RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES

A SUPERIOR DEFINITION OF SUPERIORITY: REMOVING RULE 23(b)(3)'S BAN AGAINST CONSIDERING NON-LITIGATION SOLUTIONS WHEN DECIDING WHETHER A CLASS ACTION IS "SUPERIOR TO OTHER AVAILABLE METHODS"

September 2, 2022

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules ("Committee").

I. INTRODUCTION

Rule 23(b)(3) requires courts considering class certification motions to determine whether "a class action is ***superior*** to other available methods for fairly and efficiently ***adjudicating*** the controversy."[2] According to the Committee Notes, this "superiority" requirement is intended to help ensure that "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[3] Unfortunately, the superiority requirement frequently fails to serve this purpose—and even thwarts it—because the word "adjudicating" is often interpreted to prohibit courts from weighing a class action against non-litigation "other available methods" that provide quick and effective redress to putative class members—such as refunds, warranties, customer care programs, remediation, private claim resolution, and consent judgments. Ignoring these options can lead courts to certify class actions that not only fail to protect class members, but actually hurt them by delaying remedies and reducing plaintiffs' recovery due to litigation costs and attorneys' fees. Such cases also waste judicial resources, discourage companies from taking swift remedial action, and overburden the courts. Numerous published opinions reflect courts' frustration that Rule 23(b)(3) prevents a full and complete

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Fed. R. Civ. P. 23(b)(3) (emphasis added). A court also must find that the requirements of Rule 23(a) are satisfied and the predominance requirement is met.

[3] Fed. R. Civ. P. 23, 1966 Committee Note.

determination of whether a particular class action is in fact "superior to other available methods." Some courts are resorting to rule gymnastics to conduct this analysis under Rule 32(a)(4)'s "adequacy" requirement, but this approach should not be necessary. The Committee should amend Rule 23(b)(3) to include consideration of all "other available methods"—whether in or out of court—for resolving the potential class claims as part of determining superiority. A suggested amendment is attached.

II. RULE 23(b)(3) AND THE COMMITTEE NOTES ARE WIDELY INTERPRETED TO PRECLUDE COURTS FROM CONSIDERING NON-LITIGATION REMEDIES WHEN DETERMINING WHETHER CLASS LITIGATION IS "SUPERIOR TO OTHER AVAILABLE METHODS"—SPURRING A CALL TO RULE MAKERS

Some courts presiding over class actions—including class actions that would provide no added value to class members—have held that, because Rule 23(b)(3) speaks of other methods of "adjudicating," the rule prohibits judges from considering remedies already available to putative class members outside of litigation. For example, in *Aqua Dots*[4]—a consumer class action involving a defective toy—the Seventh Circuit held that the language of Rule 23(b)(3) did not permit the District Court to compare the defendant's voluntary recall and refund program to the class action litigation device. While stating that he had no "quarrel with the district court's objective" of avoiding duplicative litigation, Judge Easterbrook wrote that the participants in the rulemaking process—including the Committee—did not use the word adjudication "loosely to mean all ways to redress injuries," but rather drafted Rule 23(b)(3) "with the legal understanding of 'adjudication' in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits."[5] In other words, because the defendant's voluntary recall and refund program did not involve or result from an "adjudication" by a court, it could not be considered in the court's analysis of whether "a class action is superior to other available methods for fairly and efficiently *adjudicating* the controversy."[6]

Similarly, in *Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*,[7] the Third Circuit found that the Rule 23(b)(3) superiority requirement "focus[es] on the question whether one suit is preferable to several," and that "the rule was not intended to weigh the superiority of a class action against possible administrative relief.... We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class suit as a superior form of action was to be weighed against the advantages of an administrative remedy."[8]

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[4] *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (2011).
[5] *Id.* at 751-52.
[6] *Id.* at 752 (emphasis added).
[7] 478 F.2d 540 (3d Cir. 1973).
[8] *Id.* at 579; *see also de Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 346 (S.D.N.Y. 2021) ("Rule 23...was drafted with the legal understanding of adjudication in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits.") (internal quotation marks omitted); *Bruzek v. Husky Oil Ops. Ltd.*, 520 F. Supp. 3d 1079, 1099 (W.D. Wis. 2021) (following *Aqua Dots,* and refusing to consider defendant's reimbursement program as an "adjudication"); *Martin v. Monsanto Co.*, No. EDCV162168JFW(SPx), 2017 WL 1115167, at *9 (C.D. Cal. Mar. 24, 2017) ("pursuant to the plain language of Fed. R. Civ. P. 23(b)(3), '[t]he analysis is whether the class action format is superior to other methods of adjudication, not whether a class action is superior

