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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Norman Zwicky, et al.,
Plaintiffs,
v.
Diamond Resorts Incorporated, et al.,
Defendants.

No. CV-20-02322-PHX-DJH
ORDER

Plaintiffs Norman Zwicky (“Zwicky”), George Abarca (“Abarca”), Vikki Osborn (“Osborn”), and Elizabeth Stryks-Shaw (“Stryks-Shaw”) (collectively “Plaintiffs” or “Class Representatives”) previously filed an “Unopposed Motion for Preliminary Certification of Class for Settlement Purposes Only, Preliminary Approval of Settlement, and Approval of Notice” (Doc. 129) (the “Initial Motion”), which the Court granted in part and denied in part. (Doc. 136). Although the Court granted conditional certification of the Class, it denied without prejudice the proposed Settlement Agreement and Release (Doc. 129-1) (the “Proposed Settlement Agreement” or “Agreement”). (Doc. 136 at 17–28). Plaintiffs have since filed an “Unopposed Renewed Motion for Preliminary Approval of Settlement, Approval of Notice” (Doc. 144) (the “Renewed Motion”). Plaintiffs have sufficiently supplemented the record with appropriate documentation regarding the Proposed Settlement Agreement. So, the Court grants Plaintiffs’ Renewed Motion.

///

1 **I. Background¹**

2 Plaintiffs are all current or former owners of timeshare interests that were acquired
 3 or sold by Defendants Diamond Resorts International, Inc. (“DRI”) and Diamond Resorts
 4 Management, Inc. (“DRMI”).² (Doc. 109 at ¶ 12). Defendants Troy Magdos and Kathy
 5 Wheeler (collectively the “Defendant Individuals”) are employees of DRI.
 6 (*Id.* at ¶¶ 4, 97, 99). This suit stems from a 2015 state action Zwicky filed in the
 7 Maricopa County Superior Court seeking to enforce his statutory and common law
 8 inspection rights as a timeshare owner. *See Zwicky v. Premiere Vacation Collection*
 9 *Owners Ass’n*, No. CV2015-051911 (Ariz. Super. 2015) (the “State Inspection Action”).
 10 Zwicky questioned why he was charged annual assessments and fees that were materially
 11 higher than previous years. *See generally id.*

12 In August 2021, Plaintiffs filed their Third Amended Class Action Complaint
 13 (“TAC”) (Doc. 109) and brought three causes of action: Count I against all Defendants
 14 for violation of the Federal Racketeering Influenced and Corrupt Organization Act
 15 (“Federal RICO”), 28 U.S.C. §§ 1961 *et seq.*; Count II against all Defendants for
 16 violation of the Arizona Civil Racketeering Statute (“Arizona RICO”), A.R.S. § 13-
 17 2312(B); and Count III against Defendant Individuals only for breach of fiduciary duty.
 18 (*Id.* at ¶ ¶ 130–85). In short, the TAC alleged Defendants failed to disclose certain
 19 charges and overcharged timeshare owners annual assessments by imposing those hidden
 20 costs as ordinary common expenses. (*See* Doc. 144 at 4).

21 In its November 15, 2022, Order (Doc. 136) (the “2022 Order”), the Court
 22 preliminary certified this matter as a class action on behalf of the following class:

23 ///

24 ///

25 ///

26 ¹ The Court has discussed the background of this case at length in its prior Orders
 27 (Docs. 102 at 1–5; 136 at 1–4) and so the Court will not repeat it here.

28 ² DRMI is a property management company and wholly owned subsidiary of DRI.
 (Doc. 109 at ¶ 77).

1 All current and former members of the Premiere Vacation Collection
2 Owners Association who were assessed Assessments for any Calendar
3 year(s) from 2011 through and including 2022, excluding ILX Acquisition
4 and any entity that received any bulk transfer/assignment of ILX
5 Acquisition’s Bulk Membership in the Premiere Vacation Collection
6 Owners Association. Excluded from the Class are Diamond Resorts
7 International, Inc., Diamond Resorts Management, Inc., their parents,
8 subsidiaries, successors, affiliates, current officers and directors and all
9 judges assigned to this litigation and their immediate family members.

10 (*Id.* at 29–30) (the “Class” or “Class Members”). The Court denied the Proposed
11 Settlement without prejudice because it was unsupported by appropriate documentation.
12 (*Id.* at 17–28).

