New Settlement Paradigms: How to Navigate the Rule Changes

Ellen Gusikoff Stewart, Esq.
Ol__fkp Dbiibo Ora j ^k # Al t a IIM, P^k Afbdl) @>

NEW SETTLEMENT PARADIGMS – HOW TO NAVIGATE THE RULE CHANGES AND OTHER RECENT DEVELOPMENTS

Settlements of class actions are highly favored – courts like them because complex litigation is generally very demanding of a court's time, and its limited judicial resources can be directed to other matters; class members like them because they recover some portion of a loss suffered by them without having to take on a big, well-financed defendant for what is usually a relatively small claim, and defendants like them because they resolve distracting and potentially expensive litigation.

This article addresses the recent amendments to Rule 23 of the Federal Rules of Civil Procedure, which took effect on December 1, 2018, a number of recent class action settlement decisions from New York state courts, the new settlement guidelines enacted by the Northern District of California, and, finally, the full *cy pres* settlement case currently under consideration by the United States Supreme Court.

I. AMENDMENTS TO RULE 23[1]

The first amendments to Rule 23 in 15 years primarily address settlement procedures. In general, the amendments: require lawyers to provide additional information to the Court before the Court grants preliminary approval; encourage parties to consider alternative methods for providing notice, including by electronic means; imposes limitations on compensating objectors without court approval; and clarifies final settlement criteria. As of the date of this submission there are no reported decisions interpreting the new rules.

[1] The amendments, with redlines and committee notes, can be found at https://www.supremecourt.gov/orders/courtorders/frcvls_5924.pdf.

A. GIVING NOTICE UNDER RULE 23(c)(2)(B)

1. This amendment specifically endorses the propriety of combined Rule 23(b)(3) certification and settlement notices.

2. This amendment does not change the substance of what a notice should contain, or the requirement that the method of notice be "the best notice is practicable." Notice has traditionally been provided by mail and publication, and those may, in certain circumstances, remain the preferred primary methods, of giving notice, but the amended rule requires the parties to consider whether "electronic means, or other appropriate means" would constitute the most reliable and effective means of notice, in light of new technologies, and the make-up of the Class and its likely access to this new technology, *i.e.*, email, texts, online digital media, websites, social media, and how the defendant communicates with class members if it is a company or business. The Federal Judicial Center's Judges' Class Action Notice and Claims Processing Checklist and Plan Language Guide, which, provides extensive guidance on the formatting and contents of class action notices, also serves as a useful guide. *See* https://www.fjc.gov.sites/default/files/2012/notcheck.pdf The notice should be informative and easy to understand, and class member calls to action, such as objecting, opting out or filing a claim should be immediately and easily identifiable.

3. Rule 23(c)(2) now likely requires (and the Committee Notes recommend) that the parties submit a declaration or affidavit of a notice expert (usually the notice or claims administrator) to the Court in connection with the motion for preliminary approval detailing the proposed means of notice and its anticipated effectiveness (including whether it will actually come to the attention of the class) and provide the Court with a copy of each notice, including screen shots. *See* Committee Notes for proposed 2018 Amendments.

4. The Committee Notes also advise the parties and the Court to focus on the method of opting out of the Class, balancing the convenience to the Class Member with the risk of unauthorized opt-outs. *Id*.

B. CLASS ACTION SETTLEMENTS UNDER RULE 23(e)

Rule 23(e) requires Court approval before "claims, issues or defenses of a certified class (or a class proposed to be certified for purposes of settlement) may be settled, voluntarily dismissed or compromised . . . ." As amended, Rule 23(e) expressly adopts a two-step approval process – initially providing the Court with information sufficient for it to approve the sending of notice under Rule 23(e)(1), and subsequently holding a hearing under Rule 23(e)(2) at which the Court determines whether a settlement is fair, reasonable and adequate.

As amended, this rule requires that the proponents of a settlement "front load" information for the Court before notice is provided to potential class members. Courts will now be required to consider at preliminary approval many of the same procedural and substantive factors that it traditionally considers at final approval. The purpose of this amendment is to require the proponents of settlement to "front load" settlement approval, *i.e.*, provide sufficient evidence to the Court that it "will likely be able to approve" the proposed settlement and certify the class for purposes of judgment on the proposal following notice to and an opportunity to be heard by the class. *See* Rules 23(e)(1)(A) and 23(e)(1)(B).

1. Rule 23(e)(1). Rule 23(e)(1) does not identify what specific information the parties must provide to the court before a decision allowing notice to provided is made. The Committee Notes provide substantial guidance here. In short, "[a]t the time they seek notice to the class, the proponents of the Settlement should ordinarily provide the Court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. "While of course the subjects to be addressed will vary

depending on the particular case, some general observations can be made." (Committee Notes to Subdivision (e)(1)).

(a) Class Certification. If the court has already certified the litigation class, then the court should be informed if the settlement class differs from the litigation class in any way. If the class has not yet been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class.

(b) Other information in support of the settlement. The Committee Notes identify additional information that the parties should consider providing to the court at the preliminary approval stage: the extent and type of benefits that the Settlement will confer on class members, including, if appropriate, the claims process and the anticipated claims rate, and the recipient of any unclaimed funds; the likely range of litigated outcomes, and risks of continuing with the litigation; the extent of discovery completed; the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal; the fees that will be sought and the timing of payment of fees; and any agreement that must be identified under Rule 23(e)(3).

2. Rule 23(e)(2). Rule 23(e)(2) lists the core issues of procedure and substance that a court must consider in deciding whether to send notice and approve a proposed Settlement. The parties should provide information to the court evidencing that class representatives and counsel have adequately represented the class; that the settlement was negotiated at arm's length, including whether a mediator was involved; that the expected relief to class members is adequate in light of: the costs, specific risks and delay of trial and appeal, including the likelihood of success and an estimate of the likely range of a class-wide recovery; the effectiveness of any method of processing class-member claims, and the burdensomeness of the claims process; the

terms of any proposed award of attorneys' fees, including timing of payment; and any agreement required to be identified under Rule 23(e)(3). The court must also consider whether the proposal treats class members equitably relative to each other. This likely requires plaintiff's counsel to address the proposed plan of allocation and establish that all class members are being treated equitably, relative to the strength of the claims alleged or sought to be released. This evaluation does not displace the criteria for approval factors enumerated by courts nationwide, as, for example, the Second Circuit in *City of Detroit v. Grinnell*, 495 F.2d 448 (1974), but according to the Committee Notes, should "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." The parties should focus "on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." (Committee Notes on Rule 23(e)(2)).

When class members would be bound under Rule 23(c)(3), the Court must also determine whether it can certify the Class under the standards of Rules 23(a) and 23(b) for purposes of judgment based on the proposal.

3. Rule 23(e)(5) contains important clarifications and changes with respect to objections and objectors to class action settlements. This is the amendment that has garnered the most discussion and commentary. The Committee Notes acknowledge that "[o]bjections by class members can provide the Court with important information bearing on its determination under Rule 23(e)(2) whether approve the proposal," and this rule strengthens the ability of good-faith objectors to pursue meritorious objections. However, "professional" or "serial" objectors often seek to hold up valid settlements in bad-faith. The amendments are designed to curtail abusive professional objector tactics.

(a) Rule 23(e)(5)(A). The amendment to this rule eliminates the prior requirement that an objection could only be withdrawn with the approval of the court. The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. *See* Fed. R. Civ. P. 23(e)(5)(A) committee's notes to the proposed 2018 amendment. The amendment also requires the objector to identify whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. This requirement can provide the court with useful information on the objector's motivation and permit evaluation on whether payment for withdrawing the objection is justified. While failure to provide needed specificity in an objection may be a basis for rejecting it, courts should not unduly burden class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards. *Id.*

(b) Rule 23(e)(5)(B). This amendment requires court approval for payment in connection with an objection or a threat of an objection. "Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with: foregoing or withdrawing an objection, or foregoing, dismissing, or abandoning an appeal from a judgment approving the proposal." It is designed to reduce the financial incentive for professional objectors to object solely for personal financial gain by subjecting them to greater judiciary scrutiny and provide transparency on the consideration being paid (either in monetary or non-monetary terms).[2]

[2] Rule 23 (e)(5)(B)(ii) applies to payments for forgiving, dismissing or abandoning an appeal of an approved settlement. Nevertheless, the motion for approval of such a payment must be made in the district court.

