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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

TRAVIS SMITH et al., Plaintiffs and Respondents, v. APRIA HEALTHCARE, Defendant and Respondent; ANGELA TISDALE et al., Interveners and Appellants.	C104113 (Super. Ct. No. CVCS220000644)

APPEAL from a judgment of the Superior Court of Sutter County, Christopher R. Chandler, Judge. (Retired Judge of the Sutter Sup. Ct.) Affirmed.

Law Offices of Alejandro P. Gutierrez, Alejandro P. Gutierrez; Palay Hefelfinger, Daniel J. Palay and Brian D. Hefelfinger for Interveners and Appellants.

James Hawkins, James R. Hawkins, Isandra Fernandez and Lance Dacre for Plaintiffs and Respondents Travis Smith and Uriel Arauz.

Jackson Lewis, Nathan W. Austin, Keelia K. Lee; Jackson Lewis and Dylan B. Carp for Defendant and Respondent Apria Healthcare.

Angela Tisdale and Terrance Pratt appeal from an order denying their ex parte application to intervene in a class action settlement between plaintiffs Travis Smith and Uriel Arauz (together, the *Smith* plaintiffs) against defendant Apria Healthcare LLC (Apria). Tisdale and Pratt argue the trial court erred in denying the application because the settlement was collusive, and intervention was necessary to protect the interests of

putative class members in a separate but similar action in federal court. We conclude the application was untimely. Accordingly, we will affirm.

I. BACKGROUND

Apria provides home healthcare products and services. Some of Apria's home healthcare products (such as beds, oxygenators, and wheelchairs) are delivered to customers' homes by delivery drivers or couriers employed by third-party staffing agencies. Some services (such as respiratory therapy and sleep apnea services) are provided by licensed vocational nurses employed by Apria. Uriel Arauz works as a delivery driver for Apria.[1] Smith was previously employed as a licensed vocational nurse. Uriel Arauz and Smith are named plaintiffs in the present putative class action (the *Smith* action), which most recently alleged wage and hour claims on behalf of themselves and similarly situated delivery drivers and licensed vocational nurses.[2]

Proposed interveners Tisdale and Pratt are former delivery drivers and named plaintiffs in a putative wage and hour class and representative action originally filed in Los Angeles County Superior Court and subsequently removed to the United States District Court for the Central District of California. (See *Tisdale v. Apria Healthcare LLC* (C.D.Cal., May 22, 2025, No. 2:24-cv-09620-AH (PVCx)) (the *Tisdale/Pratt* action).) Tisdale and Pratt are also members of the putative courier class in the *Smith* action.

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[1] We refer to Uriel Arauz by his full name to distinguish him from Sadick Arauz, who also plays a role in this case.

[2] As we shall explain, the *Smith* action began as a representative action seeking civil penalties on behalf of aggrieved non-exempt employees under the Private Attorneys General Act of 2004 (Labor Code, § 2698 et seq.) (PAGA) and was transformed by amendment into a representative action and putative class action on behalf of aggrieved non-exempt employees and employees alleged to have been misclassified as independent contractors.

The *Smith* plaintiffs and Apria agreed to settle the *Smith* action for $5,750,000, of which $977,500 was earmarked for an estimated class of 350 delivery drivers (the *Smith* settlement). The trial court preliminarily approved the *Smith* settlement, and Tisdale and Pratt applied for intervention on the ground the settlement was the result of a collusive "reverse auction." (See generally *Negrete v. Allianz Life Ins. Co.* (9th Cir. 2008) 523 F.3d 1091, 1099 ["A reverse auction is said to occur when 'the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant' "].) Tisdale and Pratt renew this argument for intervention on appeal. To understand their argument, and why the application was untimely, we must introduce another putative class action involving Apria, *Quintero v. Apria Healthcare, LLC* (Super. Ct. Los Angeles County, No. 20STCV42367) (the *Quintero* action).

A. The Quintero *Action*

Delivery driver Alvaro Quintero (represented by Tisdale and Pratt's counsel herein) sued Apria in the Los Angeles County Superior Court in November 2020. (The *Quintero* action*, supra*, 20STCV42367.) The operative first amended complaint alleged wage and hour violations on behalf of a putative class of delivery drivers allegedly misclassified as independent contractors (the *Quintero* plaintiffs) and sought civil penalties under PAGA.

The *Quintero* action was hard fought, with substantial discovery and motion practice, including the *Quintero* plaintiffs' successful motion for certification of a class of persons provided as delivery drivers by staffing agencies and Apria's unsuccessful motion to compel arbitration. Apria appealed from the Los Angeles County Superior Court's order denying the motion to compel arbitration, prompting an appeal that brought trial proceedings to a standstill in the fall of 2021. Our case begins during this lull in the *Quintero* action.

B. The Smith *Action*

Smith filed a class action complaint against Apria in the Sutter County Superior Court on February 14, 2022. (*Smith v. Apria Healthcare* (Super. Ct. Sutter County, No. CVCS22-0000261) (the *Smith* class action).) The class action complaint alleged wage and hour violations on behalf of a putative class of similarly situated non-exempt Apria employees. Smith provided written notice to the Labor and Workforce Development Agency (LWDA) of his intent to seek civil penalties under PAGA around the same time. He commenced the instant action as a separate case asserting individual and representative PAGA claims in the Sutter County Superior Court in April 2022. The Sutter County Superior Court entered a stipulated order in June 2023, which called for dismissal of the *Smith* class action, arbitration of Smith's individual PAGA claims, and a stay of the representative PAGA claims. The *Smith* action was now effectively on hold, at least so far as trial court proceedings were concerned.[3]

C. Defense Setbacks in the Quintero *Action*

Meanwhile, things were heating up in the *Quintero* action. Apria lost its appeal from the order denying the motion to compel arbitration in July 2023. (*Quintero v. Apria Healthcare LLC* (July 5, 2023, B316463) [nonpub. opn.].) The Los Angeles Superior Court granted the *Quintero* plaintiffs' long-pending motion for summary adjudication of one of Apria's affirmative defenses (that it was not an "employer" for purposes of wage-and-hour liability) on February 1, 2024, and set a trial date for November 4, 2024.