13 **II. Legal Standard**

14 Rule 23³ governs the requirements and procedures for class action settlements.
15 The Ninth Circuit has declared a strong judicial policy that favors settlement of class
16 actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Hyundai*
17 *and Kia Fuel Economy Litig.*, 926 F.3d 539, 556 (9th Cir. 2019). When the “parties
18 reach a settlement agreement prior to class certification, courts must peruse the proposed
19 compromise to ratify both [1] the propriety of the certification and [2] the fairness of the
20 settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *see also In re*
21 *Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (holding
22 when parties seek approval of a settlement negotiated prior to formal class certification,
23 “there is an even greater potential for a breach of fiduciary duty owed the class during
24 settlement”). The second inquiry is at issue as the Court already preliminary certified this
25 class action for settlement purposes.

26 The “court must carefully consider ‘whether a proposed settlement is
27 fundamentally fair, adequate, and reasonable,’ recognizing that ‘[i]t is the settlement
28 taken as a whole, rather than the individual component parts, that must be examined for
overall fairness’” *Staton*, 327 F.3d at 952 (quoting *Hanlon*, 150 F.3d at 1026); *see*

³ Unless where otherwise noted, all Rule references are to the Federal Rules of Civil Procedure.

1 also Fed. R. Civ. P. 23(e) (outlining class action settlement procedures). Procedurally,
2 the approval of a class action settlement takes place in two stages. In the first stage of the
3 approval process, “the court preliminarily approve[s] the Settlement pending a fairness
4 hearing, temporarily certifie[s] the Class . . . , and authorize[s] notice to be given to the
5 Class.” *West v. Circle K Stores, Inc.*, 2006 WL 1652598, at *2 (E.D. Cal. June 13, 2006)
6 (quoting *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 556
7 (W.D. Wash. 2004)). Therefore, in this Order the Court will only “determine [] whether
8 a proposed class action settlement deserves preliminary approval” and lay the
9 groundwork for a future fairness hearing. *Nat’l Rural Telecomms. Coop. v. DIRECTV,*
10 *Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).

11 At the fairness hearing and after notice to the Class, the Court will entertain any of
12 the Class’s objections to (1) the treatment of this litigation as a class action and/or (2) the
13 terms of the Proposed Settlement Agreement. *See Diaz v. Trust Territory of Pac. Islands*,
14 876 F.2d 1401, 1408 (9th Cir. 1989) (prior to approving the dismissal or compromise of
15 claims containing class allegations, district courts must, pursuant to Rule 23(e), hold a
16 hearing to “inquire into the terms and circumstances of any dismissal or compromise to
17 ensure that it is not collusive or prejudicial”). Following the fairness hearing, the Court
18 will make a final determination as to whether the parties should be allowed to settle the
19 class action under the terms agreed upon. *DIRECTV*, 221 F.R.D. at 525.

20 **III. Discussion**

21 In the 2022 Order, the Court identified three deficiencies with respect to Plaintiff’s
22 Initial Motion and the Proposed Settlement Agreement: (1) there was insufficient
23 documentation to adequately assess the parties’ rationale behind arriving at the
24 Agreement; (2) there appeared to be a facial inequity when comparing the relief provided
25 to the Class and the amount of attorneys’ fees requested; and (3) the parties did not
26 provide any documents to support their calculations behind the proposed Settlement
27 Fund. (*See Doc. 136 at 29*). In their Renewed Motion, Plaintiffs supplement the record
28 and argue the Court should approve the Proposed Settlement Agreement that was

1 attached to their Initial Motion. (*Compare* Doc. 129-1 with Doc. 145-5). Plaintiffs also
2 request the Court to approve their proposed methods and forms of notice to the Class and
3 set a date for a fairness hearing.⁴ The Court will address each request in turn.

