breadth of the Garnica Release*

Deleon argues that the trial court should not have approved the Settlement Agreement because (1) the Settlement Agreement required the class to release claims that were not litigated and pleaded in *Garnica* and, therefore, were not the subject of any discovery or valuation analysis and (2) the class was never given notice that it was releasing these unlitigated claims which are, according to Deleon, the subject of his own and other class action lawsuits pending in Los Angeles County.[1] We disagree with both contentions.

Deleon's argument is premised on a misreading of the scope of the release, which is not as broad as he argues and, therefore, does not have the consequences he contends it does. We agree with the trial court that "The objectors misread the scope of the release in that they characterize it as being broader than a fair reading of its language would permit. For example, . . . they say that 'under the terms of the *Garnica* Settlement Agreement, all

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[1] On appeal, Deleon has made two requests for judicial notice. The first such request, filed September 20, 2010, is for judicial notice of six documents, none of which was before the trial court, and all of which concern complaints against Verizon filed in Los Angeles Superior Court. Respondents oppose this request. We deny the request for judicial notice on the ground that the documents were not before the trial court and thus not relevant to our appellate review. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) The second request, filed September 29, 2010, asks that we take notice of the Reporter's Transcript of Proceedings for March 19, 2010, in this case. This transcript, however, is already part of the record and, therefore, we need not take judicial notice of it. We also deny respondents Garnica's and Johnston's request for judicial notice filed November 5, 2010, of their opposition to Verizon's motion for summary judgment in Los Angeles County Superior Court Case No. BC328769.

claims for compensation would be released, including all claims for premium wages and all penalties thereon.' However, in the words of the settlement agreement, the scope of the released claims is those that are 'based on, arising out of, or related to the Lawsuit and causes of action alleged therein.' Those words, including the word 'and,' make it clear that the released claims must meet each of two tests. The first test is that the claims are based on, arise out of, or are related to the *Garnica* lawsuit. The second test that must be met is that the released claims must be based on, arise out of, or be related to the causes of action that are alleged in the *Garnica* lawsuit. It follows that claims that are not based on, do not arise out of, or are not related to the specific causes of action alleged in the *Garnica* case are not released by reason of the settlement."

The trial court then articulated the precise nature of the claims settled in this matter. "Turning to the specific causes of action alleged in *Garnica*, as set forth in the amended complaint of December 3, 2009, the first cause of action is for failure to pay overtime wages pursuant to Labor Code section 1194. *The charging allegation in support of that cause of action is that the defendants failed to compensate the plaintiffs and class members for overtime hours that they worked at the proper regular rate of pay.* The second and third causes of action are brought under other statutory provisions, but in each case, as made clear by paragraphs 20 and 25 of the amended complaint, *they are expressly derivative of the alleged failure to pay for overtime hours worked at the proper regular rate of pay.* The lead-in language to these paragraphs makes this point clear, as each one states, 'The policies, acts and practices heretofore described were and are an unlawful business act or practice. . . .' The only additional alleged violation of law is found in the allegation that the *failure to compensate for overtime hours at the proper regular rate resulted in a failure to provide accurate and timely wage statements.* In other words, the allegations in the amended complaint are relatively narrow."

As we have noted, plaintiffs' counsel offered the court a specific description of the narrow scope of the litigation. The court relied on this description in its order approving the Settlement Agreement and found, as illustrated by the sections of its order italicized above, that the *Garnica* litigation involved only Verizon's method of calculating the

regular rate of pay and the timeliness with which it made that calculation. Garnica, however, suggests that the release in this matter is broad enough to release claims beyond those that the parties actually litigated. We do not agree. As we have explained, the release extends only to those relatively narrow claims alleged in Garnica's amended complaint.

