BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	MDL No. 2672
This document relates to: ALL CASES	

INTERESTED PARTY RESPONSE OF AMICUS CURIAE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS RESPONSE TO MOTIONS TO TRANSFER AND CONSOLIDATE ACTIONS AND REQUEST TO CONSOLIDATE CASES IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA BEFORE JUDGE ALSUP

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Corporate Disclosure Statement

Amicus curiae Competitive Enterprise Institute ("CEI") is an IRC § 501(c)(3) non-profit corporation incorporated under the laws of Washington, D.C., with its principal place of business in Washington, D.C. Center for Class Action Fairness is a sub-unit within CEI. CEI does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a volunteer Board of Directors.

Introduction

28 U.S.C. § 1407 requires the Panel to consider, *inter alia*, whether transfer will "promote a just and efficient outcome." *Amicus curiae* submits that "a just and efficient outcome" necessarily includes the fairness of any class action settlement that will almost certainly be reached in this case. Furthermore, out of the over 175 substantially similar, putative class actions pending in dozens of federal courts, only *one* court has issued an order setting forward standards for evaluating a class-action settlement and warning against "red flags" of abusive settlements. *McGarry v. Volkswagen Group of Amer., Inc.*, No. C 15-4541 WHA (N.D. Cal.) (Alsup, J.), Dkt. 18 (Oct. 9, 2015) (attached as Exhibit 1). In contrast, many MDL settlements, including the *Toyota* settlement in MDL 2151 held out as a model for this case, include abusive provisions such as clear-sailing arrangements and segregated attorney-fee funds. Other plaintiffs have argued for transfer to the Northern District of California as the most appropriate venue for reasons of convenience, and because it has a disproportionate number of pending "Clean Diesel" cases and Volkswagen owners. Dkt. 46 at 5-8 and Exs. 3-4. This Panel should go further, emphasize that "a just and efficient outcome" requires the sort of scrutiny of class-action settlements that Judge Alsup provides, and consolidate and transfer the Related Actions to his court.

Interest of Amicus Curiae

The Center for Class Action Fairness ("CCAF") is a sub-unit of the IRC § 501(c)(3) non-profit Competitive Enterprise Institute ("CEI"). (CCAF, which was founded by Ted Frank in 2009, became part of CEI on October 1, 2015.) CCAF is recognized as "the leading critic of abusive class action settlements." Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12. CCAF stands for the principles that settlement fairness requires that the primary beneficiary of a class-action settlement should be the class, rather than the attorneys or third parties; and that courts scrutinizing settlements should value them based on what the class actually receives, rather than on illusory measures of relief. In CCAF's six-year history CCAF attorneys have won numerous

landmark decisions in support of these principles. *E.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) ("*Pampers*"); *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) ("*Baby Prods.*"); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) ("*Bluetooth*").

JPML Rule 6.2(e) permits *amicus* to file as an interested party.

Argument

I. This elephantine litigation is likely to settle—but the incentives of class litigation and the MDL process risk leaving absent class members unfairly treated in the settlement. Because no party's briefing to the JPML will emphasize the importance of judicial scrutiny of class settlements in MDL litigation, it is critical that the JPML do so to protect absent class members' rights "to promote a just and efficient outcome."

There are over 175 class actions pending: the feeding frenzy of me-too lawsuits demonstrates the tremendous windfalls available to the attorneys who are eventually appointed class counsel in a case where the class is large (over 500,000 owners and lessees of affected vehicles); potential damages are in the billions or hundreds of millions; the defendant has already admitted some wrongdoing; and plaintiffs will be able to piggyback off of government investigations of Volkswagen's conduct. Clearly these actions are considered much more profitable than entrepreneurially investigating wrongdoing that hasn't already been exposed, because everyone involves understands that Volkswagen will eventually pay large sums to settle this litigation, even more so than in the typical class action. *Cf. Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.).

There are multiple motions by multiple sets of plaintiffs to transfer all cases regarding Volkswagen "clean diesel" liability to various district courts under 28 U.S.C. § 1407. *E.g.,* Dkt. 1, Dkt. 10, Dkt. 13, and Dkt. 46. With over 175 class actions pending, one can expect defendant Volkswagen's filing today to also suggest consolidation and transfer. We assume *arguendo* that the Panel will rule for consolidation and transfer. Though all of the parties will couch their proposals for specific transferee courts in terms of geographic convenience or the experience or workload of the judges, each of the various suggestions for the location of transfer reflect self-interest: law firms seek transfer

to locations where they might have a geographic advantage in being appointed to the "lucrative" lead plaintiffs' committee. *See generally* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015). Plaintiffs and defendants will each argue for jurisdictions they perceive as favorable to their interests (perhaps because of previous rulings on class-certification or state-law issues) to maximize their leverage in settlement negotiations.