4 **A. Preliminary Evaluation of Fairness of Proposed Class Action**
5 **Settlement**

6 The Court first considers whether to the preliminarily approve the Proposed
7 Settlement Agreement. Rule 23(e) requires courts to evaluate a proposed settlement for
8 fundamental fairness, adequacy, and reasonableness before approving it. Fed. R. Civ. P.
9 23(e)(2). Ultimately, a determination of the fairness, adequacy, and reasonableness of a
10 class action settlement involves consideration of the following eight factors:

11 (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and
12 likely duration of further litigation; (3) the risk of maintaining class action
13 status throughout the trial; (4) the amount offered in settlement; (5) the
14 extent of discovery completed and the stage of the proceedings; (6) the
15 experience and views of counsel; (7) the presence of a governmental
16 participant; and (8) the reaction of the class members to the proposed
17 settlement.

18 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004) (citation omitted).
19 Some of the *Churchill* factors, however, cannot be fully assessed until the court conducts
20 its fairness hearing. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008). At the
21 preliminary approval stage, courts need only evaluate “whether the proposed settlement
22 [1] appears to be the product of serious, informed, non-collusive negotiations, [2] has no
23 obvious-deficiency, [3] does not improperly grant preferential treatment to class
24 representatives or segments of the class and [4] falls within the range of possible
25 approval.” *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 363 (D. Ariz. 2009) (internal
26 quotation and citation omitted). In its 2022 Order, the Court conducted a cursory review
27 of the Proposed Settlement Agreement in accordance with these four factors.

28 The Court initially rejected the Agreement because it was deficient under the first,

⁴ Plaintiffs also request the Court to set a deadline for filing a separate motion for attorneys’ fees and costs. The Court finds it premature to consider this request and will not do so here.

1 second, and fourth factors.⁵ As to the first factor, Plaintiffs did not provide sufficient
2 information from which the Court could adequately assess the content of the parties’
3 settlement negotiations or the sufficiency of evidence used therein. (Doc. 136 at 19–20).
4 As to the second factor, the Court was concerned with the facial inequities and conflicts
5 of interest regarding the parties’ clear-sailing agreement for what appeared to be a
6 disproportionate and unsubstantiated award of attorneys’ fees. (*Id.* at 21–24). As to the
7 fourth factor, Plaintiffs did not provide sufficient documentation demonstrating how the
8 proposed Settlement Fund amount was adequately justified. (*Id.* at 27–28). In short,
9 Plaintiffs failed to show their work. The Court now considers whether Plaintiffs’
10 Renewed Motion rectifies these deficiencies.

11 **1. Factor One: Settlement Process**

12 The parties’ arrived at the Agreement after an all-day, in-person mediation
13 session with Retired Magistrate Judge Edward Infante (“The Hon. Infante”), who is an
14 experienced private mediator and former Chief Magistrate Judge (Doc. 129-7 at 3). The
15 Court found “[t]he parties’ attestations regarding the process of mediation evince[d] good
16 faith negotiations and a thorough process for arriving at settlement” but was unpersuaded
17 because “Plaintiffs d[id] not provide any supplemental documents that concretely show
18 what their ‘numerous offers and counter offers’ and initial term sheet entailed.”
19 (Doc. 136 at 20). There was not enough information for the Court to assess “the
20 strengths and weaknesses of the parties’ claims and defenses . . . and consider how class
21 members will benefit from settlement” to determine if it was fair and adequate. *Acosta v.*
22 *Trans Union, LLC*, 243 F.R.D. 377, 397 (C.D. Cal. 2007).

23 In their Renewed Motion, Plaintiffs outline in detail the substance of the parties’
24 mediation sessions with the Hon. Infante. For example, Plaintiffs explain the progression
25 in which the parties revised their proposal settlement structures and the contents of the
26 offers and counteroffers. (Doc. 144 at 27–33). Plaintiffs also attach the initial Terms

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28 ⁵ The Court approved the Agreement with respect to the third factor, finding the proposed
incentive awards to Plaintiffs did not improperly grant preferential treatment to class
representatives or segments of the class. (Doc. 136 at 25–27).

1 Sheet (Doc. 145-4) the parties generated at the close of mediation, identify the material
2 changes between the Term Sheet and Proposed Settlement Agreement, and explain why
3 the Agreement is a better deal for the Class. (Doc. 144 at 31–43). These clarifications
4 show the parties engaged in back-and-forth negotiations, meaningfully evaluated the
5 claims and defenses at issue in the case, and settled on an Agreement that benefitted the
6 class through a lump sum payment rather than a multi-year payment plan. The settlement
7 process appears to be fair and adequate.