As noted in the advisory committee notes, "[g]ood faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h)." The committee also acknowledges that "some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process." *Id*. Some of these objectors or their counsel have sought to obtain consideration for withdrawing their objections or dismissing appeals for judgments approving class settlements. Class counsel may conclude that paying or providing other consideration to the objector or its counsel to withdraw the objection or appeal is in the class' best interest in a particular case. But the Committee Notes warn (any many courts have noted) that this is a system "that can encourage objections advanced for improper purposes." Court approval of such consideration should help deter frivolous, bad faith objections from "professional" objectors that provide no benefit to class members. And if conversation involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees. *See* Committee Notes.

4. Rule 23(f). This rule clarifies that a decision to permit notice of a settlement pursuant of Rule 23(e)(1) does not grant or deny class certification, and review under Rule 23(f) would be premature. *See* Committee Notes. The rule also extends the time to file a petition for review of a class certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf.

II. SETTLEMENT CONSIDERATIONS UNDER CPLR ARTICLE 9

Settlements in New York courts are governed by CPLR §908, which provides that: "[a] class action shall not be dismissed, discontinued, or compromised without approval of the Court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members

of the class in such manner as the Court directs." Following are some recent New York decisions addressing recent settlement approval-related issues.

A. Preliminary Approval Standards

There is no explicit requirement under Article 9 for preliminary approval of settlements. New York courts look to Federal Rule of Civil Procedure 23 "to inform New York's class action law." *Vasquez v. Nat'l Secs. Corp.*, 49 Misc. 3d 597, 600 (Sup. Ct., N.Y. County 2015), aff'd 130 A.D. 3d 503 (1st Dept. 2016). New York courts have adopted the federal court practice of hearing and considering preliminary approval motions. *Saska v. Met. Museum of Art*, 2016 N.Y. Misc. LEXIS 4184, *27-*28 (Sup. Ct., N.Y. County 2016).

At the present time, the standard for granting preliminary approval of a class action settlement is not as high as that for granting final approval. "Preliminary approval is the first step in the settlement process. Preliminary approval requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Illoldi v. Koi NY LLC*, 2016 U.S. Dist. LEXIS 71057, at *1 (S.D.N.Y. 2016). The decision to grant preliminary is what has been deemed "probable cause" or "within a range of reasonableness to submit the proposed settlement to class members and thereafter hold a full-scale hearing as to its fairness. *Saska v. Metropolitan Museum of Art*, 2016 N.Y. Misc. LEXIS 4184, at *28-*30 (citing federal cases). It remains to be seen if New York courts adopt the higher preliminary approval standards set forth in the amendments to Rule 23 of the Federal Rules of Civil Procedure.

B. Class Certification – Nationwide Settlement Class

Matter of HSBC Bank U.S.A. N.A. Checking Account Overdraft Litig., 2015 N.Y. Misc. LEXIS 3908 (N.Y. County 2015). Here, Justice Bransten certified a nationwide settlement class of HSBC account holders in the United States who, within the applicable statute of limitations,

incurred an overdraft fee on a debit card transaction as a result of HSBC's practice of posting transactions from highest to lowest dollar amount. In her discussion of the commonality element of CPLR §901(a)(2), Justice Bransten acknowledged that "since the Settlement Class is a national class, it is important to note the differences that exist, state-by-state, with respect to the applicable contract and consumer protection laws." 2015 N.Y. Misc. LEXIS 3908, at *17. She concluded, however, that "[d]espite these variations in state law, common issues nonetheless predominate by virtue of HSBC's uniform contract with the Settlement Class and its uniform practice of "high-to-low posting." *Id*. at *18.

C. Approval of Nonmonetary Settlements

Over the past several years, non-monetary settlements, mostly in the form of merger challenges, have become increasingly disfavored by courts and commentators. Delaware Chancery courts, where much of the country's merger litigation has traditionally taken place, took the lead in disapproving such settlements when proposed "disclosure-only" resolutions provided only disclosures that were deemed not material or even helpful to shareholders. *See Matter of Trulia, Inc. Stockholders Litig.,* 129 A.3d 884 (Del. CH. 2016). The *Trulia* court went on to note that "scholars, practitioners and members of the judiciary have expressed (concerns) that these settlements rarely yield genuine benefits for stockholders." *Id*.

Several New York courts have followed the *Trulia* decision to deny approval of disclosure-only settlements where the proposed disclosures were determined to be not legally material or of little value. *See City Trading v. Nye*, 46 Misc. 3d 1206 (Sup. Ct. N.Y. County 2015) and 59 Misc. 3d 497 (Sup. Ct. N.Y. County 2018); and *Matter of Allied Healthcare Shareholder Litig.,* 49 Misc. 3d 1210 (Sup. Ct. N.Y. County 2015). Justice Ramos denied preliminary approval of a proposed disclosure-only settlement in *Allied Healthcare* without identifying the additional disclosures, noting only that "[n]ot one of the additional disclosures the

defendants included in the supplement to the proxy at class counsels' urging could be characterized as significant nor would the failure to make any of the additional disclosures have resulted in this Court issuing a preliminary injunction to prevent or delay the merger." 2015 N.Y. Misc. 3810, at *2. In contrast, the *City Trading* court twice considered each additional disclosure and concluded that none were material, beneficial or helpful, and in fact were "utterly useless to the shareholders." 59 Misc. 3d at 498. Both courts were highly critical of non-monetary disclosure-only merger litigation.

Nevertheless, disclosure settlements have been approved by New York courts in the years since *Trulia*. *In Gordon v. Verizon Communications, Inc.*, 148 A.D. 3d (1st Dept. 2017), the Court evaluated the proposed settlement under the factors enumerated for class action settlements enumerated by the First Department in *In re Colt Industries Shareholder Litig.*, 155 A.D. 2d 154 (199), *aff'd as mod.* 77 N.Y. 2d 195 (1991), and added and evaluated two additional factors to reverse a decision of the motions court to disapprove a non-monetary settlement which included additional disclosures and a corporate governance reform.[3]

The First Department explained in *Gordon* that: "[M]ore than two decades of mergers and acquisitions litigation following *Colt* have been informative as to the need to curtail excesses not only on the part of corporate management, but also on the part of overzealous litigating shareholders and their counsel. Accordingly, a revisiting of our five-factor *Colt* standard is warranted in order to affect an appropriately balanced approach to judicial review of proposed non-monetary class action settlements and to provide further guidance to courts reviewing such proposed settlements in the future." *Id*. at 158.

[3] The *Colt* approval factors are: likelihood of success; the extent of support from the parties; the judgement of counsel; the presence of bargaining in good faith; and the nature of the issues of law and fact. *See Colt*, 155 A.D. 2d at 160.

The two additional factors added by the *Gordon* court are: whether the proposed settlement is in the best interests of the putative settlement class as a whole, and whether the settlement is in the best interest of the corporation. *Id*. The *Gordon* court evaluated the four categories of additional disclosures and found that they were of some benefit to Verizon shareholders. *Id*. The court also found that the prospective corporate governance reform met the enhanced standard for approval, as it provided a benefit to both Verizon shareholders and to Verizon. *Id*. at 161.

Justice Kornreich, who twice declined to approve the *City Trading* case, nevertheless approved a proposed non-monetary settlement in *Roth v. Phoenix Cos.*, 56 Misc. 3d 191 (Sup. Ct. N.Y. County 2017), a bondholder class action challenging a proposed reduction of a defendant corporation's reporting obligation following a merger and the allegedly inadequate disclosure of the transaction's implications to those bondholders. *Id*. at 193. The merger agreement challenged in *Roth* would have eliminated the rights of certain bondholders to receive certain financial information. The settlement preserved the bondholders' disclosure rights. *Id*. at 194. In approving the settlement, Justice Kornreich said:

> [T]he settlement is outstanding. It provides for expeditious beneficial relief for the class that affords them material disclosures without the need for protracted, costly litigation. While disclosure-only settlements resolving pre-merger lawsuits are the subject of much controversy and often properly viewed with a fair degree of skepticism, this case lacks the pernicious indicia of a frivolous "strike suit" seeking a "merger tax." Here, the gravamen of plaintiff's complaint is a challenge to the disclosure implications of the merger, which the court finds to have been well-founded. The terms of the Settlement sufficiently remedy plaintiff's concerns.