D. Settlement Negotiations in the Smith *Action*

As these events were unfolding, Smith and Apria were beginning to discuss settlement. They participated in an all-day mediation before the Honorable Ronald M. Sabraw (Ret.) on May 22, 2024. The mediation was not immediately successful;

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[3] Our record does not reveal whether arbitration proceedings took place.

however, negotiations continued, and the parties accepted a mediator's proposal on or about June 10, 2024. Tisdale and Pratt entered the scene soon thereafter.

E. The Tisdale/Pratt *Action*

Tisdale and Pratt (represented by class counsel in the *Quintero* action) filed a class action complaint in the Los Angeles County Superior Court on July 3, 2024.[4] (*Tisdale v. Apria Healthcare* (Super. Ct. Los Angeles County, No. 24STCV16583).) The complaint asserted the same causes of action as the *Quintero* action on behalf of a putative class of delivery drivers hired after September 14, 2021 (the class certification date in the *Quintero* action). The complaint was later amended to seek PAGA penalties. Apria filed a notice of related case disclosing the *Smith* action on August 23, 2024.

F. Another Stipulation and Order in the Smith *Action*

Back in Sutter County Superior Court, Apria and Smith entered into another stipulation and proposed order. The stipulation recited that the parties had reached an agreement in principle to settle the *Smith* action, including the claims asserted in the previously dismissed *Smith* class action, the representative claims, and Smith's individual PAGA claims. The stipulation further recited that the parties had agreed to the filing of a proposed first amended representative action and class action complaint which would bring about three principal changes. First, the proposed first amended representative and class action complaint would revive and incorporate the wage and hour claims from the previously dismissed *Smith* class action. Second, the proposed pleading would add delivery drivers Uriel Arauz and Sadick Arauz as named plaintiffs. Third, the pleading would assert new allegations on behalf of Uriel Arauz and Sadick Arauz and a putative

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[4] Tisdale and Pratt (represented by class counsel in the *Quintero* action) sent written notice of their intent to pursue a representative PAGA action against Apria to the LWDA on July 3, 2024. (Lab. Code, § 2699.3.)

class of similarly situated delivery drivers.[5] The stipulation asked that the proposed first amended representative action and class action complaint—which was attached as an exhibit—be deemed filed and served upon entry of the proposed order. The Sutter County Superior Court entered the order on September 12, 2024.

G. Mediation and Settlement in the Quintero *Action*

Meanwhile, trial was fast approaching in the *Quintero* action. With six weeks to go, the *Quintero* plaintiffs and Apria participated in an all-day mediation in September 2024, which eventually led to an agreement to settle the *Quintero* action. The *Quintero* action ultimately settled for $16.5 million for 230 class members, or $71,739 for each class member before fees and costs.

H. The Memorandum of Understanding in the Smith *Action and Related Developments*

Settlement negotiations were also proceeding apace in the *Smith* action. Apria and the *Smith* plaintiffs entered into a memorandum of understanding outlining the principal terms of a settlement sometime in October 2024 (the MOU). The MOU soon became a subject of discussion in the *Tisdale/Pratt* action, in which Apria requested an early evaluation conference and stay. (Lab. Code, § 2699.3, subd. (f).) Tisdale and Pratt opposed the request.

In an opposition brief filed on October 15, 2024, Tisdale and Pratt wrote: "Plaintiffs have grave concerns that the Defendant's request is intended to delay certification of the wage/hour claims in this matter, and an effort to simply 'buy time' in order to rush through a settlement in the *Smith* [action] which adversely affects the rights of the *Tisdale* putative class members." In a supporting declaration from Daniel J. Palay, one of their attorneys herein, Tisdale and Pratt described a questionable settlement timeline whereby: (1) Apria and the *Smith* plaintiffs participated in mediation; (2) Apria

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[5] Smith and Uriel Arauz submitted an amended notice to the LWDA that same day.

gave the *Smith* plaintiffs the name and number of Uriel Arauz (a person with standing to bring the courier claims asserted in the *Quintero* and *Tisdale/Pratt* actions); (3) Apria and the *Smith* plaintiffs stipulated to the filing of the first amended representative action and class action complaint, which incorporated allegations from the *Tisdale/Pratt* action; and (4) Apria failed to respond to requests for a copy of the MOU. They warned: "Were a stay to be granted without protecting the putative class from the collusion of a reverse auction, the putative class would suffer great harm."

Apria acknowledged in reply that the parties to the *Smith* action were "in the process of effectuating" a "settlement in principle that will directly impact the PAGA claims at issue in the *Tisdale* case." Nevertheless, Apria said the terms of the "settlement in principle" in the *Smith* action "were part of a 'confidential MOU' and could not be shared at this time." The Los Angeles County Superior Court denied Apria's request for an early evaluation conference and stay as impractical considering its unwillingness to disclose the terms of the MOU.

I. The First Amended Representative Action and Class Action Complaint

The *Smith* plaintiffs filed the first amended representative action and class action complaint on November 1, 2024. As noted, the amended pleading added delivery drivers Uriel Arauz and Sadick Arauz as named plaintiffs and asserted wage and hour violations on their behalf and on behalf of a putative class of delivery drivers from September 15, 2021, through the filing date. Sadick Arauz, who was also a member of the certified class of delivery drivers in the *Quintero* action, was voluntarily dismissed as a plaintiff on November 7, 2024.