8 The Court was also concerned that the parties arrived at a settlement before they
9 completed extensive discovery. *See Acosta*, 243 F.R.D. at 397 (“Federal courts are
10 inherently skeptical of pre-certification settlements, precisely because such settlements
11 tend to be reached quickly before the plaintiffs’ counsel has had the benefit of the
12 discovery necessary to make an informed evaluation of the case and, accordingly, to
13 strike a fair and adequate settlement.”). While Plaintiffs vaguely mentioned the
14 negotiations were aided by disclosures mandated by the Arizona Superior Court in the
15 State Inspection Action and Defendants’ summaries of their indirect corporate costs,
16 Plaintiffs did not provide or cite to any of those documents in their Initial Motion.
17 (Doc. 136 at 20). These gaps prevented the Court from evaluating the content of the
18 parties’ negotiations or the sufficiency of evidence used by the parties.

19 Plaintiffs now supply those documents in their Renewed Motion. (*See Docs.* 144-
20 4; 144-5; 144-7; 144-8) (State Inspection Action disclosure orders); (*see also Docs.* 144-
21 6; 144-9) (Defendants’ summaries of indirect corporate costs). Plaintiffs also aver they
22 engaged in informal investigation of DRI’s public filings to better understand DRI’s
23 business operations, “and to determine (among other things) whether [DRI’s alleged]
24 overhead-shifting practice was sanctioned or disclosed.” (Doc. 144 at 5). Of these
25 documents include DRI’s filings at the United States Securities and Exchange
26 Commission, Arizona Department of Real Estate, and during various bankruptcy
27 proceedings. (Doc. 144 at 5–6); (*see e.g.*, Doc. 145-1) (Arizona Department of Real
28 Estate Electronic Filing). Moreover, Plaintiffs’ Renewed Motion includes the discovery

1 documents facilitated in the present action. (*See* Doc. 144-10). The Court agrees that the
2 discovery obtained in the State Inspection Action and this matter demonstrates the
3 parties' efforts to investigate before settlement are satisfactory.

4 In sum, Plaintiffs have sufficiently supplemented the record to demonstrate the
5 parties engaged in a good-faith mediation session. There is no evidence to suggest that
6 the Proposed Settlement Agreement was negotiated in haste or collusion. *See Hanlon*,
7 150 F.3d at 1027. Thus, the Court is preliminarily satisfied that the Agreement was the
8 product of serious, informed negotiations.

9 **2. Factor Two: Obvious Deficiencies**

10 Next, the Court will reevaluate the terms of the Agreement for obvious
11 deficiencies. The Ninth Circuit has identified three "subtle signs" of deficiencies, which
12 it refers to as the *Bluetooth* factors: "(1) when counsel receives a disproportionate
13 distribution of the settlement; (2) when the parties negotiate a clearsailing arrangement,
14 under which the defendant agrees not to challenge a request for an agreed-upon attorney's
15 fee; and (3) when the agreement contains a kicker or reverter clause that returns
16 unawarded fees to the defendant, rather than the class." *McKinney-Drobnis*, 16 F.4th at
17 607–08 (citation omitted); *In re Bluetooth*, 654 F.3d at 947 (internal quotation and
18 citation omitted). In the 2022 Order, the Court rejected the Agreement due to concerns
19 arising under the first and second *Bluetooth* factor.⁶

20 **a. Disproportionate Distribution of the Settlement to** 21 **Counsel**

22 The Court first took issue with the proportionality between the agreed upon award
23 of attorney's fees and the results obtained for the Class. In their Initial Motion, Plaintiffs
24 requested approval of "25% of the settlement fund (\$3,250,000) as an award of attorneys'
25 fees and expenses (currently estimated at \$25,000)." (Doc. 129 at 4). The Court

26 _____
27 ⁶ The Court found the third *Bluetooth* factor weighed against collusion because there was
28 no reverter clause and the Proposed Settlement Agreement required any undistributed
funds to be distributed to Habitat for Humanity as a *cy pres* recipient. (Doc. 136 at 24–
25). The Court need not address this factor again.