Finally, a non-monetary, settlement was recently approved outside of the merger context. *See Saska v. Metropolitan Museum of Art*, 2016 N.Y. Misc. LEXIS 4184 (Sup. Ct. N.Y. County 2016) (preliminary approval) and 2017 N.Y. Misc. LEXIS 2324 (Sup. Ct. N.Y. County 2017) (final approval). *Saska* concerned the Museum's "pay what you wish admissions policy." The

parties ultimately settled the case for equitable relief in the form of a consent decree with respect to the "pay what you wish policy" that would be binding on the Museum for 78 months, but no monetary damages. The court approved the settlement, which provided the following release of claims: "[a]ll other members of the Settlement Class release only claims for equitable relief and for attorney's fees and expenses, and shall not be deemed to have settled, discharged or released the Museum from any claim for monetary damages."[4]

The court also addressed and overruled an objection to this settlement as a "worthless disclosure only" one, finding the case "bears absolutely no resemblance to a lawsuit about inadequate pre-merger disclosure. Rather, this case concerns whether the Museum's patrons were deceived by the Museum's admission policy. The instant settlement, which remediates any possible deception, provides a real benefit to the public." 2017 N.Y. Misc. LEXIS 2324, at *10.

D. Other Settlement Issues

- Notice. *Vasquez v. National Sec. Corp.*, 2015 N.Y. Misc. LEXIS 1457 (Sup. Ct. N.Y. County 2015), *aff'd* 2016 N.Y. App. Div. LEXIS 3638 (1st Dept. 2016): CPLR §908 requires notice of proposed dismissal of an action although the class had not yet been certified and plaintiff class representative has been paid all of his monetary damages. Although federal law no longer requires this notice, CPLR Article 9 has not yet been similarly amended.

- Incentive Awards. *Saska v. Metropolitan Museum of Art*, 2017 N.Y. Misc. 2324 (Sup. Ct. N.Y. County 2017): CPLR §909 does not expressly permit incentive awards for class representatives. CPLR §909 provides for representatives and objectors to recover attorneys' fees, but does not provide for a separate cash award. While acknowledging that other courts had approved such awards, and that such awards were deserving in this particular case, the court

[4] The three named plaintiffs released their claims for monetary damages.

nevertheless denied the request, citing the code section and the CPLR commentary, especially in light of the amendment to CPLR §909 following the Court of Appeals' decision in *Fleming v. Barnwell Nursing Home & Health Facilities, Inc.*, 15 N.Y. 3d 375 (2010).

- Opt out Rights. In *Colt*, the Court of Appeals considered whether a class action complaint demanding primarily equitable relief required the court to give class members an opportunity to opt out of the class. The *Colt* court concluded that class members have no constitutional due process right to opt out of a class that seeks predominantly equitable relief, as long as the prerequisites for certification of the class are satisfied. *See* 77 N.Y. 2d at 194-196. *Colt* also observed that unlike Rule 23, CPLR article 9 does not specifically enumerate or identify any particular category of case in which opt out rights are mandatory. Rather, CPLR §903 permits a court to exercise discretion to permit opt outs when appropriate. *Id*. at 194-195. The *Colt* court ruled that although the claims asserted and relief obtained was essentially equitable in nature, the release of damage claims without opt out rights for out-of-state class members with no ties to New York State was improper.

This aspect of *Colt* was recently affirmed by the Court of Appeals in *Jiannaras v. Alfant*, 27 N.Y. 3d 349 (2016). The Court declined to distinguish a claim for "incidental damage claims" from individualized damage claims. 27 N.Y. 3d at 353. The Supreme Court in *Jiannaras* had declined to approve a disclosure settlement that it otherwise found was fair and reasonable, solely because it failed to provide op out rights to non-residents with respect to damage claims.

III. NEW NORTHERN DISTRICT OF CALIFORNIA SETTLEMENT GUIDELINES

Why discuss the California settlement guidelines at the NYSBA Meeting? These "guidelines" which became effective in the Northern District on November 1, 2018, are the most

comprehensive set of settlement considerations in the country, and it can be expected that courts nationwide, many of which have started to more critically evaluate class action settlements at preliminary approval, will ultimately formulate their own guidelines, based at least in part on these guidelines.[5] Experience has also shown that courts are more and more interested in what happens with respect to Class Members interests after final approval and, presumably after Plaintiffs' counsel has been paid its fees and expenses.

An earlier set of guidelines appeared on the Northern District's website, but they were not uniformly followed by that court's judges; in fact, a number of the judges in that court have issued their own settlement guidelines. *See, e.g.*, *Luna v. Marvell Technology Group*, Case No. C 15-05447 WHA, Notice Regarding Factors To Be Evaluated For Any Proposed Settlement (ECF No. 105) (Nov. 28, 2016), an example of a standing order of Judge William H. Alsup, issued at an early stage of the litigation, (*see* Appendix B) and well before the settlement of that case in late 2017; and the Order Requiring Supplementation issued by Judge Edward Chen in *In re Leapfrog Enterprise, Inc. Securities Litigation*, 15-cv-00376-EMC (ECF No. 172) (Feb. 28, 2018) which was issued after that court reviewed Plaintiff's Unopposed Motion for Preliminary Approval of Settlement. (*See* Appendix C).

Judge Phyllis Hamilton, the Chief Judge of the Northern District, sought guidance from class action practitioners on both the plaintiff and defense side to review potential revisions to the initial guidelines that had been proposed by the Court's staff. Many of the practitioners' suggestions were adopted by the Court. The guidelines also dovetail with the Rule 23 amendments, especially with respect to the front-loading of information at the preliminary approval stage. Notably, the Court singles out cases litigated under the Private Securities

[5] The Guidelines can be found at https://www.cand.uscourts.gov/ClassAction SettlementGuidance, and are attached as Appendix A hereto.

Litigation Reform Act of 1995, which contains its own settlement and notice provisions. Parties in those cases are directed to "follow the statute and case law requirements that apply to such cases, such as regarding reasonable cost and expense awards to representative plaintiffs, and this procedural guidance to the extent applicable."

A. Preliminary Approval

1. The guidelines require 12 categories of information be provided to the Court at the preliminary approval stage, and recommends that the parties take these requirements into account "during settlement negotiations" and when drafting class notices. Among the requirements:

(a) a description of the differences between the Class proposed for settlement purposes and the Class proposed in the operative complaint (if the Class has not previously been certified) or the certified Class (the litigation class) and an explanation as to why the differences are appropriate. Given the concerns raised by courts nationwide in settlements that provide for a broader settlement class than the class litigated on behalf of, broader settlement classes should be the exception rather than the rule;

(b) a description of any differences between claims being settled and the claims in the operative complaint, and the appropriateness of the broadening of those claims. Again, any expansion of the claims being released should be made with caution and will be viewed with suspicion;

(c) the actual recovery versus the potential recovery, and how that recovery will be distributed, as well as whether there is any reversion of funds to the defendants or their insurers, and the anticipated amount of such reversion (and also noting the Ninth Circuit's case law disfavoring reversions); and

(d) the "risks" of litigation and why the settlement is fair, reasonable and adequate under the circumstances. Although these "risks" have always been addressed in the final approval motion, and summarized at preliminary approval, additional detail is now required at the preliminary approval stage. An explanation of the proposed plan of allocation should also be provided at this stage.

(e) Whether a claim form is required and the estimated number and/or percentage of class members who are expected to submit a claim, based on previous experience of the claims administrator and/or counsel, with examples of such prior experiences and the reasons for the selection of those examples. The declaration from the claims administrator may address these requirements. The guidance also recommends that class counsel provide specific data for at least one of their past comparable class settlements (*i.e.*, settlements involving the same or similar clients, claim and/or issues) and provide the following information: the total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to each *cy pres* recipient, the administrative costs, the attorneys' fees and costs and the benefit conferred on the class in coupon or non-monetary relief settlements. A concern about low participation rates in consumer class actions is likely the impetus for this requirement.