J. The Tisdale/Pratt *Action is Removed to Federal Court*

Apria removed the *Tisdale/Pratt* action to the United States District Court for the Central District of California on November 6, 2024. Apria filed a motion to compel arbitration of the *Tisdale/Pratt* action in February 2025. Tisdale and Pratt moved for class certification on March 24, 2025, before the scheduled hearing on the motion to

compel arbitration. Apria filed an ex parte application to strike the motion for class certification as untimely on March 26, 2025. The district court granted the application without prejudice on April 1, 2025.

K. Joint Stipulation for Settlement and Preliminary Approval of the Smith *Settlement*

Apria and the *Smith* plaintiffs approved and executed a joint stipulation for settlement on March 24 and 25, 2025. The *Smith* plaintiffs requested dismissal of their PAGA claims on March 25, 2025, and moved for preliminary approval of the settlement on March 28, 2025.[6] The Sutter County Superior Court conditionally certified a class of non-exempt employees (excluding members of the certified class in the *Quintero* action) and found on a preliminary basis that the settlement amount was fair, adequate, and reasonable to all potential class members.[7] The Sutter County Superior Court granted preliminary approval of the proposed settlement on April 21, 2024, and authorized the retention of a claims administrator (Simpluris, Inc.), which notified class members of the settlement on May 6, 2025.

L. The Ex Parte Application for Leave to Intervene

Tisdale and Pratt filed an ex parte application to intervene in the *Smith* action on May 8, 2025. They argued the *Smith* settlement was the result of a collusive reverse auction, and intervention was necessary to protect members of the would-be courier class in the *Tisdale/Pratt* action.[8] They also sought leave to file a proposed complaint in

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[6] The LWDA had previously given notice of its intent to investigate the alleged PAGA violations in the *Smith* action.

[7] Again, the proposed settlement contemplated a maximum settlement amount of $5,750,000, of which $977,500 was to be allocated to 350 delivery drivers.

[8] As mentioned, the district court struck Tisdale and Pratt's motion for class certification as untimely on April 1, 2025.

intervention, which would call for reconsideration of the preliminary approval order and transfer of the *Smith* action to the Los Angeles County Superior Court.

Tisdale and Pratt's application was supported by another declaration from attorney Palay, again opining that the *Smith* settlement was the product of a collusive reverse auction. Palay renewed his theory that Apria slow walked litigation of the *Tisdale/Pratt* action while rushing settlement in the *Smith* action. He repackaged the timeline presented in the declaration submitted in opposition to Apria's request for an early evaluation conference and stay in the *Tisdale/Pratt* action, again emphasizing that: (1) Apria and the *Smith* plaintiffs participated in a mediation that resulted in some sort of settlement agreement; (2) Apria gave the *Smith* plaintiffs the name and number of Uriel Arauz; (3) Apria and the *Smith* plaintiffs stipulated to the filing of the first amended representative action and class action complaint, which enlarged the putative class by introducing courier claims similar to those alleged in the *Tisdale/Pratt* action; and (4) Apria refused to respond to requests for information about the MOU. Palay also argued the *Smith* settlement reflected an "astonishing" and "baffling" degree of discounting, noting the settlement value for each member of the certified courier class in the *Quintero* action was "**nearly 50 times**" more than the settlement value for each member of the putative courier class in the *Smith* action.

Palay made no attempt to suggest that the alleged collusion between Apria and the *Smith* plaintiffs had only recently come to his attention. To the contrary, he averred: "On or about August 30, 2024, I learned that there were efforts being made by Apria and the *Smith* counsel to effectuate a reverse auction settlement that would wipe out claims of the Couriers." Palay did not say how he came to learn of these efforts. However, he attached copies of emails and other correspondence showing he had been sounding the alarm for some time.

In one such email, dated August 30, 2024, Palay told counsel for the *Smith* plaintiffs: "We write to address some concerning information just presented to us today

by Apria's counsel. It appears that frantic efforts are being made to effectuate a settlement including improper contact with individual(s) that we represent as part of the certified class [in the *Quintero* action]."

In another email, dated September 2, 2024, Palay wrote: "I have attempted to contact you on numerous occasions. We will be having a conference call with opposing counsel tomorrow at 10:00 a.m. concerning this matter. It is imperative that I speak with you prior to that to establish what representations were made to you and to confirm a lack of complicity by your office." He elaborated: "The issues include the contacting/attempt to represent one of our clients, the sudden mimicking of our complaint when the original complaint only concerned [licensed vocational nurses], and numerous additional issues including the fact that we have obtained summary judgment in this matter, have a statute that goes back to November of 2016, and have obtained all of the data to proceed to the schedule[d] trial in two (2) months. You may or may not be aware of these issues and we need to determine the source of any representations with regard to what appears to be a 'reverse auction' and whether we need to bring such issues before the court."[9]

A couple days later, on September 5, 2024, Palay emailed the *Smith* plaintiffs' counsel a copy of the California Employment Lawyers Association's policy paper on reverse auctions. (See California Employment Lawyers Assn., The CELA Reverse Auction Policy (Oct. 8, 2020) §§ 1-4.) He suggested a conference call to discuss potential settlement of the *Smith* action and "prevent the filing of objections with the Court."

Palay raised similar concerns in correspondence with Apria's counsel. In an October 10, 2024 letter, Palay wrote: "Following the filing of the *Tisdale* action, your firm provided the name and address of a putative class member to the Hawkins firm

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[9] Some of these representations appear to relate to the first-filed *Quintero* action, not the follow-on *Tisdale/Pratt* action.

[counsel for the *Smith* plaintiffs], in an attempt to resolve the action via a 'reverse auction' in the *Smith v. Apria* case. Thereafter, by stipulation, your firm then agreed to the filing of a carbon-copy of our client's class-action complaint to include couriers, waiving its previous assertion of arbitration rights for the [licensed vocational nurse]/W-2 employee Smith Plaintiff. [¶] It would appear that you are attempting to delay this matter [the *Tisdale/Pratt* action], while moving as quickly as possible to obtain a full release of such claims in a collusive manner in the *Smith v. Apria* matter. If we have misunderstood your intentions, this can be easily remedied by your client's agreement to refrain from any resolution of the claims of the putative class [both wage and hour and PAGA], and to provide a copy of the *Smith* MOU/Settlement Agreement. Please let us know if you are willing to do so." Neither Apria nor the *Smith* plaintiffs provided Tisdale and Pratt with any information about the MOU or anticipated settlement.