But there is one critical area where both plaintiffs' counsel and defendants have a common but perverse interest in proposing transferee courts: neither wishes the transferee court to closely scrutinize the class action settlements that will inevitably be reached to resolve the litigation. The naming of the transferee MDL court almost always means the naming of the judge who will evaluate the settlement terminating the case. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 128 (2015) ("97% of MDL cases terminate in transferee districts"). Meanwhile, the "structure of class actions … gives class action lawyers an incentive to negotiate settlements that enrich themselves but give scant reward to class members, while [defendants have] an incentive to agree to early settlement that may treat the class action lawyers better than the class." *Thorogood v. Sears, Roebuck, & Co.*, 627 F.3d 289, 293 (7th Cir. 2010) (Posner, J.) (denying rehearing *en banc*), *underlying opinion rev'd on other grounds*, 131 S.Ct. 3060 (2011); *accord Eubank*, 753 F.3d at 719-20; *Bluetooth*, 654 F.3d at 946. Rather than explicit collusion, there need only be acquiescence for such self-dealing to occur: "a defendant is interested only in disposing of the total claim asserted against it" and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Id.* at 949 (internal quotations and citations omitted); *Eubank*, 753 F.3d at 720; *Dry Max Pampers*, 724 F.3d at 717-18; *Piambino v. Bailey,* 757 F.2d 1112, 1139 (11th Cir. 1985). This can only happen when district court judges fail to adequately scrutinize settlements. Unfortunately, Rule 23(e) fairness hearings are often *de facto ex parte* proceedings: "American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case. And so when a judge is being urged by both adversaries to approve the class-action settlement that they've

negotiated, he's at a disadvantage in evaluating the fairness of the settlement to the class." *Eubank*, 753 F.3d at 720. As a result, district courts all too often inappropriately take a "passive role" when confronted with a class-action settlement agreement, and treat it as an adversarial agreement. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014) (Posner, J.).

Section 1407(a) requires this Panel to consider how a transfer will "promote the just and efficient conduct" of transferred actions. We submit that a district court's track record in scrutinizing class action settlements is an inherently necessary component in evaluating that factor. Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Bluetooth*, 654 F.3d at 947. A "one-sided[]" settlement can be unfair even without a finding of collusion, and judicial review should include that objective inquiry into settlement value. *Eubank*, 753 F.3d at 727, 729. Unfortunately, the incentives of the litigants before the JPML is to entirely ignore that aspect of the "just and efficient conduct" factor and emphasize other aspects of the § 1407 process. *Cf.* Margaret S. Williams and Tracey E. George, *Between Cases and Classes: The Decision to Consolidate Multidistrict Litigation* (August 3, 2009), available at http://ssrn.com/abstract=1443377. The problem is that there is no incentive for a plaintiff's attorney or a defendant to ask the JPML to ensure that the transferee judge will closely scrutinize a class-action settlement, as doing so will benefit absent class members at the expense of class counsel's fees and the defendants' attempt to minimize litigation expense—and, until this brief, no party speaks up for those absent class members. With hundreds of millions of dollars at stake (the fee award in the MDL 2151 *Toyota* class action was $200 million), this Panel must do so.

There is an inherent conflict of interest between class counsel and the class, as every dollar reserved to the class in a settlement is a dollar that the defendant will be unwilling to pay to class counsel. The primary way that class attorneys self-deal to maximize their fees at the expense of the class is by creating the illusion of relief. For example, if attorney Lionel Hutz settled the fictional class action of *Simpson v. The Frying Dutchman Restaurant* with a straightforward common-fund cash settlement that paid attorneys $2 million and class members $200,000, few judges would approve it,

and those that would would risk reversal for the disproportion. *E.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (class counsel receiving 38.9% of settlement benefit "clearly excessive"). But if instead, the parties settled the case by issuing coupons with face-value of $10 million to the class with the same $2 million attorney award, a judge might be deceived into thinking the settlement allocation fair—even though (because so few coupons in coupon settlements are actually redeemed) the economic effect to the defendant and benefit to the class is about the same $200,000 as the transparently objectionable settlement. "[P]aying the class members in coupons masks the relative payment of the class counsel as compared to the amount of money actually received by the class members." *In re HP Inkjet Printer Litig.*, 716 F.3d 1174, 1179 (9th Cir. 2013) (internal quotation omitted).