A case cited by Deleon, *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134 (*Trotsky*), does not convince us otherwise. In *Trotsky,* a class action was filed challenging three provisions contained in form of trust deed securing the loan. The complaint sought a declaration that those three provisions were invalid, and sought damages for moneys collected under those provisions. Plaintiffs filed, unopposed, a second amended complaint that withdrew any challenge to the second of the three provisions in deed of trust. Some time later, another borrower filed a class action involving the same deed of trust. In that case, however, the borrower challenged only the document's second provision, challenge the *Trotsky* class had deleted from its amended complaint.

The *Trotsky* parties settled the class action in an agreement that released the defendant from liability relating to all three claims, including the claim that that been abandoned by the plaintiffs. The plaintiff in the second action objected to the settlement, arguing that it might be given collateral estoppel effect and bar the plaintiff's own class action. The trial court rejected this argument and approved the settlement.

The Court of Appeal reversed, finding that the settlement was outside the scope of the amended complaint, and plaintiffs could not settle the claims of a class of plaintiffs they did not represent. The Court of Appeal warned that "Any attempt to include in a class settlement terms which are outside the scope of the operative complaint should be closely scrutinized by the trial court to determine if the plaintiff genuinely contests those issues and adequately represents the class." (*Trotsky, supra*, 48 Cal.App.3d at p. 148.)

Here, the trial court closely scrutinized the issues contested by plaintiffs and found that the plaintiffs' release did not extend beyond the plaintiffs' claims regarding Verizon's calculation and reporting of plaintiffs' regular rate of pay, as class counsel

represented to the court when he sought approval of the Settlement Agreement. We reject, therefore, Deleon's contention that the trial court's approval of the Settlement Agreement constituted an abuse of discretion because the court did not have before it adequate investigation of the broad claims he contends were released by the Settlement Agreement. Given that the release was more limited than Deleon contends, the trial court was within its discretion to approve the Settlement Agreement without requiring further discovery regarding the value of claims that were not pursued in the *Garnica* action. Similarly, there was no reason to notify the class regarding the pendency of such claims, given that they were not at issue in *Garnica.* And, finally, there is simply no evidence in the record to support Deleon's claim that the settlement in this matter was the result of either collusion among the parties or a "reverse auction" in which Verizon chose to settle the *Garnica* action at a discount in order to secure a release of stronger claims in other actions.

Unlike Garnica, Verizon does not acknowledge that the trial court understood the scope of the release to be quite limited. In fact, Verizon argues, citing *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562; *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.* (2d Cir. 2005) 396 F.3d 96, 107 and *TBK Partners, Ltd. v. Western Union Corp.* (2d Cir. 1982) 675 F.2d 456, 460 that, in general, a release may be broader than the claims actually pursued in an action. Regardless of whether this is the case, the release here is not broader than the claims pursued by plaintiffs, claims the trial court identified as related to Verizon's calculation and reporting of the plaintiffs' regular rate of pay. To the extent that Verizon believed the release included claims broader than those specifically described by class counsel in his declaration in support of the request for approval of the Settlement Agreement, and broader than the regular rate of pay calculation issues the trial court understood, as a result, to be involved in this matter, it should not have entered into the Settlement Agreement. Instead, however, Verizon approved, as to form and substance, the trial court's order which described the effect of the release of claims to be limited to those claims regarding Verizon's calculation of the regular rate of pay.

Ultimately, the trial court's decision to approve a class settlement " ' " '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.) The trial court in this matter ably performed this task and we can find no error in its decision to approve the class settlement.

C. *Standing to Release PAGA Penalties*

Finally, we reject Deleon's argument that class plaintiff Wendy Johnston did not have standing to assert or seek the release of PAGA claims because her claims were time-barred. This issue was not raised before the trial court and we will not consider it for the first time on appeal. (*Nordstrom Com. Cases* (2010) 186 CalApp.4th 576, 583). In any event, even if she had asserted this claim in the action below, it was without merit. The issue of whether her claim was time-barred was Verizon's to assert. Verizon did not do so and, therefore, Johnston was not barred from seeking recover for her PAGA claims.

IV. DISPOSITION

The order and judgment appealed from are affirmed.

Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.

A128577, *Garnica, et al. v. Verizon Wireless Telecom, Inc.,*