(f) The process used to select the claims administrator and anticipated administration costs. This guideline likely requires a competitive bidding procedure, and potentially will result in a race to the bottom, as claims administrators attempt to undercut each other on price. The concern here is that quality could suffer; cheaper is not always better, and

experience matters, especially in litigations with complex plans of allocation and various types of non-customary distributions.

(g) Notice. The guidelines also require that the notice is easily understandable, taking into account the membership of the Class, and identifies the information that the notice must contain. The guidelines also suggest that the parties consider increasing notice to class members ***via*** third-party data sources, social media, a settlement website and/or a marketing specialist to supplement mail and publication notice, so as to achieve "the best notice that is practicable," and includes suggested language to be included in the notice, as well as specific instructions for objections and opt-outs. At least 35 days should be provided for Class Members to object to the Settlement or opt-out of the Class.

(h) Attorneys' Fees. The preliminary approval motion must now provide information regarding the anticipated requested attorneys' fees and litigation expenses, a supporting lodestar calculation, and, if the fee request will be based on having obtained injunctive relief and/or other non-monetary relief for the Class, a discussions of the benefit. Whether courts will focus solely on the lodestar in determining a fair fee remains to be seen. The Ninth Circuit does not require a lodestar cross-check on a percentage fee request, and the criticisms of lodestar fee awards remain – is plaintiff's counsel running up their time in order to justify its fee? Is this in the best interests of the Class? Must every hour spent on the litigation be justified? The preliminary approval motion should also address the amount of any incentive awards that may be sought, as well as evidence supporting such a request.

(i) *Cy Pres* Awardees. If any portion of the settlement fund will be distributed to a *cy pres* organization, the recipient(s) should be identified at preliminary approval,

as well as an explanation of how the recipient(s) are related to the subject matter of the litigation, and any relationship between counsel and the recipient.

(j) Class Action Fairness Act (CAFA). The motion for preliminary approval should address the applicability of CAFA, and how the settlement complies with 28 U.S.C. §1712 if coupons are included in the recovery.

B. Final Approval Requirements

1. Class Members' Response. The motion for final approval should provide the Court with responses to any objections, the number of undeliverable class notices and claims packets, the number of class members who submitted valid claims and the number of opt-outs.[6]

2. Attorneys' Fees. Here, the guidelines move from "should" to "must," *i.e.*, counsel ***must*** include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund, and a detailed declaration of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information. Counsel should also be prepared to submit copies of billing records.

3. Incentive Awards. All requests for incentive awards must be supported by evidence of the proposed awardees' involvement in the case and any other justification for the award.

C. Post-Distribution Accounting

1. Courts are increasingly interested in what happens in a settlement after it grants final approval. The guidelines now require that within 21 days after the distribution of the settlement fund and payment of attorneys' fees, the parties shall file a post-distribution

[6] Unless the final approval hearing is held after the claim submission deadline, the number of "valid claims" will be unavailable in virtually all cases.

accounting and post to the settlement website an "easy-to-read" chart with the following information: the total settlement fund; the number of class members; the number of class members to whom notice was sent and not returned as undeliverable; the claims rate (the number and percentage of claim forms submitted); the number of opt-outs and objections; the average, median, largest and smallest recovery per claimant; the notice and payment methods; the number and value of checks not cashed; amounts distributed to each *cy pres* recipient; administrative costs; and attorneys' fees and costs, including as a percentage of the settlement fund, and the multiplier, if any; if any non-monetary relief is obtained, such as discount coupons, debit cards, or similar instruments, the chart should include the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the Class.[7] Practitioners in the Northern District have developed a "nutrition label" chart to provide this information to the Court and Class Members. *See* Appendix D.

2. The Court may hold a hearing following submission of this information.

D. Yahoo Breach Settlement

On November 2, 2018 and November 5, 2018, Judge Lucy Koh of the Northern District issued orders in the Yahoo! security breach litigation (Case No. 16-MD-02752-LHK) requiring supplemental information regarding the proposed settlement which largely track the new guidelines. (ECF Nos. 333, 335) Notably, the Court asked for an estimate of the potential class recovery had the case not settled, as well as Plaintiff's counsel's lodestar. In their response to the orders, Counsel produced their lodestar, and submitted under seal information regarding how

[7] Some of this information, such as the number of uncashed checks and the amount of *cy pres* distribution, will not be fully available 21 days after distribution is made.

much the class could have gotten had the case not settled, telling Judge Koh that revealing this information would reveal attorney work product and mental impressions. This work product concern will likely be raised by Plaintiff's counsel, especially given the risk that a settlement is not approved, and litigation continues.

The Court heard the preliminary approval motion on November 29, 2018, and the motion remained under advisement as of the date of the submission of these materials.

IV. CY PRES CONSIDERATIONS

Frank v. Gaos, 17-961, currently pending in the Supreme Court ***may*** determine the propriety of the rare situation of full *cy pres* settlements; *i.e.*, those in which, because distribution to class members is impossible, or even impractical, no settlement funds are distributed in any manner to class members, but rather, after deduction of notice expenses and attorneys' fees, are given directly to third parties, likely public-interest or charitable organizations, that ideally are related to the subject matter of the litigation.

The underlying lawsuit was a privacy challenge to Google's practice of sharing information about its customers' internet searches. The case settled for $8.5 million. *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1126-1127 (N.D. Cal 2015). Plaintiffs' complaint represented that the class was made up of 129 million Google users. The $8.5 million included $1 million in notice and administrative costs, $5,000 in incentive awards to each of the three named plaintiffs, and $2.125 million to plaintiffs' counsel, with the remaining $5.3 million awarded *cy pres* to six academic and non-profit institutions which were "independent and free from conflict, have a record of promoting privacy protection on the Internet, reach and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online

privacy risks." *Id.* at 1133.[8] There was no direct distribution of the settlement fund to class members, as the parties informed the district court that it was "infeasible" to do so – it would result in a payment of only four cents per class member – and the costs of identifying, processing and paying claims would exceed the available funds. The district court agreed. *Id.*

The proposed *cy pres* recipients were Carnegie Mellon University; the World Privacy Forum; Illinois Tech's Chicago-Kent College of Law Center for Information, Society and Policy; Stanford Law School Center for Internet and Society; the Berkman Center for Internet & Society at Harvard University; and the AARP Foundation. Google already supported some of these organizations through donations.

Following notice, only five class members objected, arguing that *cy pres* relief was inappropriate because it would in fact be practical to distribute the settlement fund through a claims-made process or a lottery, and because class counsel were alumni of several of the *cy pres* recipients. One of the objectors was Ted Frank of the Competitive Enterprise Institute. Mr. Frank has challenged settlements, including *cy pres* settlements, for a number of years.

Judge Davila approved the settlement, finding the settlement "non-distributable." *Id.* at 1132. Judge Davila also determined that the "*cy pres* distribution accounts for the nature of this suit, meets the objectives of the [Stored Communications Act] and furthers the interests of class members." *Id*. at 1133. After evaluating each of the six proposed recipients, Judge Davila concluded that it was "satisfied that the proposed *cy pres* distribution 'bears a substantial nexus to the interests of the class members,' as required by the Ninth Circuit." *Id*.

[8] Google also agreed to "maintain information on its website" which addresses "how information concerning users' search queries are shared with third parties" and directs users to Google's privacy policy for additional information. [CITE]

The court addressed the objections to the settlement, and overruled them. With respect to the *cy pres* objections, the Court reiterated that plaintiffs had adequately established that plaintiffs had sufficiently shown "that the cost of distributing this or really any settlement fund to the class members would be prohibitive." *Id*. at 1137. Finally, the Court rejected the objections to the extent they argued that the *cy pres* recipients were unrelated to the subject matter of the litigation and because some of plaintiffs' counsel attended Harvard University, one of the recipients. *Id*. at 1138. While noting the potential for a conflict of interest, the court held that there was "no indication that counsel's allegiance to a particular alma mater factored into the selection process. Indeed, the identity of potential *cy pres* recipients was a negotiated term included in the Settlement Agreement and therefore not chosen solely by Harvard alumni." *Id.* at 1138.