Although Palay anticipated the possibility of a reverse auction settlement as early as August 30, 2024, he suggested his suspicions were not confirmed until May 2, 2025, some eight months later. According to Palay, Tisdale and Pratt only learned the *Smith* settlement had been preliminarily approved on the evening of April 30, 2025, when Apria's counsel circulated a draft of a joint status conference report for the *Tisdale/Pratt* action.[10] Palay's declaration explains that Tisdale and Pratt "immediately" sought copies of relevant filings from the Sutter County Superior Court, which they received on May 2,

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[10] The draft said: "The parties in the *Smith* action have reached a settlement as to the class claims that will directly impact the claims at issue in the *Tisdale/Pratt* case. The parties are in the process of effectuating the settlement in principle. Preliminary approval of the the [*sic*] class action settlement was granted on April 21, 2025. The final approval hearing is scheduled for August 25, 2025."

2025.[11] Again, Tisdale and Pratt filed their ex parte application to intervene on May 8, 2025.

The *Smith* plaintiffs and Apria opposed the application. They argued there was no showing of irreparable harm, immediate danger, or any other basis for ex parte relief. They also argued the application was untimely and intervention was unwarranted, whether mandatory or permissive.

The Sutter County Superior Court heard argument and expressed an inclination to deny the application in a tentative ruling delivered from the bench, stating: "The proposed intervener has had adequate notice as is set forth in the numerous declarations. This case is further along and has proceeded quicker than the other case. There is absolutely no basis that has been presented to me, other than hope and conjecture, that this group of plaintiffs in this current case, Smith and Arauz, is going to benefit by a delay or that the parties – excuse me, the plaintiffs in the other case are going to be benefited by the joinder [*sic*], and on its merits the request is denied." Following argument, the Sutter County Superior Court adopted the tentative ruling and instructed the *Smith* plaintiffs to prepare an order after hearing. The order, which was entered on June 6, 2025, denied the application stating, with respect to the request for intervention (as opposed to ex parte relief): "The Proposed Intervenors' substantive motion to intervene is denied."

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[11] Those filings included: (1) the *Smith* plaintiffs' request for dismissal of their PAGA claims, filed March 25, 2025; (2) the *Smith* plaintiffs' notice of motion and motion for preliminary approval of class action settlement, filed March 28, 2025; (3) the declaration of attorney Lance Dacre in support of the *Smith* plaintiffs' motion for preliminary approval (which attached a copy of the joint stipulation for settlement), also filed March 28, 2025; (4) Apria's notice of non-opposition to the motion for preliminary approval, filed April 8, 2025; and (5) the Sutter County Superior Court's preliminary approval order, entered April 21, 2025.

Tisdale and Pratt appealed the order on June 16, 2025. (Code Civ. Proc., § 902; see also *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838, 841 (*Noya*) ["An order denying a motion to intervene is appealable when it finally and adversely determines the right of the moving party to proceed in the action"].)[12] The *Smith* settlement was finally approved and incorporated into a final judgment on August 25, 2025. No named party to the *Smith* action has appealed from the judgment; however, we take judicial notice on our own motion of the fact that Ahsaki Hudson, a non-objecting member of the conditionally certified courier class, has appealed from the Sutter County Superior Court's denial of her motion to vacate the judgment (*Smith v. Apria Healthcare* (C105695, app. pending); the *Hudson* appeal). The *Hudson* appeal is now pending before our court.

II. DISCUSSION

A. Pending Motions

Before turning to the merits, we briefly consider Apria's appellate motions, which have been deferred for our consideration. In the first such motion, Apria asks us to take additional evidence pursuant to section 909, consisting of the declaration of Denise Islas, a senior director of client services for the claims administrator in the *Smith* action. The declaration avers that Tisdale and Pratt opted out of the *Smith* settlement and settlement checks were mailed to participating class members on September 29, 2025. In the second such motion, Apria asks that we dismiss the appeal as moot in light of the proffered evidence. We consider these requests in turn.

Under section 909, " 'an appellate court may exercise its discretion to consider evidence that was not before the trial court in " 'exceptional circumstances.' " ' " (*Glassman v. Safeco Ins. Co. of America* (2023) 90 Cal.App.5th 1281, 1309.) The

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[12] Undesignated statutory references are to the Code of Civil Procedure.

authority to receive new evidence " ' "should be exercised sparingly" ' " and " 'only to affirm the case.' " (*Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1213.) "Such postjudgment evidence may, in appropriate cases, be considered to determine whether an issue on appeal is moot." (*In re M.B.* (2022) 80 Cal.App.5th 617, 627; see *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 [courts may consider postjudgment evidence "when subsequent events have caused issues to become moot"].) We grant the motion to take additional evidence for the limited purpose of deciding whether it requires us to grant the motion to dismiss. We conclude it does not.

"An appeal becomes moot when ' " ' "the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief." ' " ' " (*Becerra v. McClatchy Co.* (2021) 69 Cal.App.5th 913, 927, fn. 4; *Shapell SoCal Rental Properties, LLC v. Chico's FAS, Inc.* (2022) 85 Cal.App.5th 198, 209 ["A case is moot and will be dismissed when the appellate court cannot grant the appellant any effective relief"].) "Generally, the burden is on the party claiming mootness to establish that an appeal is moot." (*Becerra v. McClatchy Co., supra*, at p. 927, fn. 4.) We are not convinced that Apria has carried that burden here.