1 construed this statement to mean that the parties presumptively agreed to a fee award that
2 was 134 times the amount of actual fees estimated at \$25,000. (Doc. 136 at 23 citing
3 Docs. 129-1 at 44; 129 at 4). In their Renewed Motion, Plaintiffs now clarify their
4 “counsels’ statement was ambiguous and perhaps poorly worded” and that “their estimate
5 of \$25,000 was intended to refer to *expenses only*. Not fees.” (Doc. 144 at 25).
6 Plaintiffs also attach declarations by their Counsel as preliminary examples of actual
7 hours billed to justify their request for a 25% fee award. (Docs. 145-6; 145-7).

8 In light of Plaintiffs’ clarification and the Ninth Circuit recognition that “25% of
9 the fund as the benchmark for a reasonable fee award,” the Court is preliminarily assured
10 there is no danger of disproportionate distribution of the settlement to Counsel. *In re*
11 *Bluetooth*, 654 F.3d at 942.

12 **b. Clear-sailing Arrangement for Attorneys’ Fees**

13 The Court also took issue with the parties’ clear-sailing agreement for fees
14 because Defendants promised not to oppose Plaintiffs’ request for attorneys’ fees of 25%
15 of the Settlement Fund. (Doc. 129-1 at 44). This concern was compounded due to the
16 Court’s initial understanding that the Agreement promoted a fee award grossly greater
17 than the actual fees estimated. However, the parties have since clarified their request for
18 fees and sufficiently dispelled any reservations regarding disproportionality. *See supra*
19 Section III.A(2)(a).

20 Although there is a clear-sailing agreement for fees, Plaintiffs’ petition for fees
21 nonetheless remains subject to Court approval. (Doc. 144 at 27). And to be sure, the
22 Proposed Settlement Agreement protects the interest of the Class by providing that “the
23 Court’s failure to approve, in whole or in part, any award for attorneys’ fees shall not
24 prevent the Settlement Agreement from becoming effective, nor shall it be grounds for
25 termination.” (Doc. 129-1 at 44).

26 In sum, Plaintiffs have alleviated the concerns identified in the 2022 Order with
27 respect to the first and second *Bluetooth* factors. There are no obvious deficiencies in the
28 Proposed Settlement Agreement.

1 **3. Factor Four: Settlement Fund Within Range of Possible**
2 **Approval**

3 Last, the Court will reconsider the proposed Settlement Fund amount in light of
4 the parties' supplemental documents. In their Initial Motion, Plaintiffs represented the
5 "maximum, reasonable, nontrebled" recovery award for this lawsuit is \$35,000,000.
6 (Doc. 129 at 21–22). They concluded the \$13,000,000 Settlement Fund, which is roughly
7 37% of estimated damages, was well within reason because even a fractional recovery
8 may be fair in light of the uncertainties, delay, and expense of trial. *Id.* (citing *Millan v.*
9 *Cascade Water Servs., Inc.*, 310 F.R.D. 593, 611 (E.D. Cal. 2015)). The Court found this
10 explanation hollow because Plaintiffs did not provide any concrete information to justify
11 their calculations. (Doc. 136 at 28).

12 In their Renewed Motion, Plaintiffs attach the parties' quantitative analysis that
13 supports the maximum value estimate at \$35,000,000. (Doc. 145-2) (Indirect Corporate
14 Cost Analytical Work-Up). The analysis references Defendants' indirect corporate cost
15 summaries from 2011–2021 (Docs. 144-6; 144-9) and "presents a year-by-year recap of
16 the total net adjusted Indirect Corporate Costs passed on to [] Class members" that totals
17 \$35,275,633. (Docs. 144 at 16–17; 145-2). Plaintiffs represent this figure constitutes the
18 maximum because it would be "achieve[d] [] only if the Court or jury were to
19 categorically reject all of the Defendants' challenges to the merits and damages claims[.]"
20 (Doc. 144 at 12).