The Ninth Circuit affirmed the settlement, *Gaos v. Holyoke*, 869 F.3d 737 (2017), finding that although *cy pres*-only settlement are considered the exception and not the rule, they are appropriate where, as here, the settlement fund is non-distributable, and noting that the Ninth Circuit has "never imposed a categorical ban on a settlement that does not include direct payments to class members." *Id*. at 742.

The Court also evaluated and approved the six proposed *cy pres* recipients, finding that the district court "appropriately found that the *cy pres* distribution addressed the objectives of the Stored Communications Act and furthered the interests of the class members." *Id*. at 743. In considering the argument that three of the *cy pres* recipients had previously received *cy pres* funds from Google it did "not impugn the settlement without something more, such as fraud or collusion." *Id*. at 745. the Ninth Circuit found "that 'something more' [was] missing here." *Id*.

Finally, the court rejected the argument that the link between the *cy pres* recipients and class counsel's alma maters raised a significant question about whether the recipients were selected on the merits. *Id*. While noting that there may be occasions where such a relationship could cast doubt on the selection process, there was no evidence before the court which would create such doubt. *Id*.

Circuit Judge Wallace dissented in part. While he agreed that a *cy pres*-only settlement was appropriate in this case, he never the less contended that the "fact alone that 47% of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further in a case such as this." *Id*. at 748. Judge Wallace "would vacate the district court's approval of the class settlement, and remand with instructions to hold an evidentiary hearing, examine class counsel under oath, and determine whether class counsel's prior affiliation with the *cy pres* recipients played ***any*** role in their selection as beneficiaries." *Id*. (emphasis in original).

Frank petitioned the Supreme Court for review, which was granted. Following full briefing by the parties, several amici and the government, argument was held on November 1, 2018. Then it got interesting. A large portion of the argument was spent on the question of whether the plaintiffs even had standing to bring the action, in light of the Supreme Court's 2016 *Spokeo, Inc. v. Robins* decision (136 S.Ct. 1540) (2016). The *Spokeo* Court held that a plaintiff in federal court cannot establish standing simply by alleging a violation of a federal statute (here, the Stored Communications Act); rather, the plaintiffs must allege an "injury-in-fact" that is both "concrete" and "particularized." 136 S.Ct. at 1545. Standing had not been raised by any of the parties to the litigation, or the reviewing courts at the settlement stage. Plaintiffs' lack of *Spokeo* standing to sue Google was raised by the Justice Department in its brief, which did not take sides

on the merits of the case, and the district court had approved the settlement prior to issuance of the *Spokeo* decision. Each of the advocates advised the Court that remand would permit full briefing on the complex question raised with respect to *Spokeo* standing and claims brought for violation of the SCA.

On November 5, 2018, the Court directed the parties and the Solicitor General to file supplemental briefs addressing whether any named plaintiff has Article III standing to bring the litigation. Briefing will be completed on December 21, 2018.

On the merits of the appeal, the Court acknowledged full *cy pres* settlements were rare, and questions and comments by the Justices predictably followed party lines. It is unlikely that the Court will hold that when further re-distribution of residual settlement funds is no longer economically feasible in common fund cases, that those funds may not be donated to appropriate organizations.[9] The Court will likely, at the minimum, obligate lower courts to evaluate full *cy pres* cases very carefully, both with respect to the feasibility of distribution to class members and the proposed beneficiaries of any such funds if distribution is not possible.

When drafting settlement agreements, counsel should consider drafting a provision that permits payment of "de minimus residual distributions" to appropriate organization(s) following a determination that further distributions or re-distributions of settlement funds would no longer be economically feasible. Identification of the organization(s), the relevance to the subject matter of the litigation, and any association between any of the parties or their counsel to the organization should also be disclosed to the court.

[9] Legal aid groups and other non-profits rely on these contributions of residual post-distribution funds, and have argued that an unfavorable ruling could threaten this funding.

Appendix A (*Procedural Guidance for Class Action Settlements* – Northern District of California) to Materials Submitted by Ellen Gusikoff Stewart

Procedural Guidance for Class Action Settlements

Updated November 1, 2018 and December 5, 2018

> ***NOTE**: This updated guidance, first published November 1, 2018, was modified December 5, 2018 to include the following clarification: the first sentence of the guidance has been revised to reflect that even though the guidance is highly recommended, the parties must comply in the first instance with the specific orders of the presiding judge.*

Parties submitting class action settlements for preliminary and final approval in the Northern District of California should review and follow these guidelines to the extent they do not conflict with a specific judicial order in an individual case. Failure to address the issues discussed below may result in unnecessary delay or denial of approval. Parties should consider this guidance during settlement negotiations. Parties should also consider the suggested language below when drafting class notices. In cases litigated under the Private Securities Litigation Reform Act of 1995, follow the statute and case law requirements that apply to such cases, such as regarding reasonable costs and expenses awards to representative plaintiffs, and this procedural guidance to the extent applicable.

Preliminary Approval

1) INFORMATION ABOUT THE SETTLEMENT—The motion for preliminary approval should state, where applicable:

a. If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

b. If a litigation class has been certified, any differences between the settlement class and the class certified and an explanation as to why the differences are appropriate in the instant case.

c. If a litigation class has not been certified, any differences between the claims to be released and the claims in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

d. If a litigation class has been certified, any differences between the claims to be released and the claims certified for class treatment and an explanation as to why the differences are appropriate in the instant case.

e. The anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.

f. The proposed allocation plan for the settlement fund.

g. If there is a claim form, an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.

h. In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instant case.

2) SETTLEMENT ADMINISTRATION—In the motion for preliminary approval, the parties should identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years. The parties should also address the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs. The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing.

3) NOTICE—The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members. The notice should include the following information: (1) contact information for class counsel to answer questions; (2) the address for a website, maintained by the claims administrator or class counsel, that has links to the notice, motions for approval and for attorneys' fees and any other important documents in the case; (3) instructions on how to access the case docket via PACER or in person at any of the court's locations. The notice should state the date of the final approval hearing and clearly state

that the date may change without further notice to the class. Class members should be advised to check the settlement website or the Court's PACER site to confirm that the date has not been changed. The notice distribution plan should be an effective one.

Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.

The notice distribution plan should rely on U.S. mail, email, and/or social media as appropriate to achieve the best notice that is practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c)(2). If U.S. mail is part of the notice distribution plan, the notice envelope should be designed to enhance the chance that it will be opened.

Below is suggested language for inclusion in class notices:

> This notice summarizes the proposed settlement. For the precise terms and conditions of the settlement, please see the settlement agreement available at www._____.com, by contacting class counsel at _____, by accessing the Court docket in this case, for a fee, through the Court's Public Access to Court Electronic Records (PACER) system at https://ecf.cand.uscourts.gov, or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, *[insert appropriate Court location here]*, between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.
>
> PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.

4) OPT-OUTS—The notice should instruct class members who wish to opt out of the settlement to send a letter, setting forth their name and information needed to be properly identified and to opt out of the settlement, to the settlement administrator and/or the person or entity designated to receive opt outs. It should require only the information needed to opt out of the settlement and no extraneous information. The notice should clearly advise class members of the deadline, methods to opt out, and the consequences of opting out.

5) OBJECTIONS—Objections must comply with Federal Rule of Civil Procedure 23(e)(5). The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filings. The notice should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement. The notice should clearly advise class members of the deadline for submission of any objections.

Below is suggested language for inclusion in class notices:

"You can ask the Court to deny approval by filing an objection. You can't ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you must object.

Any objection to the proposed settlement must be in writing. If you file a timely written objection, you may, but are not required to, appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for hiring and paying that attorney. All written objections and supporting papers must (a) clearly identify the case name and number (_____ v. _____, Case Number _____), (b) be submitted to the Court either by mailing them to the Class Action Clerk, United States District Court for the Northern District of California, *[insert appropriate Court location here]*, or by filing them in person at any location of the United States District Court for the Northern District of California, and (c) be filed or postmarked on or before _____."

6) ATTORNEYS' FEES—The court will not approve a request for attorneys' fees until the final approval hearing, but class counsel should include information about the fees they intend to request and their lodestar calculation in the motion for preliminary approval. In a common fund case, the parties should include information about the relationship among the amount of the award, the amount of the common fund, and counsel's lodestar calculation. To the extent counsel base their fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class. Counsel's lodestar calculation should include the total number of hours billed to date and the requested multiplier, if any. Additionally, counsel should state whether and in what amounts they seek payment of costs and expenses, including expert fees, in addition to attorneys' fees.

7) INCENTIVE AWARDS—Judges in this district have different perspectives on extra payments to named plaintiffs or class representatives that are not made available to other class members. Counsel seeking approval of incentive awards should consult relevant prior orders by the judge reviewing the request. The court will not approve a request for incentive awards until the final approval hearing, but the parties should include information about the incentive awards they intend to request as well as the evidence supporting the awards in the motion for preliminary approval. The parties should ensure that neither the size nor any conditions placed on the incentive awards undermine the adequacy of the named plaintiffs or class representatives. In general, unused funds allocated to incentive awards should be distributed to the class pro rata or awarded to cy pres recipients.

8) CY PRES AWARDEES—If the settlement contemplates a cy pres award, the parties should identify their chosen cy pres recipients, if any, and how those recipients are related to the subject matter of the lawsuit and the class members. The parties should also identify any relationship they or their counsel have with the proposed cy pres recipients. In general, unused funds allocated to attorneys' fees, incentive awards, settlement administration fees and payments to class members should be distributed to the class pro rata or awarded to cy pres recipients.

9) TIMELINE—The parties should ensure that class members have at least thirty-five days to opt out or object to the settlement and the motion for attorney's fees and costs.

10) CLASS ACTION FAIRNESS ACT (CAFA)—The parties should address whether CAFA notice is required and, if so, when it will be given. In addition the parties should address substantive compliance with CAFA. For example, if the settlement includes coupons, the parties should explain how the settlement complies with 28 U.S.C. § 1712.

11) PAST DISTRIBUTIONS—Lead class counsel should provide the following information for at least one of their past comparable class settlements (i.e. settlements involving the same or similar clients, claims, and/or issues):

a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to each cy pres recipient, the administrative costs, and the attorneys' fees and costs.

b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons or debit cards or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in easy-to-read charts that allow for quick comparisons with other cases.

12) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or WordPerfect) of all proposed orders and notices should be submitted to the presiding judge's Proposed Order (PO) email address when filed. Most judges in this district use Microsoft Word, but counsel should check with the individual judge's Courtroom Deputy.

Final Approval

1) CLASS MEMBERS' RESPONSE—The motion for final approval briefing should include information about the number of undeliverable class notices and claim packets, the number of class members who submitted valid claims, the number of class members who elected to opt out of the class, and the number of class members who objected to or commented on the settlement. In addition, the motion for final approval should respond to any objections.

2) ATTORNEYS' FEES—All requests for approval of attorneys' fees must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. Counsel should be prepared to submit copies of billing records themselves at the court's order.

Regardless of when they are filed, requests for attorneys' fees must be noticed for the same date as the final approval hearing. If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions. The motion for attorneys' fees should refer to the history and facts set out in the motion for final approval.

3) INCENTIVE AWARDS—All requests for incentive awards must be supported by evidence of the proposed awardees' involvement in the case and other justifications for the awards.

4) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or Word Perfect) of all proposed orders and judgments should be submitted to the presiding judge's Proposed Order (PO) email address at the time they are filed.

Post-Distribution Accounting

1) Within 21 days after the distribution of the settlement funds and payment of attorneys' fees, the parties should file a Post-Distribution Accounting, which provides the following information:

a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, and the multiplier, if any.

b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in an easy-to-read chart that allows for quick comparisons with other cases.

2) Within 21 days after the distribution of the settlement funds and award of attorneys' fees, the parties should post the Post-Distribution Accounting, including the easy-to-read chart, on the settlement website.

3) The Court may hold a hearing following submission of the parties' Post-Distribution Accounting.

Appendix B (*Luna v. Marvell* –Notice Regarding Factors to Be Evaluated for any Proposed Settlement) to Materials Submitted by Ellen Gusikoff Stewart

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL LUNA,

Plaintiff,

v.

MARVELL TECHNOLOGY GROUP, *et al.*,

Defendants.
_____/

No. C 15-05447 WHA

NOTICE REGARDING FACTORS TO BE EVALUATED FOR ANY PROPOSED CLASS SETTLEMENT

For the guidance of counsel, please review the *Procedural Guidance for Class Action Settlements*, which is available on the website for the United States District Court for the Northern District of California at www.cand.uscourts.gov/ClassActionSettlementGuidance.

In addition, counsel should review the following substantive and timing factors that the undersigned judge will consider in determining whether to grant preliminary and/or final approval to a proposed class settlement. Many of these factors have already been set forth in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir. 2011), but the following discussion further illustrates the undersigned judge's consideration of such factors:

1. ADEQUACY OF REPRESENTATION.

Anyone seeking to represent a class, including a settlement class, must affirmatively meet the Rule 23 standards, including adequacy. It will not be enough for a defendant to stipulate to adequacy of the class representation (because a defendant cannot speak for absent class members). An affirmative showing of adequacy must be made in a sworn record. Any possible

shortcomings in a plaintiff's resume, such as a conflict of interest, a criminal conviction, a prior history of litigiousness, and/or a prior history with counsel, must be disclosed. Adequacy of counsel is not a substitute for adequacy of the representative.

To elaborate, when a settlement proposal is made prior to formal class certification, there is a risk that class claims have been discounted, at least in part, by the risk that class certification might be denied. Absent class members, of course, should be subject to normal discounts for risks of litigation on the merits but they should not be subject to a further discount for a risk of denial of class certification, such as, for example, a denial based on problems with a proposed class representative, including a conflict of interest or a prior criminal conviction. This is a main reason the Court prefers to litigate and vet a class certification motion *before* any settlement discussions take place. That way, the class certification is a done deal and cannot compromise class claims. Only the risks of litigation on the merits can do so.

2. DUE DILIGENCE.

Please remember that when one undertakes to act as a fiduciary on behalf of others (here, the absent class members), one must perform adequate due diligence before acting. This requires the representative and his or her counsel to investigate the strengths and weaknesses of the case, including the best-case dollar amount of claim relief. A quick deal up front may not be fair to absent class members.

3. COST-BENEFIT FOR ABSENT CLASS MEMBERS.

In the proposed settlement, what will absent class members give up versus what will they receive in exchange, *i.e.*, a cost-benefit analysis? If the recovery will be a full recovery, then much less will be required to justify the settlement than for a partial recovery, in which case the discount will have to be justified. The greater the discount, the greater must be the justification. This will require an analysis of the specific proof, such as a synopsis of any conflicting evidence on key fact points. It will also require a final class-wide damage study or a very good substitute, in sworn form. If little discovery has been done to see how strong the claim is, it will be hard to justify a substantial discount on the mere generalized theory of "risks of litigation." A coupon

settlement will rarely be approved. Where there are various subgroups within the class, counsel must justify the plan of allocation of the settlement fund.

4. THE RELEASE.

The release should be limited only to the claims certified for class treatment. Language releasing claims that "could have been brought" is too vague and overbroad. The specific statutory or common law claims to be released should be spelled out. Class counsel must justify the release as to each claim released, the probability of winning, and its estimated value if fully successful.

Does the settlement contemplate that claims of absent class members will be released even for those whose class notice is returned as undeliverable? Usually, the Court will *not* extinguish claims of individuals known to have received no notice or who received no benefit (and/or for whom there is no way to send them a settlement check). Put differently, usually the release must extend only to those who receive money for the release.

5. EXPANSION OF THE CLASS.

Typically, defendants vigorously oppose class certification and/or argue for a narrow class. In settling, however, defendants often seek to expand the class, either geographically (*i.e.*, nationwide) or claim-wise (including claims not even in the complaint) or person-wise (*e.g.*, multiple new categories). Such expansions will be viewed with suspicion. If an expansion is to occur it must come with an adequate plaintiff and one with standing to represent the add-on scope and with an amended complaint to include the new claims, not to mention due diligence as to the expanded scope. The settlement dollars must be sufficient to cover the old scope plus the new scope. Personal and subject-matter jurisdiction over the new individuals to be compromised by the class judgment must be shown.

6. REVERSION.

A settlement that allows for a reversion of settlement funds to the defendant(s) is a red flag, for it runs the risk of an illusory settlement, especially when combined with a requirement to submit claims that may lead to a shortfall in claim submissions.

7. CLAIM PROCEDURE.

A settlement that imposes a claim procedure rather than cutting checks to class members for the appropriate amount may (or may not) impose too much of a burden on class members, especially if the claim procedure is onerous, or the period for submitting is too short, or there is a likelihood of class members treating the notice envelope as junk mail. The best approach, when feasible, is to calculate settlement checks from a defendant's records (plus due diligence performed by counsel) and to send the checks to the class members along with a notice that cashing the checks will be deemed acceptance of the release and all other terms of the settlement.

8. ATTORNEY'S FEES.

To avoid collusive settlements, the Court prefers that all settlements avoid any agreement as to attorney's fees and leave that to the judge. If the defense insists on an overall cap, then the Court will decide how much will go to the class and how much will go to counsel, just as in common fund cases. Please avoid agreement on any division, tentative or otherwise. A settlement whereby the attorney seems likely to obtain funds out of proportion to the benefit conferred on the class must be justified.

9. DWINDLING OR MINIMAL ASSETS?

If the defendant is broke or nearly so with no prospect of future rehabilitation, a steeper discount may be warranted. This must be proven. Counsel should normally verify a claim of poverty via a sworn record, thoroughly vetted.

10. TIMING OF PROPOSED SETTLEMENT.

In order to have a better record to evaluate the foregoing considerations, it is better to develop and to present a proposed compromise *after* class certification, *after* diligent discovery on the merits, and *after* the damage study has been finalized. On the other hand, there will be some cases in which it will be acceptable to conserve resources and to propose a resolution sooner. For example, if the proposal will provide full recovery (or very close to full recovery) then there is little need for more due diligence. The poorer the settlement, however, the more

justification will be needed and that usually translates to *more* discovery and *more* due diligence; otherwise, it is best to let absent class members keep their own claims and fend for themselves rather than foist a poor settlement on them. Particularly when counsel propose to compromise the potential claims of absent class members in a low-percentage recovery, the Court will insist on a detailed explanation of why the case has turned so weak, an explanation that usually must flow from discovery and due diligence, not merely generalized "risks of litigation." Counsel should remember that merely filing a putative class complaint does not authorize them to extinguish the rights of absent class members. *If counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made.* "[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

It is reasonable to discount class members' claims by the risk of litigation on the merits, but it is not reasonable to further discount claims by the risk that class certification will be denied. *See* Howard Erichson, *Beware The Settlement Class Action*, DAILY JOURNAL, Nov. 24, 2014.

11. A RIGHT TO OPT OUT IS NOT A CURE-ALL.

A borderline settlement cannot be justified merely because absent class members may opt out if they wish. The Court has (and counsel have) an independent, stand-alone duty to assess whether the proposed settlement is reasonable and adequate. Once the named parties reach a settlement in a purported class action, they are always solidly in favor of their own proposal. There is no advocate to critique the proposal on behalf of absent class members. That is one reason that Rule 23(e) insists that the district court vet all class settlements.

12. INCENTIVE PAYMENT.

If the proposed settlement by itself is not good enough for the named plaintiff, why should it be good enough for absent class members similarly situated? Class litigation proceeded well for many decades before the advent of requests for "incentive payments," which too often are simply ways to make a collusive or poor settlement palatable to the named plaintiff. A request for an incentive payment is a red flag.

13. NOTICE TO CLASS MEMBERS.

Is the notice in plain English, plain Spanish, and/or plain Chinese (or the appropriate language)? Does it plainly lay out the salient points, which are mainly the foregoing points in this memorandum? Will the method of notice distribution really reach every class member? Will it likely be opened or tossed as junk mail? How can the envelope design enhance the chance of opening? Can mail notice be supplemented by e-mail notice?

* * *

Counsel will please see from the foregoing that the main focus will be on what is in the best interest of absent class members. Counsel should be mindful of the factors identified in *In re Bluetooth*, 654 F.3d at 946–47, as well as the fairness considerations detailed in *Hanlon*, 150 F.3d at 1026. Finally, for an order denying proposed preliminary approval based on many of the foregoing considerations, *see Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal. June 19, 2007).

Dated: November 28, 2016.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Appendix C (*In re Leapfrog* – Order Re Supplemental Briefing and/or Evidence) to Materials Submitted by Ellen Gusikoff Stewart

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE LEAPFROG ENTERPRISE, INC. SECURITIES LITIGATION,

_____/

This Document Relates to:

All Actions.

Case No. 15-cv-00347-EMC

ORDER RE SUPPLEMENTAL BRIEFING AND/OR EVIDENCE

Docket No. 169

The Court has reviewed Lead Plaintiff's motion for preliminary approval and accompanying submissions. Having done so, the Court hereby orders the parties to file supplemental briefing and/or evidence as follows. (A joint filing is preferred. This does not preclude the parties from providing their separate positions within the joint filing.) The parties' filing shall be made **within one week of the date of this order**.

A. Maximum Value of the Case

Lead Plaintiff states that its expert "estimates that the maximum recoverable damages under the alleged Class Period of May 5, 2014, through June 11, 2015, are $89 million." Mot. at 10 n.4. Lead Plaintiff shall explain whether this estimate includes *all* of the claims it has ever asserted in this case or just the two accounting claims (*i.e.*, the goodwill and long-lived asset claims). *See, e.g.*, Docket No. 88 (order) (dismissing claims based on allegedly false and misleading statements about LeapFrog's inventory, the rollout of LeapTV, and LeapFrog's financial guidance).

B. Risks of Litigation

In its motion, Lead Plaintiff states that one risk of litigation with respect to the long-lived asset claim is the difficulty in proving that Lead Plaintiff or other putative class members' losses

were due to the disclosure about the long-lived asset impairment as opposed to some other reason. *See* Mot. at 11 ("[B]ecause LeapFrog's stock price declined in the wake of the Company's announcement of its disappointing fiscal year 2015 financial results, an announcement that also contained substantial commentary on issues not directly related to taking a charge for LeapFrog's long-lived asset impairment, Defendants would have argued that facts other than the announcement of the impairment were the proximate cause of Lead Plaintiff's losses."). The parties shall address what possible "other" reasons for the losses there could have been.

C. Net Settlement Fund

Under the Settlement Agreement, "Net Settlement Fund" is defined as "the Settlement Fund less: (i) Court-awarded attorneys' fees and expenses; (ii) Notice and Administration Expenses; (iii) Taxes; and (iv) any other fees or expenses approved by the Court." Sett. Agmt. § III, ¶ 1.18. How much in taxes do the parties anticipate will be deducted from the gross settlement fund?

D. Average Recovery

Lead Plaintiff indicates that the average recovery per share is estimated to be $0.125 before deduction of attorney's fees and expenses and $0.083 after such deduction. What is the average recovery when not only attorney's fees and expenses are deducted but also claim administration fees and expenses (the full $350,000 contemplated by the Settlement Agreement) and taxes?

E. Attorney's Fees and Expenses

Although the Court is not requiring Lead Plaintiff, at this time, to file a motion for attorney's fees and expenses, more information about the fees and expenses is needed than that contained within the pending motion. For example:

- What is the asserted lodestar? (An estimate is acceptable.)
- What is the range of hourly rates?
- What is the number of hours on which the lodestar is based?
- What were the major litigation tasks and how much time was spent on each? (Estimates are acceptable.)
- What and how much were the major expenses?

F. Incentive Award

What is the factual basis for the requested $5,600 incentive award?