The constraints of this common interpretation of Rule 23(b)(3) have created such "uneasiness" that at least one court has raised a "call to the Rulemakers." In *In re Hannaford Brothers Co. Customer Data Security Breach Litigation,*[9] the court understood that the defendant had already reimbursed its customers for the cost of replacing their credit cards after a data theft incident,[10] and noted the defendant's view that its program "afford[s] class members a comparable or even better remedy than they could hope to achieve in court."[11] Nevertheless, the court refused to consider the program because it was not an "adjudication":

> [As] much as I too favor parties being able to resolve their controversies without expensive litigation, I observe that Rule 23(b)(3) does not address superiority as a matter of abstract economic choice analysis, but asks if a class action is "superior to other available methods for fairly and efficiently *adjudicating* the controversy"—*i.e.*, other possible adjudication methods such as individual lawsuits or a consolidated lawsuit.... [Defendant] Hannaford may or may not have a good program to satisfy aggrieved customers, but [ ] the Hannaford program is not relevant to my superiority determination under the class certification decision.[12]

In arriving at this conclusion, the Court noted that the language of the Rule compelled an outcome that failed to fulfill the policy goals of Rule 23.

> [T]he recovery of generous fees for plaintiffs' attorneys and large cy pres awards with little money going to actual class members call[s] into question the integrity of the class action process for resolving lawsuits.
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to an out-of-court, private settlement program'") (quoting *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 610 (E.D. La. 2006)); *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 672 (C.D. Cal. 2014) (citing *Aqua Dots* with approval in concluding that defendant's refund program did not constitute "superior method for 'adjudicating' the controversy"); *Githieya v. Global Tel*Link Corp.*, No. 1:15-cv-0986-AT, 2020 WL 12948011, at *11 (N.D. Ga. Nov. 30, 2020) (same); *Dean v. Colgate-Palmolive Co.*, No. EDCV 15-00107 JGB, 2018 WL 6265003, at *10 (C.D Cal. Mar. 8, 2018) (in "close issue," finding superiority despite preexisting corporate return policy because definition of "'adjudication'... does not include non-legal forms of adjudication such as a recall campaign, or presumably, a money-back guarantee"), *aff'd*, 772 F. App'x 561 (9th Cir. 2018); *Korolshteyn v. Costco Wholesale Corp.,* No. 3:15-cv-709-CAB-RBB, 2017 WL 1020391, at *8 (S.D. Cal. Mar. 16, 2017) (finding superiority despite preexisting refund program because refund was not "adjudication"); *Melgar v. Zicam LLC*, No. 2:14-CV-00160-MCE-AC, 2016 WL 1267870, at *6 (E.D. Cal. Mar. 31, 2016) (finding that Defendants' refund program was not superior because "it does not comport with the plain language of Rule 23"); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 415 (S.D.N.Y. 2015) ("[a]s an initial matter, the Court is not convinced non-adjudicative forms of redress may even be considered under Rule 23(b)(3)'s superiority analysis," citing to use of word "adjudication"); *Forcellati v. Hyland's, Inc.,* No. 12-1983-GHK (MRWx), 2014 WL 1410264, at *12 (C.D. Cal. Apr. 9, 2014) (finding superiority despite preexisting refund program because Rule 23 "directs courts to consider other available methods of *adjudication*"); *Jovel v. Boiron Inc.*, No. 2:11-CV-10803-SVW-SH, 2013 WL 12162440, at *5 (C.D. Cal. Mar. 28, 2013) ("[T]he Court shares Plaintiff's doubt that such a private refund program even constitutes an alternative form of 'adjudication.'").

[9] 293 F.R.D. 21 (D. Me. 2013).

[10] *Id.* at 34.

[11] *Id.*

[12] *Id.* at 34-35.

> [M]y concern here that this is a *de minimis* class action where virtually no one will bother to make a claim and that any recovery will serve solely the lawyers (and perhaps some modest measure of corporate deterrence) ***present[s] questions for those who write the class action rules*** and for Congress, not for this individual judge applying the language of the Rule.
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> Although reasonable people can certainly maintain that as a matter of policy other solutions are preferable to litigation, I do not see how that argument has a place in the class certification decision under the current Rule.[13]

As these cases reflect, the term "adjudicating" in Rule 23(b)(3) not only stifles courts' discretion over the scope of their legal analysis, but also results in holdings that do not promote the best interests of class members and are contrary to the Committee's stated policy of ensuring "economies of time, effort, and expense … without sacrificing procedural fairness or bringing about other undesirable results."[14]