Relying on *Hindman v. Owl Drug Co.* (1935) 4 Cal.2d 451 (*Hindman*), Apria argues we cannot grant effective relief here because judgment has been entered, Tisdale and Pratt have not appealed from the judgment, and the settlement proceeds have been distributed. We think *Hindman* is distinguishable.

In *Hindman*, the plaintiff brought a derivative action on behalf of a drug company to recover damages against certain defendants. (*Hindman, supra*, 4 Cal.2d at p. 453.) The case settled, and the settlement was reported to the trial court. (*Ibid.*) Other shareholders sought to intervene, arguing the settlement was unfair to the drug company. (*Ibid.*) The trial court granted the interveners the right to be heard in proceedings related to the fairness of the settlement agreement, " 'but refused them the right to intervene in

the cause at large until it had passed upon the proposed settlement.' " (*Ibid.*) The proposed interveners " 'declined to join in the inquiry relating to the settlement agreement.' " (*Ibid.*) Accordingly, the trial court struck the complaint in intervention, approved the settlement, and entered judgment. (*Ibid.*)

The proposed interveners appealed from the order striking their complaint in intervention. (*Hindman, supra*, 4 Cal.2d at p. 452.) Respondents moved to dismiss the appeal as moot in light of two postjudgment events. (*Id.* at p. 453.) First, the drug company filed for bankruptcy, and the bankruptcy court approved the sale of its assets to another company, including all choses in action belonging to it. (*Id.* at pp. 453-454.) Second, the judgment was satisfied and had become final. (*Id.* at p. 454.) Our Supreme Court granted the motion to dismiss, stating: " 'Neither the drug company nor the [proposed interveners] can carry the litigation any further. The judgment in the company's favor has been fully satisfied, and has become final. Where the judgment in a cause, rendered in the trial court, has become final, an appeal from an order denying intervention in such cause will be dismissed, as a reversal of such order would be of no avail. The appeal presents only a moot case.' " (*Id*. at p. 456.)

We perceive two fundamental differences between *Hindman* and the present case. First, as Tisdale and Pratt observe, the intervention statute (§ 387) has been amended, and now permits intervention "upon timely application" rather than "before trial." Section 387 "formerly limited intervention to a time before trial, but this limitation was removed by the 1977 amendment to the section, which now reads 'Upon timely application' rather than 'At any time before trial.' Thus, intervention is possible, if otherwise appropriate, at any time, even after judgment." (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437; see *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 267 ["The fact that section 387 allows for a 'timely' application means that intervention after a judgment is possible"].) That "timely application" may be made after entry of judgment means that

any appeal from the denial of such an application can also proceed after entry of judgment. Thus, the judgment does not necessarily moot the appeal.

Second, as Tisdale and Pratt also observe, the *Hudson* appeal opens an avenue for granting them relief. If the *Hudson* appeal were to succeed, the judgment would be reversed, in which case, the *Smith* action would still be alive and Tisdale and Pratt could conceivably intervene to challenge the *Smith* settlement.[13] (See, e.g., *Linder v. Vogue Investments, Inc.* (1966) 239 Cal.App.2d 338, 343 [court granted limited partner effective relief by reversing orders denying motion to vacate the judgment and motion for reconsideration of denial of intervention motion].) That settlement proceeds have been distributed and Tisdale and Pratt have opted out would undoubtedly make intervention more complicated; however, we are not prepared to say it would be impossible to grant effective relief, particularly given the allegedly collusive settlement at issue here. (See *Federal Deposit Insurance Corp. v. Jennings* (1987) 816 F.2d 1488, 1491 ["To allow a settlement between parties to moot an extant appeal concerning intervention of right might well provide incentives for settlement that would run contrary to the interests of justice"].) We therefore deny Apria's motion to dismiss and turn now to the merits.

B. Applicable Law and Standard of Review for Intervention

Section 387, subdivision (d) provides for mandatory or permissive intervention upon timely application by a proposed intervener. The trial court *must* grant a timely application for mandatory intervention where the proposed intervener: (1) claims an interest related to the subject matter of the action; (2) "is so situated that the disposition of the action may impair or impede that person's ability to protect that interest"; and (3) the person's interest is not adequately protected by an existing party. (§ 387, subd. (d)(1)(B); see *Carlsbad Police Officers Assn. v. City of Carlsbad* (2020) 49 Cal.App.5th

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[13] We express no opinion on the merits of the *Hudson* appeal.

135, 148.) The trial court *may* grant a timely application for permissive intervention where the proposed intervener "has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." (§ 387, subd. (d)(2); see *Carlsbad, supra*, at p. 148.)

"California cases are not settled on whether we review the denial of a request for mandatory intervention pursuant to section 387 de novo or for abuse of discretion." (*Edwards v. Heartland Payment Systems, Inc.* (2018) 29 Cal.App.5th 725, 732; see *Crestwood Behavioral Health, Inc. v. Lacy* (2021) 70 Cal.App.5th 560, 573 (*Crestwood*).) Although the standard of review has not been squarely decided, another panel of this court has suggested appellate courts should conduct de novo review of orders denying requests for mandatory intervention. (See *State Water Bd. Cases* (2023) 97 Cal.App.5th 1035, 1043.) The standard of review for denial of an application for permissive intervention is abuse of discretion. (See *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386.)

Intervention, whether mandatory or permissive, must be sought on "timely application." (§ 387, subd. (d)(1) & (2); see *Lofton v. Wells Fargo Home Mortgage* (2018) 27 Cal.App.5th 1001, 1012 (*Lofton*) ["a party's proposed intervention must be timely"]; see also *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 109 [timeliness is "one of the prerequisites for granting an application to intervene"].) Timeliness, in either instance, is determined by the totality of the circumstances. (*Crestwood, supra*, 70 Cal.App.5th at p. 574.) Our evaluation of the totality of the circumstances is more rigorous when mandatory intervention is sought because the would-be intervener " ' "may be seriously harmed if intervention is denied." ' " (*Ibid.* [" ' "courts should be reluctant to dismiss such a request for intervention as untimely, even though they might deny the request if the intervention were merely permissive" ' "].)

Timeliness findings are generally reviewed for abuse of discretion. (*Crestwood, supra*, 70 Cal.App.5th at p. 573; *Noya, supra*, 143 Cal.App.4th at p. 843; *Lofton, supra*, 27 Cal.App.5th at pp. 1012-1013.) However, some federal appellate courts have concluded that de novo review applies when the district court makes no timeliness findings. (See, e.g., *Barnes v. Security Life of Denver Insurance Co.* (10th Cir. 2019) 945 F.3d 1112, 1121 [" 'We review a district court's timeliness ruling for an abuse of discretion, unless the district court makes no findings on timeliness; in that case, we review de novo' "]; see also *8fig, Inc. v. Stepup Funny, L.L.C.* (5th Cir. 2025) 135 F.4th 285, 291, fn. 9 ["The timeliness requirement of intervention as of right is typically reviewed for abuse of discretion, but it is reviewed [de novo] where the district court failed to make any findings regarding its timeliness conclusion"]; and see *State Water Bd. Cases, supra*, 97 Cal.App.5th at p. 1043 [explaining that § 387's timeliness requirement is derived from rule 24 of the Federal Rules of Civil Procedure and thus "we may look to federal cases interpreting rule 24 when interpreting [§] 387"].)

Tisdale and Pratt observe the Sutter County Superior Court made no timeliness findings, raising the possibility that de novo review might be appropriate here. But they do not develop that line of argument. Instead, they gloss over the standard of review for timeliness determinations. To the extent they discuss the issue at all, they suggest the Sutter County Superior Court could not have found the application untimely given the evidence set forth in the Palay declaration. That argument effectively concedes the abuse of discretion standard of review for timeliness.[14] (See, e.g., *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 624 [" 'the abuse of discretion standard measures

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[14] Tisdale and Pratt argue in reply that the order denying the "substantive merits of the intervention" could be understood to have impliedly decided the "procedural requirement of timeliness" in their favor. We do not consider arguments made for the first time in a reply brief. (*United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 157-158.) Regardless, the argument is unpersuasive.

whether, given the established evidence, the lower court's action "falls within the permissible range of options set by the legal criteria" ' "].)

Under the circumstances, we follow our usual appellate practice and presume the Sutter County Superior Court made all findings necessary to support the order. (See generally, *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148 [" 'We presume that the court's order is supported by the record; if there is substantial evidence in the record to support the court's *implied finding of fact,* the factual finding will be upheld. However, the conclusion the court reached based upon those findings of fact will be reviewed by this court for abuse of discretion' "]; *Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860 [the general rule, "which is consistent with the usual practice on appeal, is to imply findings in support of the order. Thus, even where there are no express findings, we must review the trial court's exercise of discretion based on implied findings that are supported by substantial evidence"].)

This is nothing new. Our court applied the same approach to an order denying an intervention motion without disclosing the reasons for the denial more than 110 years ago in *Britt v. East Side Hardware Co.* (1914) 25 Cal.App. 231 (*Britt*). The *Britt* court explained: "The record does not reveal the reason or reasons which moved the court below in its course on the appellant's motion. But, whatever might have been the grounds upon which the said motion was denied, we must assume, in the absence of an affirmative showing to the contrary, that the action of the court in disposing of it was legally justified. In other words, every presumption in support of the order must be indulged, it not appearing from the face of the record that the court erred in making it, and we must presume, therefore, that the appellant, on his motion, submitted to the court no legal ground or reason for the intervention sought for by him." (*Id.* at p. 234.) We do the same here.

Accordingly, we presume the Sutter County Superior Court made all findings necessary to support the order, including an implied finding as to timeliness. (See *Fair v.*

Bakhtiari, supra, 195 Cal.App.4th at p. 1148; *Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co., supra*, 68 Cal.App.4th at p. 860; *Britt, supra*, 25 Cal.App. at p. 234.) We review that implied finding for abuse of discretion (*Crestwood, supra*, 70 Cal.App.5th at p. 573; *Noya, supra*, 143 Cal.App.4th at p. 843; *Lofton, supra*, 27 Cal.App.5th at pp. 1012-1013), recognizing that " ' "courts should be reluctant" ' " to reject applications for mandatory intervention as untimely given the potential for harm to the proposed intervener. (*Crestwood, supra*, at pp. 574-575 [trial court abused its discretion in denying application for mandatory intervention as untimely based on 100-day delay where real parties and court identified no prejudice from the delay].) With these standards in mind, we next consider whether the Sutter County Superior Court abused its discretion in impliedly finding the application was untimely.

C. Timeliness

" 'Timeliness is determined by the totality of the circumstances facing would-be intervenors, with a focus on three primary factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the delay." ' " (*Crestwood, supra*, 70 Cal.App.5th at p. 574.) "Although the totality of the circumstances should be considered, 'prejudice to existing parties is "the most important consideration in deciding whether a motion for intervention is timely." ' [Citation.] This does not, however, include prejudice that would result from allowing intervention. [Citation.] Rather, only the ' "prejudice caused by the movant's delay" ' should be considered." (*Ibid.*) We will apply these factors momentarily.

We measure timeliness from " 'the date the proposed interveners knew or should have known their interests in the litigation were not being adequately represented.' " (*Lofton, supra*, 27 Cal.App.5th at p. 1013, quoting *Ziani Homeowners Assn. v. Brookfield Ziani LLC* (2015) 243 Cal.App.4th 274, 282 (*Ziani*); see *Crestwood, supra*, 70 Cal.App.5th at p. 575 ["In determining whether intervention is timely, courts 'focus " 'on the date the person attempting to intervene should have been aware his interest[s] would

no longer be protected adequately by the parties, rather than the date the person learned of the litigation' " ' "]; see also *Allen v. California Water & Tel. Co.* (1947) 31 Cal.2d 104, 108 [stating "the general rule that a right to intervene should be asserted within a reasonable time and that the intervener must not be guilty of an unreasonable delay after knowledge of the suit"].)

Tisdale and Pratt argue the relevant date for assessing the timeliness of the application was April 30, 2025, when Apria's counsel circulated a draft of a joint status conference report in the *Tisdale/Pratt* action indicating the *Smith* settlement had been preliminarily approved. They imply the draft's reference to preliminary approval of the *Smith* settlement was the starting gun that moved them to request copies of relevant court filings from the Sutter County Superior Court, which revealed for the first time that their interests were not being adequately protected by the *Smith* plaintiffs. This timeline cannot be squared with the record.

The record makes abundantly clear that Tisdale and Pratt knew or should have known their interests were not being adequately represented by the *Smith* plaintiffs well before April 30, 2025. The Palay declaration readily admits that Tisdale and Pratt understood their interests were at risk as early as August 30, 2024. The accompanying exhibits confirm that they raised concerns about a reverse auction settlement in the *Smith* action in emails to the *Smith* plaintiffs through early September 2024, seemingly without response. When those efforts failed to allay their concerns, they requested information about the *Smith* settlement from Apria. Those requests, too, went unanswered.

Tisdale and Pratt offer this chronology of their counsel's "many frustrated attempts" to learn about the *Smith* settlement as evidence of their diligence in the face of "ongoing concealment" by Apria and the *Smith* plaintiffs. But the fact that they tried and failed for months to gain assurances from Apria and the *Smith* plaintiffs also means they had increasing reason to believe their interests might not be adequately represented in the *Smith* settlement. By October 2024, they surely knew or should have known as much.

By the time they filed their opposition to Apria's request for an early evaluation conference and stay in the *Tisdale/Pratt* action (on October 15, 2024), Tisdale and Pratt knew: (1) Apria and the *Smith* plaintiffs participated in a mediation that resulted in some sort of agreement to settle the *Smith* action; (2) Apria gave the *Smith* plaintiffs the name and number of Uriel Arauz, a delivery driver with standing to bring the same claims asserted in the *Tisdale/Pratt* actions; (3) Apria and the *Smith* plaintiffs stipulated to the filing of the first amended representative action and class action complaint, which incorporated allegations borrowed from the *Tisdale/Pratt* action and asserted claims on behalf of a newly proposed courier class; and (4) Apria was unwilling to provide copies of the MOU or otherwise disclose the terms of the contemplated *Smith* settlement.

Tisdale and Pratt now characterize these circumstances as "smoking gun" evidence of a reverse auction. However, the same circumstances were known to Tisdale and Pratt on October 15, 2024, when they voiced their "grave concerns" that Apria was seeking an early evaluation conference and stay in the *Tisdale/Pratt* action to facilitate a collusive settlement in the *Smith* action, which would cause the putative class they hoped to represent to "suffer great harm." On the record before us, we conclude Tisdale and Pratt knew or should have known their interests were imperiled by October 15, 2024. Having so concluded, we next consider whether the application was timely under the totality of the circumstances.

1. The Stage of the Proceedings

The first factor, the stage of the proceedings, weighs against intervention.[15] Although the mere lapse of time does not render an application untimely, and " 'timely' application" may be made even after entry of judgment (*Hernandez v. Restoration Hardware, Inc., supra*, 4 Cal.5th at p. 267), we apply closer scrutiny to applications made

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[15] Again, the *Smith* action was filed on April 18, 2022. The application was filed on May 8, 2025, more than three years later.

in late stages of the overall litigation process. (See, e.g., *Banco Popular de Puerto Rico v. Greenblatt* (1st Cir. 1992) 964 F.2d 1227, 1231 (*Banco Popular*) ["The more advanced the litigation, the more searching the scrutiny which the motion must withstand"]; see also *Brown v. Google LLC* (9th Cir. 2026) 172 F.4th 1128, 1133 (*Google*) ["The timeliness requirement seeks to 'prevent a tardy intervenor from derailing a lawsuit within sight of the terminal' "]; and see *League of United Latin American Citizens v. Wilson* (9th Cir. 1997) 131 F.3d 1297, 1303 [stage of proceedings weighed against intervention where proposed-intervener sought to interject "at a time when the litigation was, by all accounts, beginning to wind itself down"].)

We are particularly leery of applications for late-stage intervention that would disrupt settlement efforts, even when those efforts require judicial approval. (See *R&G Mortgage Corp. v. Federal Home Loan Mortgage Corp.* (1st Cir. 2009) 584 F.3d 1, 7 (*R&G Mortgage*) ["motions to intervene that will have the effect of reopening settled cases are regarded with particular skepticism because such motions tend to prejudice the rights of the settling parties"]; see also *California Department of Toxic Substances Control v. Commercial Realty Projects, Inc.* (9th Cir. 2002) 309 F.3d 1113, 1119 (*Toxic Substances*) [stage of proceedings weighed "heavily" against motion for intervention made after settlement agreement but before judicial approval of consent decree]; *County of Orange v. Air California* (9th Cir. 1986) 799 F.2d 535, 537 (*Air California*) [stage of proceedings weighed "heavily" against motion for mandatory intervention "made only after a proposed, and as it turned out, final settlement had been reached by all the parties after five long years of litigation"].)

Tisdale and Pratt waited until the eve of settlement to seek intervention. By then, the *Smith* settlement was well on the way to final approval and administration, having been preliminarily approved and notice sent to class members. The application thus came at a late stage in the litigation process, which weighs against intervention. (See *Toxic Substances, supra*, 309 F.3d at p. 1119; *Air California, supra*, 799 F.2d at p. 538.)

2. Prejudice

The second factor, prejudice, weighs against intervention for the same reason. As previously discussed, " 'prejudice to existing parties is "the most important consideration in deciding whether a motion for intervention is timely." ' " (*Crestwood, supra*, 70 Cal.App.5th at p. 574.) The prejudice inquiry focuses on " ' "prejudice caused by the movant's delay," ' " rather than "prejudice that would result from allowing intervention." (*Ibid.*) Thus, "the relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." (*Stallworth v. Monsanto Co.* (5th Cir. 1977) 558 F.2d 257, 267.)

As we have explained, Tisdale and Pratt knew or should have known their interests were imperiled no later than October 15, 2024. Had they sought to intervene then, the original parties might have avoided nearly seven months of litigation activity, including the filing of the first amended representative action and class action complaint, the naming and voluntary dismissal of Sadick Arauz, the negotiation and drafting of the joint stipulation of settlement, the preparation and submission of the motion for preliminary approval, the retention of a claims administrator, and the dissemination of notice to class members. Intervention would have made these efforts pointless. More importantly, it would have scuttled the *Smith* settlement with no assurance the *Smith* plaintiffs could achieve a more favorable result in the *Tisdale/Pratt* action (where, again, Tisdale and Pratt's motion for class certification had been struck as untimely). (See *Air California, supra*, 799 F.2d at p. 538 [affirming the district court's finding that "the possibility of this settlement unraveling is so prejudicial that to allow the [proposed intervener] to intervene at this late date would be tantamount to disaster"].)

On the record before us, we conclude the second factor—prejudice —likewise weighs against intervention. (See *R&G Mortgage, supra*, 584 F.3d at p. 9 [prejudice to the original parties was "manifest" where proposed intervention was aimed at disrupting

negotiated settlement]; see also *Corley v. Jackson Police Department* (1985) 755 F.2d 1207, 1210 [prejudice to the original parties was "apparent" where intervention would have put the "negotiated settlement of a difficult problem" at risk].)

3. Length and Reason for the Delay

The third and final factor—the length and reason for the delay—also weighs against intervention. As previously discussed, the length of the delay is measured from " 'the date the proposed interveners knew or should have known their interests in the litigation were not being adequately represented.' " (*Lofton, supra*, 27 Cal.App.5th at p. 1013.) Here, as we have explained, Tisdale and Pratt knew or should have known their interests were in danger of not being adequately represented by October 15, 2024, more than six months before they filed the application on May 8, 2025. Tisdale and Pratt argue their delay was justified because they "had no reason to intervene" until they learned the terms of the *Smith* settlement, on May 2, 2025. We are not persuaded.

" 'A party seeking to intervene must act as soon as he "knows or has reason to know that his interests *might* be adversely affected by the outcome of the litigation." ' " (*Google, supra*, 172 F.4th at p. 1137, italics added.) Tisdale and Pratt suspected their interests might be adversely affected by the *Smith* settlement in late August 2024, when their counsel learned "there were efforts being made by Apria and the *Smith* counsel to effectuate a reverse auction settlement that would wipe out claims of the Couriers." Those suspicions must have been firmly entrenched by mid-October 2024, when they told the Los Angeles County Superior Court they had "grave concerns" about the possibility of a reverse auction settlement in the *Smith* action that would cause "great harm" to members of the putative class in the *Tisdale/Pratt* action.

Although Tisdale and Pratt may not have known the terms of the *Smith* settlement until May 2025, they knew their interests might be adversely affected many months earlier. That should have been their cue to act. (See *Banco Popular, supra*, 964 F.2d at p. 1231 ["the law contemplates that a party must move to protect its interest no later than

when it gains some actual knowledge that a measurable risk exists"].) As potential interveners, Tisdale and Pratt were not free to "sit idly by and await the receipt of infinitely precise information about every ramification of a pending case." (*Ibid.*; see also *R&G Mortgage, supra*, 584 F.3d at p. 8 ["Perfect knowledge of the particulars of the pending litigation is not essential to start the clock running; knowledge of a measurable risk to one's rights is enough"].)

Here, as we have said, Tisdale and Pratt knew the *Smith* settlement posed a measurable risk to their interests no later than October 15, 2024. They should have sought to intervene then, when they could have participated in the settlement process and possibly affected the outcome. Instead, they waited until the *Smith* settlement was rounding third and heading for home to file their application. Doing so meant they accepted the additional risk that the application would be denied as untimely. (See, e.g., *United States v. Oregon* (9th Cir. 1990) 913 F.2d 576, 589 [motion denied as untimely where proposed interveners were aware their interests would be discussed in settlement negotiations]; see also *Toxic Substances, supra,* 309 F.3d at p. 1120 [motion denied as untimely where proposed interveners "had reason to know the negotiations might produce a settlement decree to their detriment"]; *Air California, supra*, 799 F.2d at p. 538 [motion denied as untimely where proposed intervener was aware of settlement negotiations but not terms]; and see *Alaniz v. Tillie Lewis Foods* (9th Cir. 1978) 572 F.2d 657, 658-659 [motion denied as untimely where proposed interveners knew or should have known about consent decree preceded by well-publicized, industry-wide negotiations].) That Tisdale and Pratt were unable to discover the terms of the *Smith* settlement from original parties should have prompted them to action, not lulled them into complacency. Regardless, the fact they did not know the terms of the *Smith* settlement does not excuse or explain their months-long delay. Under the circumstances, we find the third timeliness factor also weighs against intervention.

D. Conclusion

Even assuming the *Smith* settlement was inadequate, we conclude the application was untimely. That conclusion dooms the application for both mandatory and permissive intervention and makes it unnecessary for us to consider Tisdale and Pratt's other arguments for reversal.

III. DISPOSITION

The order denying the application to intervene is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) and (2).)

/S/
RENNER, Acting P. J.

We concur:

/S/
MESIWALA, J.

/S/
WISEMAN, J.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.