G. Proofs of Claims

1. Settlement Agreement § III, ¶ 7.6

The Settlement Agreement provides that "Lead Counsel shall have the right, but not the obligation, to advise the Claims Administrator to waive what Lead Counsel deem to be *de minimis* or formal or technical defects in any Proof of Claim submitted." Sett. Agmt. § III, ¶ 7.6. The Court has some concerns about the implications of this provision. For example, should Lead Counsel have an obligation to give the Claims Administrator, prior to the Claims Administrator's review of Proofs of Claims, some guidelines as to what should be considered *de minimis* or formal or technical defects that should be waived? Should Lead Counsel have an obligation to give advice if such advice is requested by the Claims Administrator, and is the Claims Administrator obligated to follow that advice?

2. Settlement Agreement § III, ¶ 7.7(b)

The Settlement Agreement gives Lead Counsel discretion as to whether a late-filed Proof of Claim shall be accepted. *See* Sett. Agmt. § III, ¶ 7.7(b). Should there be an express provision that such discretion shall be reasonably exercised?

3. Settlement Agreement § III, ¶ 7.7(d)-(e)

The parties shall clarify the "appeals" process for deficient Proofs of Claims. *See* Sett. Agmt. § III, ¶ 7.7(d)-(e). For example:

- Does a claimant have an avenue for appealing a decision by the Claims Administrator and/or Lead Counsel that a deficiency is not curable?
- For a curable deficiency, is it correct that (a) the claimant is given an opportunity to cure and (b) only if the Claims Administrator and/or Lead Counsel determine that the attempt to cure is not successful does the claimant have an opportunity to seek judicial review?

H. Plan of Allocation

Lead Plaintiff represents that, under the Plan of Allocation, "LeapFrog common stock must

have been purchased or otherwise acquired during the Class Period [May 5, 2014, to June 11, 2015] and held through the end of trading on May 15, 2015 (Friday)." Mot. at 16. Lead Plaintiff shall explain the factual and/or legal basis for the May 15, 2015, restriction (*e.g.*, is this related to the alleged corrective disclosure dates?). Is this consistent with the Plan of Allocation described in the Settlement Notice?

I. Defendants' Right to Withdraw from the Settlement

Defendants have the right to withdraw from the settlement in the event that the requests for exclusion from the settlement class exceed certain agreed-upon criteria. *See* Sett. Agmt. § III, ¶¶ 11.2-.3. This right is memorialized in a supplemental agreement. The parties shall lodge a copy of the supplemental agreement with the Court for in camera review.

J. Means of Notice

In its motion, Lead Plaintiffs refers to mail notice and publication/transmission notice but not email notice or DTC notice, which is discussed in the Joaquin Declaration (*i.e.*, the declaration from the proposed Claims Administrator). *See* Joaquin Decl. ¶¶ 4, 12-13. Lead Plaintiff shall clarify whether these other means of notice shall also be provided. In addition, Lead Plaintiff shall clarify whether the publication notice in *The Wall Street Journal* is a one-day publication. *Compare* Joaquin Decl. ¶ 11 (noting that the Summary Notice will "be posted with the *BusinessWire*, an online newswire service, where it will be available for a month").

K. Reminder Notice

The parties shall address whether it is worth having a reminder notice sent to putative class members.

L. Content of Notice

1. Settlement Notice

The Court has comments and/or proposed edits on the Settlement Notice (*i.e.*, the long-form notice that will be mailed), *see* Prop. Order, Ex. A-1, below.

Page 1, ¶ 1. The sentence regarding average recovery should be bolded.

Page 1, ¶ 4. The entire paragraph – regarding the need to submit a claim form to obtain a share of the settlement – should be bolded.

Page 1, ¶ 5. The sentence referring to the "Class Period" should provide the exact dates for the Class Period.

Page 2, ¶ 3. The dollar amount of attorney's fees (not just the percentage) should be specified.

Page 3, chart. The part of the chart explaining the objection option should clarify that an objector should still fill out a Proof of Claim or she will not receive any distribution from the net settlement fund.

Page 4, Table of Contents. The items currently numbered 19 and 20 regarding objections should be moved up so that they follow the items on requests for exclusion. (The same should be done for the substantive sections.)

Page 5, Table of Contents. The item currently numbered 24 regarding "do nothing" should be moved up so that it follows the items on objections. (The same should be done for the substantive sections.)

Page 9, Question 8. The specific dollar amounts for deductions that could be made from the gross settlement fund should be specified (*e.g.*, attorney's fees and expenses, claims administration fees and expenses).

Page 10, Question 10. The following phrase should be bolded: "you must submit supporting documents."

Page 11, Question 13. Can a Settlement Class member submit a request for exclusion online and, if not, why not?

Page 11, Question 17. The exact dollar amount of attorney's fees should be specified.

Page 13, Question 19. The last sentence in Question 19 should be rephrased to state as follows: "Even if you object, you ~~can~~ **must** still submit a Proof of Claim to be eligible for a cash payment from the Settlement. ~~However, if~~ If you do not submit a claim form, you will not receive a payment."

Page 17, footnote 3. Is there a typo in the last sentence – *i.e.*, is the June 15 date correct?

2. Summary Notice

Page 1, ¶ 2. The exact dollar amount of attorney's fees and expenses should be specified.

3. Claim Form

The Court has comments and/or proposed edits on the Claim Form, *see* Prop. Order, Ex. A-2, below.

Page 3, ¶ 1. Is the September 9 date correct?

Page 3, ¶ 3. The last sentence regarding failure to provide documentation should be bolded.

Page 3, ¶ 5. The sentence regarding manual signing should be bolded.

Page 6. Is the September 9 date correct?

M. Proposed Order Granting Preliminary Approval

The Court has a few comments and/or proposed edits below.

Prop. Order ¶ 3. This paragraph states that the Court is certifying the Settlement Class. However, in ¶ 7, the parties seem to concede that certification should ultimately be determined at the final approval hearing. *See* Prop. Order ¶ 7(c) (providing that a hearing shall be held to consider, *inter alia*, "whether the Settlement Class should be certified"). The parties should address this conflict.

Prop. Order ¶ 16. Language should be added to this paragraph so that it reads as follows (the new language is underlined): "Lead Counsel shall, at least fourteen (14) calendar days before the Settlement Hearing, file with the Court proof of mailing of the Notice and Proof of Claim, both to putative class members individually and to nominees for putative class members."

Prop. Order ¶ 17. Language should be added to this paragraph to clarify how long the publication/transmission notice will be available on *The Wall Street Journal* and *BusinessWire*.

Prop. Order ¶ 17(a). The parties should consider whether to add a ¶ 17(a) to cover the additional means of notice identified in the Joaquin Declaration (*i.e.*, email notice and DTC notice).

Prop. Order ¶ 23. This paragraph provides that a request for exclusion must be made such that it is received at least 3 weeks prior to the final approval hearing. Depending on when the final approval hearing is, this could mean that there are different times for Settlement Class members to file requests for exclusion or Proofs of Claims. This could be confusing for

Settlement Class members. Is it simpler to have just one date by which the Settlement Class members must respond to the notice – whether to file a Proof of Claim, an objection, and/or a request for exclusion?

IT IS SO ORDERED.

Dated: February 28, 2018

EDWARD M. CHEN
United States District Judge

Appendix D (Nutrition Label) to Materials Submitted by Ellen Gusikoff Stewart

Audience

Brent T. Robinson, et al. v. Audience, Inc., et al.
No. 1:12-cv-232227 (Santa Clara Superior Court)

Total Settlement Amount	$6,050,000
Notice and Claim Packets Mailed	11,540
Number of Packets Returned Undeliverable	373 3.23%
Claims Submitted	2,285 19.80%
Opt-Outs Received	0
Objections Received	0
Mean Recovery per Claimant	$5,987.56
Median Recovery per Claimant	$296.42
Largest Recovery by Claimant	$282,542.79
Smallest Recovery by Claimant	$10.22
Method of Notice	Direct Mail Published in Investor's Business Daily, PR Newswire and over DTC Legal Notice Systems
Method of Payment	Checks and Wires
Number of Checks Not Cashed	9
Value of Checks Not Cashed and Included in Supplemental Distribution	$11,596.56
Cy Pres Distribution	$0
Administrative Costs	$141,069.53
Attorneys' Costs	$96,181.79
Expert Fees	$17,782.35
Attorney Fees	$1,815,000
% of Settlement Amount	30%
Multiplier	0.83
Distribution Completed	February 16, 2018
Reverter to Defendants	$0