The evidence indicates that the Committee did not necessarily intend for Courts to construe the term "adjudication" so narrowly. Indeed, the Committee Notes do not even use the term "adjudication." In discussing the purpose of the superiority requirement in the 1966 amendments, the Committee noted that the court is to consider whether "*another method of handling* the litigious situation may be available which has greater practical advantages."[15] The Committee further noted that the purpose of the superiority requirement is "[t]o reinforce the point that the court with the aid of the parties ought to assess the relative advantages of *alternative procedures for handling the total controversy*."[16] A leading treatise elaborates:

> The rule requires the court to find that the objectives of the class-action procedure really will be achieved in the particular case. In determining whether the answer to this inquiry is to be affirmative, the court initially must consider what other procedures, if any, exist for disposing of the dispute before it. The court must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court. It then must compare the possible alternatives

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[13] *Id.* at 26, 29, 34–35 (emphasis added).

[14] Outside of Rule 23, courts have recognized at least one method of out-of-court resolution—arbitration— as "adjudication." *See, e.g., St. Anthony Hosp. v. Eagleson,* 40 F.4th 492, 515 (7th Cir. 2022) (referring to "claim-by-claim adjudication" through arbitration); *Uniformed Fire Officers Ass'n v. Blasio,* 846 Fed.Appx. 25, 30 (2d Cir. 2021) (referring to "adjudication of [unions'] claims in arbitration"); *State v. United States*, 986 F.3d 618, 629 (6th Cir. 2021) (examining whether party "consented to adjudication before the federal arbitration panels"); *Tyler v. U.S. Dept. of Educ. Rehab. Servs. Admin.*, 904 F.3d 1167, 1184 (10th Cir. 2018) (discussing "agency adjudications" before the Federal Maritime Commission). Moreover, longstanding definitions of "adjudication" have broadly included an application of law to facts—but not necessarily by a judge in a court of law. *See, e.g.,* BENJAMIN W. POPE, LEGAL DEFINITIONS (1919–2015) (defining "adjudication" as "[a]n application of the law to the facts and an authoritative declaration of result").

[15] Fed. R. Civ. P. 23, 1966 Committee Note (emphasis added).

[16] *Id.* (emphasis added).

> to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court.[17]

By hampering courts' ability to conduct this fulsome evaluation of alternatives for resolution, the "adjudication" language in Rule 23(b)(3) undermines the Rule's purpose of avoiding prejudice to class members.

III. RULE 23(B)(3), AS CURRENTLY WRITTEN, IS PREVENTING JUDGES FROM FULFILLING THEIR DUTY TO PROTECT THE CLASS BY LIMITING CONSIDERATION OF "OTHER AVAILABLE METHODS" ONLY TO IN-COURT PROCEDURES FOR "ADJUDICATING."

Rule 23 gives judges a broad responsibility to ensure fairness to class members. As the Committee Notes explain, the core of that duty is ensuring that the action delivers a meaningful result for class members, including when a court reviews a proposed settlement ("[t]he relief that the settlement is expected to provide to class members is a central concern"[18]) and when it determines attorneys' fees ("[o]ne fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members"[19]). This duty is highly important at the certification stage as well—arguably even more so given the high stakes of the certification decision.[20]

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[17] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1779 (3d ed. 1998) (footnotes omitted). Indeed, closer to the enactment of the 1966 amendments, at least one court—the 9th Circuit—did not strictly interpret the "adjudication" language. *See, e.g., Kamm v. Calif. City Dev't Co.*, 509 F.2d 205, 212 (1975) (where California Attorney General and Real Estate Commissioner had already reached settlement in state court requiring defendant to provide restitution to purchasers, federal class action not "superior" for several reasons: "(1) A class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level … (3) Significant relief had been realized in the state action … (7) Defending a class action would prove costly to the defendants and duplicate in part the work expended over a considerable period of time in the state action. These factors as a whole support the conclusion of the district court that the class action was not a superior method of resolving the controversy.)"

[18] Fed. R. Civ. P. 23, 2018 Committee Note.

[19] Fed. R. Civ. P. 23, 2003 Committee Note.

[20] Once a class action is certified, it almost always settles. *See* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation,* 95 Cornell L. Rev. 1105, 1138 (2010) ("Settlements, not trials, have long comprised the dominant endgame for class actions . . ."); *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC,* 31 F.4th 651, 685 (9th Cir. 2022) (*en banc*) (Lee, J., dissenting) ("If trials these days are rare, class action trials are almost extinct."), *pet. for cert. filed sub. nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, No. 22-131 (U.S. Aug. 10, 2022). Certified class actions almost always end in settlement because of the potential exposure and uncertainty of a class action verdict. *Id.* (Lee, J., dissenting) ("If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses."). The leverage created once a class is certified can "so increase the defendant's potential damages liability and litigation costs that [it] may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), superseded by rule on another ground as stated in *Microsoft Corp. v. Baker,* 137 S. Ct. 1702 (2017); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail").

Many courts have recognized that their responsibility to class members includes protecting them from class actions that add little if any value—or even cause them harm.[21] This is especially true when available non-adjudicative remedies already provide class members with full and timely redress, and where litigation would delay recovery, impose significant court costs and attorneys' fees, and consume judicial resources. As one court put it, class members, if asked, "would not choose to litigate a multiyear class action just to procure refunds that are readily available here and now."[22]

Cases driven by attorneys' fees frequently fall in this category of no-value-added cases that harm rather than help class members. For example, in *Conrad v. Boiron, Inc.*[23]—a consumer fraud case arising out of a homeopathic flu remedy where a refund was already available and label changes were already made—the court emphasized that "it is hard to see how the proposed class action benefits anyone but the attorneys who filed it" and observed that "[c]lass actions driven by attorney's fees are notoriously troublesome." Similarly, in considering a class action settlement in *In re Walgreen Co. Stockholder Litig.*,[24] the Seventh Circuit wrote that "[t]he type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket.... [A] class action that seeks only worthless benefits for the class should be dismissed out of hand."). Indeed, there are many class actions where the result does not justify the attorneys' fees[25]—particularly when the remedy sought is already provided through out-of-court means. Courts have an obligation to protect class members from such

[21] The idea that the Rule prohibits consideration of alternative methods has given rise to the further step, taken by some plaintiffs' class action lawyers, of asking courts to *prohibit* defendants from informing consumers of a remedy outside of class action litigation, no matter how agreeable and efficient. *See, e.g., In re Apple Inc. Device Perf. Litig.,* No. 18-md-02827-EJD, 2018 WL 4998142, at *6 (N.D. Cal. Oct. 15, 2018) (plaintiffs in phone battery class action sought order prohibiting Apple's battery-replacement program unless Apple notified recipients of class action); *Tolmasoff v. Gen. Motors, Inc.,* No. 16-11747, 2018 WL 3548219, at *2 (E.D. Mich. June 30, 2016) (plaintiff in fuel economy class action sought order preventing General Motors from notifying potential class members of reimbursement program); *Craft v. N. Seattle Comm. Coll. Found.,* No. 3:07-CV-132(CDL), 2009 WL 424266, at *1-2 (M.D. Ga. Feb. 18, 2009) (plaintiff in fee overcharge class action sought protective order preventing defendant from issuing refund checks to potential class members). Even if the voluntary remedy is permitted, plaintiffs' counsel have encouraged their clients to *not* obtain repairs under their warranties, to forego relief available from a company's voluntary programs, and to refuse to trade in their used vehicles, because doing so would undermine the lawyer's theory of the class action case and their ultimate financial recovery. *See, e.g., Leonard v. Abbott Labs., Inc.*, 2012 WL 764199, at *26-27 (E.D.N.Y. Mar. 5, 2012) (noting plaintiff avoided recall program in order to bring class action).

[22] *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012).

[23] 86 F.3d 536 (7th Cir. 2017).

[24] 832 F.3d 718, 724 (7th Cir. 2016).

[25] *See, e.g., Briseno v. Henderson*, 998 F.3d. 1014, 1019, 1023 (9th Cir. 2021) (cautioning against approving settlements "when counsel receives a disproportionate distribution of the settlement"; in this case, "[c]lass counsel will receive seven times more money than the class members" and the "injunction touted by an expert as worth tens of millions of dollars appear worthless"); *Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) (holding that, in assessing the reasonableness of the attorney's fee in a proposed settlement, "the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation"); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 938 (9th Cir. 2011) (holding that class counsel should not have been awarded eight times the value of what the class received in the form of *cy pres* awards; "the disparity between the value of the class recovery and class counsel's compensation raises at least an inference of unfairness, and [] the current record does not adequately dispel the possibility that class counsel bargained away a benefit to the class in exchange for their own interests").

cases, and should not feel compelled by the Rules to certify them without understanding the class members' full panoply of options for resolution and remedy.

Of course, attorneys' fees are not the only costs of class actions.[26] Class actions—before any decision on the merits is ever made—require notice and administration, which can cost hundreds of thousands of dollars. Although such costs are often a necessary component to class actions and due process, they are unnecessary and therefore harmful when the class members already have a remedy outside of litigation. For example, in *Aqua Dots*, the putative class action involved an allegedly defective toy kit already subject to a broad recall and refund program. The Seventh Circuit observed that the class "[n]otice may well cost more, per kit, than the kits' retail price—and could be ineffectual at any price, since most purchases were anonymous."[27] The Court reasoned that, especially where a recall, refund, or reimbursement program has already been "widely publicized," there is no need to "bear these costs a second time."[28] This is particularly true where the product at issue is sold at a low price because any compensation to a class member would also be low. As the *Conrad* court observed, "[t]he combination of low-value claims and small class size is likely to make this another case in which 'high transaction costs (notice and attorneys' fees)' will leave class members with a negligible award."[29]

Finally, redundant and duplicative litigation not only harms class members—it also takes a toll on the judiciary and defendants as well. Then-Circuit Judge Gorsuch recognized this a decade ago in a case where the court found moot a claim seeking notice and an equitable refund for repairs because an automaker had offered a voluntary recall (through NHTSA) for the same alleged defect.[30] As Judge Gorsuch explained for the Tenth Circuit, "affording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the execution of the remedial process[,] the duplicative expenditure of finite public resources[, and] ... the entirely unwanted consequence of discouraging other branches from seeking to resolve disputes pending in court."[31] Certifying a class action would discourage manufacturers from initiating recalls and add transaction costs, with only the lawyers—and not the consumers— benefiting from the additional "labor[ing] on through certification, summary judgment, and beyond."[32] Courts should not be constrained by Rule 23's "adjudication" language from understanding and expressly considering these dynamics at the certification stage.

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[26] *See In re Aqua Dots*, 654 F.3d at 751 ("The transactions costs of a class action include not only lawyers' fees but also giving notice under Rule 23(c)(2)(B).").
[27] *Id.*
[28] *Id.*
[29] 869 F.3d at 540.
[30] *See Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208 (10th Cir. 2012).
[31] *Id.* at 1211. *See also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1019 (7th Cir. 2002) ("Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with consumer products that are said to be failure-prone.").
[32] *Id.*

IV. FREQUENTLY, NON-JUDICIAL REMEDIES ARE AVAILABLE THAT PROVIDE FASTER, MORE COMPLETE RELIEF THAN THE PROPOSED CLASS ACTION

Putative class members often have access to direct, more efficient redress that is at least equal to and, in many cases, better than, the remedy that a class action can provide. Consumers frequently obtain redress through warranties, refund policies, remediation, voluntary recalls, free software patches or updates, and private claim resolution. These programs provide timely and efficient remedies directly to the customer. Automatic software updates provide quicker relief to impacted consumers than protracted litigation, and recall programs do not require potentially injured customers to split their refunds with attorneys.

Courts should be allowed to consider whether a company's policy of curing a customer's complaints is superior to what can be achieved with the proposed class litigation, which even in the best dockets will dramatically slow resolution as compared to the relief provided through the company's voluntary policies and programs.

In addition to voluntary refund and reimbursement programs put in place by manufacturers and retailers, consumers also often obtain relief from agency administrative action faster and with fewer transaction costs than class litigation,[33] including action by the FDA,[34] NHTSA,[35] CPSC, DOT, or State Attorneys General. For example, automotive manufacturers are required to notify the federal regulator, the National Highway Transportation Safety Administration (NHTSA), of safety-related defects within five days, and NHTSA publicly announces all field actions in a timely manner. NHTSA has statutory authority to order recalls to cure defects.

Yet many class actions are tagalong suits that follow such administrative actions but do not add value to class members. For example, putative class actions were filed after KB Homes entered a settlement with the Florida Attorney General that provided repairs and refunds to homeowners.[36] Similar class actions are routinely filed on behalf of car owners following a recall that provides for repair and compensation.[37] Not only do these suits typically fail to provide any added value to class members, but they harm consumers by delaying and reducing their remedies while also punishing the companies that provide meaningful alternative measures by burdening them with multiple redundant lawsuits.

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[33] For government-supervised relief, there are concerns about "duplicat[ing] the[] efforts" of the government agency. *Winzler,* 681 F.3d at 1211.

[34] *See, e.g., In re Family Dollar Stores, Inc., Pest Infestation Litig.,* MDL No. 3032, 2022 WL 2129050, at *1 (J.P.M.L. June 2, 2022) (consolidating class actions filed in wake of FDA recall); *Coffelt v. Kroger Co.,* No. EDCV 16-1471 JGB (KKx), 2017 WL 10543343, at *2 (C.D. Cal. Jan. 27, 2017) (class action alleging overpayment for contaminated vegetables followed FDA investigation and subsequent recall).

[35] *See, e.g., Cohen v. Subaru of Am., Inc.,* No. 1:20-cv-08442-JHR-AMD, 2022 WL 714795, at *2 (D.N.J. Mar. 10, 2022) (class actions filed in wake of NHTSA-approved recalls of fuel pumps); *Zakikhani v. Hyundai Motor Corp.,* No. 8:20-cv-01584-SB (JDEx), 2022 WL 1740034, at *1-2 (C.D. Cal. Jan. 25, 2022) (class action filed in wake of NHTSA-approved recall of ABS systems).

[36] *See, e.g.*, https://topclassactions.com/lawsuit-settlements/closed-settlements/florida-kb-home-class-action-settlement/ (9/2/2016 announcement of stucco settlement); https://www.clickorlando.com/news/2017/11/11/35-lawsuits-filed-against-kb-home-in-orlando/ (11/2017 discussion of raising same claims).

[37] https://topclassactions.com/lawsuit-settlements/consumer-products/auto-news/vehicle-safety-defect-class-action-lawsuit-investigation/

Non-"adjudication" alternatives often expedite remedies to class members while saving considerable transaction costs, including attorneys' fees. Allowing judicial consideration of voluntary remedies at the certification stage places the incentives where they should be: on encouraging relief to class members in the quickest, most cost-effective and robust way.

V. CLASS MEMBERS' PREFERENCE FOR NON-JUDICIAL REMEDIES IS DEMONSTRATED BY LOW PARTICIPATION RATES IN CLASS ACTION SETTLEMENTS

Objective evidence—consumer participation rates in class action settlements—demonstrates that class actions are often not the superior mechanism for delivering relief from an alleged injury. Two Jones Day white papers[38] examining claims rates in federal class action settlements[39] of cases containing allegations of consumer fraud found that: "(i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys' fee awards even when class members receive little to no monetary recovery; and (iii) in claims-made settlements, class members as a whole receive on average only 23 percent of the settlement amount, with the remainder being consumed by attorneys' fees, expenses, or cy pres distributions…."[40] Jones Day found that "the average participation rate in such settlements was only 4.91 percent and the median participation rate was only 3.90 percent" among settlements in which class members were required to submit a claim form, with only two cases with a claim rate of higher than 15 percent.[41]

The Federal Trade Commission's data on claims rates is similar. In 2019, the FTC published a study of 149 class-action settlements from the years 2013–2015 that covered several types of consumer class actions, including privacy, defective products, debt collection, and banking practices.[42] The study considered various aspects of class action settlement effectiveness, and found that even when direct notice of settlement is provided, claims rates are surprisingly low. The FTC reported that the median overall claims rate (across all industries and direct notice types) was 9 percent, and that the mean claims rate was 4 percent.[43] These findings are

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[38] Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019–2020)* (July 2021) ("2021 Jones Day White Paper Update"), https://www.jonesday.com/en/insights/2021/07/update-an-empirical-analysis-of-federal-consumer-fraud-class-action-settlements-(20192020); Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)* (April 2020) ("2020 Jones Day White Paper"), https://www.jonesday.com/en/insights/2020/04/empirical-analysis-consumer-fraud-class-action.

[39] A total of 141 settlements were reviewed as an initial data set across the two White Papers, out of which 60 contained sufficient data to support the analysis.

[40] 2020 Jones Day White Paper at Cover page. The 2021 Jones Day White Paper Update reported that for settlements between 2019-2020, class members received only 30% of the total settlement amount in claims-made settlements. (2021 Jones Day White Paper Update at 1).

[41] 2021 Jones Day White Paper Update at 1. The participation rate range is consistent when compared with the 2020 Jones Day White Paper, which found the only 6.99% of class members submitted a claim to participate in settlements, with a median participation rate of 3.40%, and only four cases having a claims rate higher than 15%. *See* 2020 Jones Day White Paper at 1.

[42] FTC Staff Report, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns 10, 12 (Sept. 2019) ("FTC Notice Study"), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf

[43] *Id.* at 27. While the FTC ultimately made various recommendations to improve notice understandability and comprehension, it also noted that "several of these results suggest respondents may view class action settlement notices with skepticism." *Id.*at 2.

corroborated by Jones Day, which found that, in cases with direct notice to consumers of settlements, the average claim rate from 2010 to 2020 was 8.32 percent, and the median was 4.45 percent.[44]

These numbers reflect, at least in part, class members' lack of interest in class action lawsuits that force them to wait years for a remedy that they could have accessed immediately and that ultimately turns out to be severely diminished by litigation costs. Single-digit claims rates provide good reason for courts, at the certification stage, to consider whether a class action is "superior to other available methods" including money-back guarantees, product warranties, programs agreed to with regulators, remediation, and other customer satisfaction programs or government actions that offer consumers a direct, quick, and easy remedy.

These low claim rates also serve as a reason that simply relying on the named plaintiff's ability to opt out does not adequately protect the class members. At least one court has rejected concerns that many class members' "interests are better served otherwise (as by an individual lawsuit or by applying for a refund from [the defendant])," by stating that class members "are free to opt out" of the class action.[45] Although such a result might be appropriate to the facts of a particular case, the Committee should not rely on class members' ability to opt out as the reason not to fix Rule 23(b)(3)'s bar against judges' considering the class members' options before deciding whether to certify a class. That is, in the face of single-digit claim rates for those class members who *do not* opt out, the Committee should not conclude that the rule barring judges from considering non-litigation remedies as part of the superiority analysis is justified because class members can read the class notice and opt out if they prefer a no-questions-asked return policy to class litigation.

VI. JUDGES WHO WANT TO CONSIDER "AVAILABLE METHODS" OTHER THAN LITIGATION SHOULD NOT BE FORCED TO PERFORM RULE GYMNASTICS UNDER RULE 23(a)(4)'S "ADEQUACY" REQUIREMENT

Some judges who want to protect classes by considering non-litigation remedies when considering whether a class action is superior are getting around the "adjudication" problem by re-fashioning the "superiority" question to fit within Rule 23(a)(4)'s "adequacy" requirement. For example, the *Aqua Dots* court—after rejecting the district court's denial of class certification under the superiority test—upheld the denial of class certification on the grounds of adequacy of representation because "[a] representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on

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[44] 2021 Jones Day White Paper Update at 4-5. This White Paper noted that one of the takeaways from low claims appears to be that "many class members may not consider themselves to have been injured" and "potential class members are simply uninterested in participating in settlements that promise only miniscule awards." *Id.* at 5. *See also id.* ("When potential awards are as low as $0.60 per product purchased . . . the opportunity costs of participating may be too high. Where potential class members must locate proof of purchase, even where proof (such as receipts) may be available, the time required to locate that proof of purchase may be seen as far outweighing the sometimes-paltry awards. What is more, some manufacturers may already offer a money-back guarantee program, providing a full refund to dissatisfied customers. Many consumers may see this as a superior means of addressing their concerns, as they prefer to receive a refund by contacting the manufacturer directly rather than participate in a class action where relief may be delayed or less than a full refund.").

[45] *In re Hannaford*, 293 F.R.D. at 34-35. The court's holding reflects that "adequacy" is an ill-fitting test. *Id.* ("regardless of whether Hannaford customers are better advised to apply directly to Hannaford to reimburse the fees they paid, I find that the named plaintiffs are adequate under the language of the Rule").

offer is not adequately protecting the class members' interests."[46] Other courts have followed suit. In *Waller v. Hewlett-Packard Co.*,[47] the court denied class certification based on the "adequacy" of the named plaintiff because the named plaintiff "isn't fairly and adequately protecting the class's interests under Rule 23(a)(4) by pursuing litigation to obtain a restitution remedy that is already on offer in the form of the software update." Similar reasoning led the court in *Conrad*[48] to deny certification on adequacy grounds because "the remedies already in place for disappointed [ ] customers undermine [plaintiff's] ability to show that he can bring any significant extra value to the absentee class members." And in *Doster Lighting, Inc. v. E-Conolight, LLC*,[49] the court denied certification of a class action—where the defendant had already admitted the problem with its LED light bulbs, redesigned the bulbs, and offered a comprehensive refund and replacement program—due in part to the adequacy of the named plaintiff, who decided to pursue "litigation rather than a remedy already available for replacement or refund."[50]

Despite the apparent logic of these holdings, the Committee should not conclude that the "adequacy" element is an appropriate work-around for the "adjudication"/superiority problem. Adequacy should remain a separate inquiry. Courts generally consider two questions in determining whether the class representative and class counsel are adequate: (1) do they have conflicts of interest with other class members, and (2) will they "prosecute the action vigorously on behalf of the class?"[51] Adequacy thus focuses on the class representative and class counsel, not on the potential remedy.[52] One court has found that denying class certification because non-litigation remedies render a class representative inadequate amounts to a conclusion that *no* class representative or counsel would be adequate to represent the alleged class. The *In re Hannaford Bros.* court explained that "[a] named plaintiff can represent a class *only* by filing a lawsuit; that is what the Federal Rules of Civil Procedure (and Rule 23 in particular) are for."[53] Starting from that premise, the court held that a plaintiff is "hardly [an] adequate representative[ ] of a class by *not* filing a lawsuit, because then they are not class representatives at all!"[54] Similarly, in *In re Scotts EZ Seed Litig.*, the court declined to hold that lead plaintiffs were inadequate representatives because they chose to litigate rather than take advantage of Scotts' "No Quibble Guarantee" refund program. "There are reasons a rational purchaser might choose litigation over a refund," the court stated, "including the availability of statutory and/or punitive damages."[55]

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[46] *In re Aqua Dots*, 654 F.3d at 752.
[47] 295 F.R.D. 472, 490 (S.D. Cal. 2013).
[48] 869 F.3d at 541.
[49] No. 12-C-0023, 2015 WL 3776491 (E.D. Wis. June 17, 2015).
[50] *Id.* at *8.
[51] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.,* 220 F.R.D. 395, 413 (S.D.N.Y. 2004).
[52] *See In re Scotts EZ Seed Litig.*, 304 F.R.D. at 405-07 (in determining adequacy, considering only whether there is a conflict between class members and named plaintiffs, the named plaintiffs' participation in discovery, and qualifications of class counsel).
[53] 293 F.R.D. at 29; *see also id.* at 26, 34-35.
[54] *Id.* at 29.
[55] 304 F.R.D. 397, 407 n.5, 415.

Thus, it is not sufficient to rely on the "adequacy" prong of Rule 23(a)(4) to solve the "adjudication" problem.[56] The Committee instead should disentangle these questions by amending Rule 23(b)(3) to make clear that courts may consider the superiority of the class action to "other available methods" separate from adequacy of class representation.

VII. CONCLUSION

Courts evaluating "superiority" under Rule 23(b)(3) should have the discretion to consider all "other available methods" of providing remedies to putative class members, whether or not that remedy results from an in-court "adjudication." Allowing this discretion via express language in the rule would be consistent with the purpose of Rule 23, which is to ensure that a proposed class action is the superior avenue for protecting class members and resolving parties' disputes, and would promote judicial efficiency and encourage companies to take swift, effective remedial efforts when there is an issue to address. The current language of the rule leads courts reluctantly to certify class actions that harm class members when other available methods for resolving disputes are superior.

The Committee should amend Rule 23(b)(3) along the lines of the attached suggestion to remove what is interpreted as a prohibition on courts' consideration, at the certification stage, of whether available non-litigation alternatives offer class members more efficient and complete remedies than the proposed class litigation. Such an amendment would help judges meet their duty to protect the class, avoid needless drain on judicial resources, encourage the efficient administration of justice, and incentivize defendants to provide full and timely relief to consumers. Prohibiting judges from considering other means of redress leads to class action litigation that fails to protect class members, taxes judicial resources, delays access to remedies, and drives up the costs for those remedies, ultimately harming claimants and courts alike. Where non-"adjudication" alternatives provide faster, robust, and well-publicized remedies that are directly available to consumers, courts should be allowed to evaluate those alternatives—without performing rule gymnastics—when determining whether a class action is the superior method of resolving a particular dispute.

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[56] Some courts deal with the "adjudication" problem by simply ignoring it. In *Berley v. Dreyfus & Co.*, 43 F.R.D. 397, 398-99 (S.D.N.Y. 1967), for example, the court recognized that although a defendant's refund program was not an "adjudication," the "broad policy of economy in the use of society's difference-settling machinery" promotes "avoid[ing] creating lawsuits where none previously existed." The *Berley* court ultimately denied certification based on superiority given the already-in-place refund program. *Id.* at 399. Similar findings were made in *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012), where the court held that "a class action is not a superior method" because there was a voluntary recall and refund program available. *See also In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 699 (N.D. Ga. 2008) (class action did not meet superiority requirements because, in part, defendant had instituted a full refund program); *Webb v. Carter's, Inc.*, 272 F.R.D. 489, 505 (C.D. Cal. 2011) (class actions were not superior because the defendant "already offers the very remedy sought in this suit" by "allow[ing] consumers to obtain refunds for the garments, even without a receipt, and reimburs[ing] consumers for out-of-pocket medical costs for treating skin irritation resulting from the tagless labels"); *Daigle v. Ford Motor Co.*, No. 09-3214, 2012 U.S. Dist. LEXIS 106172, at *14 (D. Minn. July 31, 2012) (Ford's voluntary safety recall and refund provides the class with the relief it seeks and a class action is therefore not a superior method of adjudication); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (when a refund and recall program are already established "[i]t makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress").

Suggestion for Rule 23 "Superiority" Amendment

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

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(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy or otherwise providing redress or remedy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions, including the potential for higher value remedies through individual litigation or arbitration and the potential risk to putative class members of waiver of claims through class proceedings;

(B) the extent and nature of any (i) litigation concerning the controversy already begun by or against class members, (ii) government action, or (iii) remedies otherwise available to putative class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; ~~and~~

(D) the likely difficulties in managing a class action~~.~~;

(E) the relative ease or burden on claimants, including timeliness, of obtaining redress or remedy pursuant to the other available methods; and

(F) the efficiency or inefficiency of the other available methods.