28 U.S.C. § 1712 put a statutory stop to the most abusive coupon settlement practices. *Id.* But class counsel can obtain the same abusive result by other means of creating the illusion of relief: for example, an injunction that doesn't actually benefit class members (*Dry Max Pampers*), or a claims process so burdensome that there are few direct payments to the class (*Pearson*; *Eubank*; *Baby Products*), or diversion to inappropriate *cy pres* recipients (*Pearson*). Thus, Rule 23(e) requires "intense judicial scrutiny of proposed class action settlements." *Eubank*, 753 F.3d at 721; *accord Dry Max Pampers*, 724 F.3d at 717-18. And, by definition, "the just and efficient conduct" of class actions that are almost certain to be settled requires a court that has shown that it will perform that required intense judicial scrutiny.

II. Judge Alsup has a unique track record of solicitous concern for absent class members that should be honored here "to promote a just and efficient outcome."

One of the over 175 federal class actions identified as a "tag-along" in this matter is *McGarry v. Volkswagen Group of Amer., Inc.*, No. 3:15-cv-04541 WHA (N.D. Cal.) (Alsup, J.). *See* Dkt. 149. *McGarry* is the ***only*** case to *amicus*'s knowledge that has issued a pre-trial order addressing the need for a class-action settlement to avoid self-serving clauses that benefit class counsel at the expense of the class. *McGarry* Dkt. No. 18 (attached as Exhibit 1).

This is no surprise. Judge Alsup has a long and distinguished track record of scrutinizing class-action settlements and fee requests closely, at both the preliminary-approval and fairness hearing stages, even in cases without objectors. *E.g., Gutierrez v. Wells Fargo, NA,* 2015 WL 2438274 (N.D. Cal. May 21, 2015); *Fraser v. Asus Computer Int'l*, 2013 U.S. Dist. LEXIS 97760 (N.D. Cal. July 11, 2013), 2012 U.S. Dist. LEXIS 181315 (N.D. Cal. Dec. 21, 2012); *Lane v. Wells Fargo Bank, N.A.*, 2013 WL 3187410, 2013 U.S. Dist. LEXIS 87669 (N.D. Cal. June 21, 2013); *Akaosugi v. Benihana Nat'l Corp.,* 2013 U.S. Dist. LEXIS 9868 (N.D. Cal. Jan. 24, 2013); *Create-A-Card, Inc. v. Intuit, Inc.*, 2009 WL 3073920 (N.D. Cal. Sept. 22, 2009); *Kakani v. Oracle Corp.*, 2007 WL 1793774, 2007 U.S. Dist. LEXIS 47515 (N.D. Cal. June 19, 2007). For another example, *In re Zoran Corp. Derivative Litig.*, No. C 06-5503 WHA (N.D. Cal. Apr. 7, 2008), Judge Alsup, unlike many other judges offered a chance to be rid of a complex shareholder suit, rejected a zero-dollar settlement as illusory, because the corporate governance reforms had been adopted independent of the derivative suit; the renegotiated settlement paid plaintiffs millions.

Judge Alsup's scrutiny of class action settlements compares favorably to how class action settlements in similar MDLs have been scrutinized. For example, in MDL No. 2151, the *Toyota Sudden Acceleration* MDL that involved similar economic-loss claims, the Central District of California approved a class-action settlement that awarded $30 million to *cy pres*, though there were uncompensated class members (*compare, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015) and cases cited therein); let an uncertified subclass of Toyota consumers without separate representation go entirely uncompensated (*compare Dewey v. Volkswagen of Amer.*, 681 F.3d 170 (3d Cir. 2012) *and Daniels v. AÉropostale W.*, 2014 U.S. Dist. LEXIS 74081 (N.D. Cal. May 29, 2014) (Alsup, J.)); and had "kicker" and clear-sailing clauses that protected an abusive $200 million fee request from scrutiny (*compare McGarry, supra*, at ¶ 8; *Pearson*; *and Bluetooth*). The *McGarry* order and Judge Alsup's track record demonstrates that the unfair *Toyota Sudden Acceleration* settlement never would have been approved in his court without substantial modifications that better protected absent class members' interests.