21 Plaintiffs' additional documents competently supports their calculations for the
22 Settlement Fund. And the Court agrees that the \$13,000,000 Settlement Fund falls within
23 the "range of reasonableness" as 37% of the estimated maximum of non-trebled
24 compensatory damages. (Doc. 144 at 13–14); *see Nat'l Rural Telecommunications Coop.*
25 *v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (citing *Linney v. Cellular*
26 *Alaska P'ship*, 151 F.3d 1234 (9th Cir. 1998)) ("[I]t is well-settled law that a proposed
27 settlement may be acceptable even though it amounts to only a fraction of the potential
28 recovery that might be available to the class members at trial."); *see e.g., In re*

1 Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prod. Liab. Litig., 2018 WL
 2 6198311, at *6 (N.D. Cal. Nov. 28, 2018) (approving a settlement fund that constituted
 3 “33 percent of th[e] projected maximum recovery”). And if Class Counsel obtains an
 4 attorneys’ fees award equivalent to 25% of the Settlement Fund (\$3,250,000), the amount
 5 of the Settlement Fund available for distribution to class members would be equivalent to
 6 27% of their maximum recovery. See e.g., *In re Volkswagen*, 2018 WL 6198311, at *6
 7 (approving a settlement fund that ultimately allowed for 24% of the class members’
 8 maximum recovery after 25% of funds were allocated for attorneys’ fees). Thus, the
 9 amount of the \$13,000,000 Settlement Fund is preliminarily approved.

10 In sum, Plaintiffs have adequately showed their work behind the Proposed
 11 Settlement Agreement and allayed all concerns identified in the 2022 Order. The Court
 12 will preliminarily approve the Agreement because it “appears to be the product of
 13 serious, informed, non-collusive negotiations, has no obvious-deficiency, does not
 14 improperly grant preferential treatment to class representatives or segments of the class
 15 and falls within the range of possible approval.” *Horton*, 266 F.R.D. at 363 (internal
 16 quotation and citation omitted).

17 C. Proposed Class Notice and Administration

18 The Court next turns to the parties’ proposed methods and forms of notice to the
 19 Class. Rule 23(c)(2)(B) governs the requirements for notices in Rule 23(b)(3) class
 20 actions:

21 [T]he court must direct to class members the best notice that is practicable
 22 under the circumstances, including individual notice to all members who
 23 can be identified through reasonable effort. . . . The notice must clearly and
 concisely state in plain, easily understood language[]

- 24 (i) the nature of the action;
- 25 (ii) the definition of the class certified;
- 26 (iii) the class claims, issues, or defenses;
- 27 (iv) that a class member may enter an appearance through an attorney if
 the member so desires;
- 28 (v) that the court will exclude from the class any member who requests

1 exclusion;

2 (vi) the time and manner for requesting exclusion; and

3 (vii) the binding effect of a class judgment on members under
4 Rule 23(c)(3).

5 Fed. R. Civ. P. 23(c)(2)(B). The notice may be distributed by United States mail,
6 electronic means, or other appropriate means. *Id.* In addition, due process requires the
7 notice must be “reasonably calculated, under all the circumstances, to apprise interested
8 parties of the pendency of the action and afford them an opportunity to present their
9 objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

10 The Proposed Settlement Agreement details a Notice Program (Doc. 129-1 at 29–
11 34) and includes three notice forms: (1) a Proposed Postcard Notice (Doc. 129-2);
12 (2) a Proposed Email Notice (Doc. 129-3); and (3) a Proposed Long Form Notice
13 (Doc. 129-4). The Notice Program also provides for “the creation of a Settlement
14 Website that will provide additional information and documents, including the operative
15 pleadings and the Long Form Notice.” (Doc. 144 at 40).

16 1. Notice Methods

17 The Notice Program names JND Legal Administration as Settlement
18 Administrator⁷ and directs notice be distributed in one of three ways: “(1) Email Notice
19 shall be the primary form and notice and sent to all Class Members for whom DRM has
20 provided email addresses; (2) Postcard Notice sent by U.S. mail only to Class Members
21 for whom DRM does not have valid email addresses or for whom Email Notice bounces
22 back as undeliverable; (3) and Long Form Notice, which shall be written in both English
23 and Spanish, and shall be available on the Settlement Website and via mail upon a Class
24 Member’s request to the Settlement Administrator.” (Doc. 129-1 at 32–33). DRMI
25 agrees to provide the Settlement Administrator with a Class Membership List containing,
26 among other things, each Class Member’s name, last known address, email address

27 _____
28 ⁷ The Settlement administrator is tasked with, among other things, determining and
allocating each Class Member’s *pro rata* interest in the Settlement Fund, managing the
Settlement Website, and carrying out the Notice Program. (Doc. 129-1 at 27–29).

1 (if available), and assessment fees incurred between 2011–2022. (*Id.* at 26).

2 Courts in this circuit have approved similar notice programs that dispersed short-
3 form notice by email where possible and, alternatively, by mail to class members for
4 whom there are no known email addresses. *See e.g., Corcoran v. CVS Health*, 2019 WL
5 6250972, at *9–10 (N.D. Cal. Nov. 22, 2019); *In re MyFord Touch Consumer Litig.*,
6 2019 WL 1411510, at *4 (N.D. Cal. Mar. 28, 2019). Rule 23(c)(2)(B) indeed allows
7 electronic notice to class members in certain situations, and the parties have established a
8 procedure for obtaining the necessary information of the Class Members.
9 *See* Fed. R. Civ. P. 23(c)(2)(B). Thus, the Court finds the Notice Program’s distribution
10 method is proper.

11 **2. Notice Forms**

12 The Court next reviews the contents of the three notice forms. All forms are made
13 up of easily understandable questions and answers concerning the Proposed Settlement
14 Agreement and the litigation. The Proposed Postcard and Email Notices are identical and
15 summarize the Proposed Long Form Notice. (*Compare* Doc. 129-2 with Doc. 129-3).
16 These short-form notices meet the requirements of Rule 23(c)(2)(B) because they
17 describe the nature of the action; define the Class; state the issues; outline recovery and
18 release under the Proposed Settlement Agreement; inform Class Members they can
19 appear at the fairness hearing; and refer Class Members to the Proposed Long Form
20 Notice on the Settlement Website for instructions on how to opt out of the settlement or
21 object at the fairness hearing. (*Id.*) However, the Court notes the Proposed Postcard and
22 Email Notices only state the date and time of the fairness hearing. Both documents
23 should be revised to also include the Court’s address and courtroom number.

24 The Proposed Long Form provides greater details on the components listed in the
25 Proposed Postcard and Email Notices, including the background of the State Inspection
26 Action, the functions of non-monetary benefits provided by the Agreement, and how
27 Class Counsel will be paid. (Doc. 129-4). The Proposed Long Form meets due process
28 requirements because it explains to the Class their rights to opt out of or object to the

1 Proposed Settlement Agreement, and the deadlines by which to exercise those rights.

2 Contingent on the revisions identified above, the parties' Notice Program,
3 Proposed Postcard Notice, Proposed Email Notice, and Proposed Long Form Notice are
4 approved. The Court believes email and direct mail, with all reasonable efforts made to
5 obtain updated addresses, is the "best notice that is practicable under the circumstances."
6 Fed. R. Civ. P. 23(c)(2)(B).

7 **IV. Conclusion**

8 The Court preliminarily approves the Proposed Settlement Agreement as
9 sufficiently fair, reasonable, and adequate to allow the dissemination of notice of the
10 Agreement to the Class. Plaintiffs have amply supplemented the record to rectify all
11 prior deficiencies identified in the 2022 Order. The Notice Program and three notice
12 forms are approved so long as the parties perform the following revisions: the Proposed
13 Postcard and Email Notices should state the Court's address and courtroom number to
14 direct Class Members to the fairness hearing.

15 **Accordingly, IT IS ORDERED as follows:**

16 **I.** The Court preliminarily approves the Settlement Agreement and Release
17 (Doc. 129-1) as sufficiently fair, reasonable, and adequate to allow the dissemination of
18 notice of the Settlement Agreement and Release to the Class. This determination
19 permitting notice to the Class is not a final finding, but a determination that there is
20 sufficient cause to submit the Settlement Agreement and Release to the Class and to hold
21 a Final Approval Hearing to consider the fairness, reasonableness, and adequacy of the
22 Settlement Agreement and Release.

23 **II.** The Court appoints as third-party Settlement Administrator: JND Legal
24 Administration.

25 **III.** The Court approves the Postcard Notice, Email Notice, and Long Form
26 Notice, not materially different from those filed at (Docs. 129-2; 129-3; 129-4), provided
27 the Postcard and Email Notices be revised to state the Court's address and courtroom
28 number to direct Class Members to the fairness hearing.

1 The proposed methods and forms for notifying the Class Members of the
2 settlement and its terms and conditions meet the requirements of Fed. R. Civ. P.
3 23(c)(2)(B) and due process, constitute the best notice practicable under the
4 circumstances, and constitute due and sufficient notice to all persons entitled to the
5 notice. The Court finds that the proposed notice forms are clearly designed to advise the
6 Class Members of their rights.

7 In accordance with the Settlement Agreement and Release, Defendant Diamond
8 Resorts Management, Inc. shall provide the Class Membership List to the Settlement
9 Administrator **within twenty-one (21) days of the issuance of this Order.** The Class
10 Membership List shall include (1) the name, last known address and, to the extent
11 available, email address of each Class Member; and (2) the amount each Class Member
12 was assessed in Assessments for each Calendar Year between 2011 and 2022.

13 In accordance with the Settlement Agreement and Release, the Settlement
14 Administrator will carry out notice to the Class Members as expeditiously as possible, but
15 no later than **thirty (30) days after the issuance of this Order.**

16 **IV.** Any Class Member who desires to be excluded from the class must comply
17 with the terms set forth in the Long Form Notice and submit an appropriate and timely
18 request for exclusion that is postmarked **no later than forty-five (45) days before the**
19 **Final Approval Hearing.** Any Class Member who submits a valid and timely request
20 for exclusion will not be bound by the terms of the Settlement Agreement and Release.

21 **V.** Any Class Member who does not timely request exclusion as set forth in
22 the Long Form Notice and who intends to object to the fairness of this settlement must
23 comply with the terms set forth in the Long Form Notice and file a written objection with
24 the Court **no later than forty-five (45) days before the Final Approval Hearing.** Any
25 such Class Member must also mail a copy of the written objection, within the same
26 period, to (1) Edward Louis Barry; Law Office of Edward L. Barry; 2120 Company St.,
27 Third Floor; Christiansted, Virgin Islands 00820; (2) Phelps & Moore, PLLC; 7430 East
28 Butherus Drive, Suite A; Scottsdale, Arizona 85260; and (3) Julie Singer Brady and

1 Brandon Crossland; Baker & Hostetler, LLP; 200 South Orange Avenue; Orlando,
2 Florida 32801.

3 Any Class Member who has timely filed an objection must appear at the Final
4 Approval Hearing, in person or by counsel, and be heard to the extent allowed by the
5 Court, applying applicable law, in opposition to the fairness, reasonableness and
6 adequacy of the Settlement, and on the application for an award of attorneys' fees and
7 costs. The right to object to the Settlement Agreement and Release must be exercised
8 individually by an individual Class Member, not as a member of a group or subclass and,
9 except in the case of a deceased, minor, or incapacitated Class Member, not by the act of
10 another person acting or purporting to act in a representative capacity.

11 **VI.** The Court will conduct an in-person Final Approval Hearing on
12 **February 8, 2024**, at 10:00 AM at the United States District Court for the District of
13 Arizona, Sandra Day O'Connor U.S. Courthouse, Courtroom 605, 401 West Washington
14 Street, Phoenix, AZ 85003-2158, to review and rule upon the following issues:

15 **A.** Whether this action satisfies the applicable prerequisites for class
16 action treatment for settlement purposes under Fed. R. Civ. P. 23;

17 **B.** Whether the Settlement Agreement and Release is fundamentally
18 fair, reasonable, adequate, and in the best interest of the Class Members and should be
19 approved by the Court;


20 **C.** Whether a Final Order and Judgment, as provided under the
21 Settlement Agreement and Release, should be entered, dismissing the Lawsuit with
22 prejudice and releasing the Released Claims against the Released Parties; and

23 **E.** To discuss and review other issues as the Court deems appropriate.

24 **VII.** The Court reserves the right to adjourn or to continue the Final Approval
25 Hearing, or any further adjournment or continuance thereof, without further notice other
26 than announcement at the Final Approval Hearing or at any adjournment or continuance
27 thereof; and to approve the settlement with modifications, if any, consented to by Class
28 Counsel and Defendants without further notice.

1 **IT IS FURTHER ORDERED** that Plaintiffs' Unopposed Renewed Motion for
2 Preliminary Approval of Settlement, Approval of Notice (Doc. 144) is **GRANTED**.

3 Dated this 5th day of September, 2023.

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7 Honorable Diane J. Humetewa
8 United States District Judge
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