Selecting Judge Alsup for this important MDL in an opinion that singles out his impressive solicitude for absent class members as a reason for doing so under § 1407 would be good public policy beyond this individual case. It would incentivize plaintiffs' attorneys and defendants to encourage other district courts to follow Judge Alsup's lead in the "intense judicial scrutiny" of class-action settlements that Rule 23(e) requires so that they could make similar arguments in favor of their courts as transferee courts; it would send an important message that streamlined case management does not take a back seat to the rights of absent class members; and parties practicing before this Panel in the future would know that the Panel cares about the "just and efficient outcome" prong of § 1407 and not have the perverse incentive to steer MDLs towards courts that fail to scrutinize class-action settlements.

Other factors do not weigh against selecting Judge Alsup. When there is no geographical focal point because the litigation is national (or global) in dimensions, it is prudent to focus on the "transferee judge with the time and experience to steer this litigation on a prudent course and sitting in a district with the capacity to handle this litigation." *In re Motor Fuel Temperature Sales Practices Litig.*, 493 F. Supp. 2d 1365, 1367 (J.P.M.L. 2007). Other plaintiffs have well documented how the Northern District of California is an appropriate venue under the § 1407 factors. Dkt. 46 at 5-8. The median time to disposition of a civil case in the Northern District is 7.9 months, with only 8.3% of its civil cases pending for three years or more; both figures are better than the average United States district court, and are not materially different figures than for other district courts being proposed. Indeed, unlike many of the other requested districts, the Northern District of California is terminating cases faster than they are being filed. See *Statistical Tables for the Federal Judiciary*, Table C (Dec. 2014), available at http://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2014/12/31. *Cf. also In re Anthem, Inc., Customer Data Sec. Breach Litig.*, MDL No. 2617, __ F. Supp. 3d __, 2015 WL 3654627, 2015 U.S. Dist. LEXIS 76161, at *5 (J.P.M.L. Jun. 8, 2015) (Northern District of California "presents a convenient and accessible forum with the necessary judicial resources and expertise to manage this litigation efficiently" though defendant corporation headquartered in Indianapolis).

Judge Alsup runs his court efficiently. He has no motions listed on the Administrative Offices' most recent six-month list as of September 30, 2014. Judge Alsup has been on the bench since 1999, and has MDL experience such as the *GPU Antitrust Litig.*, MDL No. 1826, which involved extensive factual and expert discovery including depositions of top executive and former employees, as well as technical and economic experts. *See* Plaintiffs' Motion for Final Approval, No. 07-md-1826, Dkt. 654 at 5-6 (N.D. Cal.). Judge Alsup also has experience presiding over class actions involving alleged motor vehicle defects. *See Morris v. BMW of N. Am., LLC*, No. 3:07-cv-2827-WHA (N.D. Cal.). Despite this experience, he is not currently presiding over a pending MDL—perhaps because plaintiffs' attorneys and defendants both fear his scrutiny of class action settlements and do not suggest him to the Panel. *See* http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-15-2015.pdf.

CONCLUSION

Assuming that consolidation and transfer is appropriate, this Panel, for the reasons stated above and in support of the § 1407(a)'s requirement to "promote a just and efficient outcome," should transfer the *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litig.* to Judge Alsup's court in the Northern District of California, singling out in particular Judge Alsup's exceptional record in scrutinizing class-action settlements given the likelihood of settlement in this case.

Dated: October 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that, on October 20, 2015, the foregoing was electronically filed with the Clerk of the Court for the JPML using the CM/ECF system, which will send notification of such filing to the e-mail addresses on the Electronic Mail Notice List. Additionally, a copy of the foregoing was sent to the following parties on October 20, 2015 via U.S. Mail and to the e-mail addresses listed below:

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL MCGARRY,

Plaintiff,

v.

VOLKSWAGEN GROUP OF AMERICA, INC., VOLKSWAGEN AKTIENGESELLSCHAFT, AUDI AG,

Defendants.
_____/

No. C 15-04541 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).

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. *See also* Howard Erichson, *Beware The Settlement Class Action*, DAILY JOURNAL, Nov. 24, 2014. 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: October 9, 2015.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE