COMMENTS TO THE ADVISORY COMMITTEE ON CIVIL RULES

RE: PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE RULE 23

On Behalf of

NATIONAL CONSUMER LAW CENTER, INC. AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

November 3, 2016

The National Consumer Law Center ("NCLC") and the National Association of Consumer Advocates ("NACA") are pleased to submit comments to certain of the proposed amendments to Federal Rules of Civil Procedure Rule 23.

The members of NACA are private and public sector attorneys, legal services attorneys and law professors whose primary practice or areas of specialty involve the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices.

NCLC is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed and elderly consumers. NCLC is a nationally recognized expert on consumer credit issues and it has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over 47 years. A major focus of NCLC's work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC publishes a twenty-volume

Consumer Credit and Sales Legal Practice Series, including, *inter alia*, *Consumer Class Actions* (9th ed. 2016).

In the mid-1990's, responding to criticism of consumer class actions, NACA decided to seek and publish a consensus on ethical and effective class action practices. Starting with an initial draft, and incorporating suggestions and comments from many sources, NACA adopted its "Standards and Guidelines for Litigating and Settling Consumer Class Actions" in 1997. *See* 176 F.R.D. 375 (1997)("Guidelines").

The Guidelines have proven helpful to lawyers and courts alike. Through the years, a significant number of courts have referred with approval to the Guidelines, including *Boyle v, Giral*, 820 A.2d 561, 569 fn. 8 (D.C.C.A. 2003); *Braud v. Transport Service Co. of Illinois*, 2010 WL 3283398, at * 14 (E.D. La. Aug. 17, 2010); *Figueroa v. Sharper Image Corp*., 517 F. Supp. 2d 1292, 1308 (S.D. Fla. 2007); *Henderson v. Eaton*, 2002 WL 31415728, at *6 (E.D. La. Oct. 25, 2002); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197, 204 (D. Me. 2003); *In re Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7-12 Litigation*, 447 F. Supp. 2d 612, 634 (E.D. La. Aug. 31, 2006); *In re Mexico Money Transfer Litigation (Western Union and Valuta)*, 164 F. Supp. 2d 1002, 1028-1030 (N.D. Il. Dec. 22, 2000); *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 278 F.3d 175, 194 fn. 1 (3rd Cir. 2002); *Milkman v. American Travellers Life Ins. Co*., 2002 WL 778272, at *7-9 (Pa. Com. Pl. Apr. 1, 2002); *Moody v. Sears*, 2007 WL 2582193, at *5 (N.C. Super. May 7, 2007); *State v. Homeside Lending, Inc*., 826 A.2d 997, 1009-1011 (Vt. 2003); and *Wilson v. DirectBuy, Inc*., 2011 WL 2050537, at *6 (D. Conn. May 16, 2011).

The Guidelines have formed the basis of expert testimony, both in support of class action settlements and in support of objections to bad settlements. Most important, perhaps, they

achieved their primary goal of setting the standard for litigating and settling consumer class actions. Many of the Guidelines have been embraced and adopted by courts, and their principles were reflected in the 2004 changes to Federal Rule of Civil Procedure 23.

In 2006, to reflect both the adoption of these changes to Rule 23, as well as the quickly changing landscape of class action litigation, NACA revised the Guidelines. *See* 255 F.R.D. 215 (2006). This Second Edition addressed new issues, including specific problems with the class action device in predatory home lending litigation, the exponential growth of forced arbitration, and the use of offers of judgment under Federal Rule 68 and state counterparts to forestall class actions.

On May 13, 2014, in an effort to keep the Guidelines current and relevant, NACA issued the Third Edition of the Guidelines. *See* 299 F.R.D. 160 (2014). The Third Edition thoroughly updates the law in order to continue to offer assistance and guidance to lawyers and courts as a standard of practice that encourages only the most ethical and thoughtful of consumer class actions.

NCLC and NACA appreciate the opportunity that the Civil Rules Advisory Committee and its Rule 23 Subcommittee have given us to participate throughout your deliberative process and to contribute to the consideration of potential amendments to Rule 23. Previously we submitted comments and suggestions to the Committee and the Subcommittee on April 1, 2015, when you initially were considering proposals for possible revisions to Rule 23. Subsequently, on September 4, 2015 we submitted responses to certain of the conceptual sketches set forth by the Rule 23 Committee in its Introductory Materials for its Mini-Conference on Rule 23 Issues held on September 11, 2015. This opportunity has permitted us to respond, from our perspective

and given our experiences, to some of the most critical challenges facing class action practitioners and the courts today.

The additional comments we set forth below seek to combine the ethical considerations of the NACA Guidelines with the functional approach adopted by the ALI Principles of the Law of Aggregate Litigation. It is our hope and intention that the proposed amendments as ultimately promulgated and adopted will help maintain class actions as a vital component of American jurisprudence in order to preserve and enforce the rights of consumers while improving the efficiency, effectiveness and fairness of the class action procedure in our federal court system.

I. NACA'S AND NCLC'S PROPOSED CHANGE TO THE TIME FOR ISSUANCE OF A CERTIFICATION ORDER – RULE 23(c)(1)(A) AND ITS COMMITTEE NOTES.[1]

Ignoring the United States Supreme Court's mandate that courts must conduct a "rigorous analysis" of class certification, a number of courts have adopted the practice of considering, and sometimes denying, class certification based solely on the complaint via the vehicle of a motion to strike. In order to eliminate this practice, which NACA and NCLC believe has no support in the text of the Federal Rules, does not allow for proper class certification analysis as now required by *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2551 (2011) and its progeny, and makes the class certification decision an inherently subjective one based on individual judges' predilections, NACA and NCLC propose an amendment to Rule 23(c)(1)(A).

A. NACA and NCLC propose changing Rule 23(c)(1)(A) as follows:

(c) **CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.**

[1] NACA's and NCLC's Proposed Change to the Time for Issuance of a Certification Order-Rule 23(c)(1)(A) and its Committee notes originally was presented to the Civil Rules Advisory Committee and its Rule 23 Committee in our April 1, 2015, Comments. The proposal did not appear as one of the Subcommittee's subsequent conceptual "sketches" and was not included as part of the proposed amendments to Rule 23 drafted by the Subcommittee and currently under consideration. The comment is presented here again for reconsideration by the Civil Rules Advisory Committee as a potential improvement to the proposed amendments to Rule 23.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action. The determination should not be based solely on the complaint, but rather on class certification briefing and evidence submitted after a reasonable time for discovery.

B. NACA and NCLC propose the following revision to the Committee Notes to the 2003 amendments to Subdivision (c), Paragraph (1):

In the second paragraph, the first sentence should be changed from "Time *may* be needed to gather information necessary to make the certification decision," to "Time *must* be granted to gather the information necessary to inform the certification *analysis and decision*." (emphasis added).

C. NACA's and NCLC's reasons for proposing the changes:

A motion to strike class allegations at the pleadings stage finds little if any textual basis in the Federal Rules of Civil Procedure. Rule 12(f), which permits a "motion to strike" for "redundant," "impertinent" or "scandalous" matters, says nothing about purportedly unwinnable class allegations. Yet, many defendants misuse this rule to ask courts to preemptively preclude class actions from the outset. That some courts frequently "strike" class action allegations only emboldens defendants to try this tactic. As a counterpart to this approach, and as a means of avoiding the obvious problems with a Rule 12(f) motion, defendants also file motions under Rule 23(c)(1)(A) or Rule 23(d)(1)(D) at the pleading stage. Some even invoke a court's inherent power to strike, thus avoiding the Rules entirely. None of these vehicles are directed at evidence or proof. All require a plaintiff to plead Rule 23 elements with heightened particularity and predict the evidence that normally would shape the class certification decision.

Numerous district courts have denied class certification on the pleadings, and been affirmed, without any "rigorous analysis" of the proofs to be forthcoming from future discovery.[2] Yet, the Supreme Court requires the class *determination* to come after a rigorous analysis of the proofs. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551. The Supreme Court has held that it:

> may be necessary for the court to probe behind the pleadings before coming to rest on the *certification question*,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'… Such an analysis will frequently entail "overlap with the merits of the plaintiff's underlying claim." That is so because the "'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' …

Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (emphasis added).[3]

The courts that strike class action allegations cite in support *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982), because it states that sometimes it is "plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claims." *Id.* However, that statement (which really only addresses typicality and adequacy) does not support denying class certification at the pleading stage, because *Falcon* involved a class certification decision issued after evidence had been collected and presented, *and* it admonished district courts to conduct a rigorous analysis of Rule 23 rather than presuming compliance with Rule 23 based upon the allegations of the complaint. Thus,

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[2] *See, e.g., Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *Kennedy v. Unumprovident Corp.*, 50 F. App'x 354, 355 (9th Cir. 2002); *Ross-Randolph v. Allstate Ins. Co*., 2001 WL 36042162, at *4 (D. Md. May 11, 2001); *Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 832 (N.D. Ill. 2013); *Alqaq v. CitiMortgage, Inc.*, 2014 WL 1689685, at *4–6 (N.D. Ill. Apr. 29, 2014).

[3] Allowing Plaintiffs time to develop their classwide proofs makes sense: "the class definition put forth in the complaint is often a working definition—one that will serve to identify relevant inquiries in pre-certification discovery." *Moore v. Walter Coke, Inc.*, 294 F.R.D. 620, 627 (N.D. Ala. 2013) (citing 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1785.4 at n.1 (3d ed. 2009)); *see also, e.g., Glazer v. Chase Home Fin. LLC, 20*14 U.S. Dist. LEXIS 39297, 15 (N.D. Ohio Mar. 25, 2014); *Chaney v. Crystal Beach Capital, LLC*, 2011 WL 17639, at *2 (M.D. Fla. Jan. 4, 2011); *Motisola Malikha Abdallah v. Coca–Cola Co*., 1999 WL 527835 (N.D. Ga. July 16, 1999). The class definition might get "tweaked as the pre-certification discovery process sheds light on the contours of the potential class." *Moore,* 294 F.R.D. at 627.

striking class action allegations without a rigorous analysis via negative presumptions actually spins *Falcon* off its axis.

Before 2003, Rule 23(c)(1)(A) required that the determination as to whether to certify a class be made "as soon as practicable after commencement of an action." Effective December 1, 2003, this language was amended to require instead that "the court must – ***at an early practicable time*** – determine by order to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A) (emphasis added). According to the Committee Notes, the "as soon as practicable" language was changed because class certification decision-making at the pleadings stage did not reflect prevailing practice and because "[t]ime may be needed to gather information necessary to make the certification decision." Advisory Committee Notes to 2003 Amendments.

In other words, Rule 23(c) was amended expressly to forestall class action decision-making until ***after*** the parties have conducted discovery. *See id.* (noting that it might make sense for a court to rule on dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified.). Unfortunately, courts frequently ignore the Committee Notes on this issue and strike class action allegations at the pleading stage.

Rule 23(d)(1)(D) permits orders that "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D). But this provision expressly concerns the "conduct" of a class action ***after*** a class has been certified under Rule 23, because it is prefaced by the general phrase: "In conducting an action under this rule, the court may issue orders that: . . . (D)." *Id.* Considered in its actual context, subpart (D) merely allows a court to exclude opt-outs, bar uncooperative opt-ins, decertify an existing class, or otherwise cabin an already certified class to precise persons so

all the parties will know who will be bound by a final judgment. By its own terms, Rule 23(d)(1)(D) has no application to a pre-certification decision. It cannot, and should not, authorize a motion to strike class allegations at the pleadings stage.

II. NOTICE

NCLC and NACA endorse the proposed amendments to Subdivision (c)(2) of Rule 23 in order to reflect the changing realities of communication modes in the 21st Century. Rather than limiting the means of giving "the best notice practicable" to class members, courts should have the ability to exercise discretion to select the most appropriate means of giving notice in a case based on the specific facts and circumstances presented.

We particularly appreciate the Committee Note's recognition of the fact that a significant portion of class members in certain cases may have limited or no access to email or the Internet and that, therefore, the courts and counsel should focus on the means of notice most likely to be effective in the case before the court. As consumer advocates who represent low income and elderly consumers who disproportionately do not engage in social media and are less likely to have regular access to email or the Internet, we can confirm the Committee Note's assessment and applaud its sensitivity and understanding.

NCLC and NACA also wish to support the Committee Note's admonition that in determining whether the proposed means of giving notice is appropriate, the court should give careful attention to the content and the format of the notice and, if notice is given under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. No matter how effective a system is in providing access to notice to class members, the notice received is only as good as the comprehension of the message it delivers. As noted by the Committee Note, "the ultimate goal of giving notice is to enable class members to make

informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or make claims." Therefore, "the form of notice *should* be tailored to the class members' anticipated understanding and capabilities."(Emphasis added).

In this vein, NCLC and NACA would like to propose three additional improvements to the Committee Notes expressly addressing concerns we have regarding the form and content of notices.

First, for publication or posting on websites, practitioners increasingly have been turning to more simplified forms of summary notice that state, in plain terms and using easier-to-read graphic fonts and presentation, the nature of the case, who is in the class, what relief is sought, and, for settlement notices, the relief available and the availability of opting out or objecting. One advantage of this approach is that these bolder, more widely published, and possibly smaller notices permit a broader reach. Such "summary notices" also usually provide telephone, website, and physical addresses from which fuller notices—containing all the information required by Rule 23(c)(2)(B) as well as additional detail—can be obtained.

Full notices now often have a summary at the outset of the most salient points (e.g., who is in the class, what relief is sought or being provided by settlement, how claims can be made, who counsel is or what fees they might be requesting, and how counsel can be contacted), with the full details of the settlement (including, for example, who is excluded, what are the verbatim terms of the release, etc.) set forth below.

NCLC and NACA support simplified, plain language disclosure of the salient aspects of a class, including the settlement terms. If anything, the use of a summary notice should be pressed for as a means to ensure wider, not more limited, dissemination. While such determinations invariably depend on the nature of the case, as well as the size and make-up of the class, NCLC

and NACA believe summary notices can be valuable and should be encouraged, provided that they offer enough information to be meaningful.

Certainly, an easy way to obtain a full notice (e.g., a website address) must be provided. Summary notices can either be summaries at the beginning of a "full" notice (as where notice has been provided by direct mail) or two-tiered notices—summary notices combined with available full-form notices. Summaries or summary notices should be considered if doing so can broaden the reach of the notice by permitting more widespread dissemination. A practitioner using a summary notice, however, must ensure that the physical size of the notice remains noticeable enough to catch the attention of class members. When used, the most salient items of information that should be set forth include:

- A clear statement explaining how to tell whether a consumer is a class member.
- The total amount of relief to be granted the class, stated in dollars where the payment is in cash or credit to an account, and the nature and form of the individual relief each class member could obtain.
- How further information can be obtained. More than one means (e.g., phone, fax, email, websites, and mail) of obtaining information should be provided.
- Options available to class members including at least opting out and objecting.
- What the class member would release by not opting-out from the settlement.

Second, NCLC and NACA recommend, where appropriate, that counsel consider soliciting the advice of readability experts (often found at local universities) to recommend simplified ways of expressing the relevant concepts. Even though this may be cost-prohibitive or unnecessary in many cases, it is a matter worth considering, particularly if the parties have reached an impasse on the notice's wording or where a defendant is insisting upon legalistic or

technical wording. At the very least, readability of the notice should be checked using a word processor. Most word processing programs today have a tool that allows the grade level of a document to be checked. Although this is an imprecise measure, it can give class counsel a general understanding of their writing's complexity.

Third, NCLC and NACA recommend considering non-English notice publication, in addition to English notices, where a substantial portion of the class may not be fluent in English. If much or most of the class does not speak English, then the notice must be in the other language.

III. OBJECTORS

NCLC and NACA also endorse the proposed amendment of Subdivision (e)(5)(A) and (B) of Rule 23 relating to Objectors. Although objectionable class action settlements do exist, they are in the significant minority. By protecting the interests of the absent class members, valid objections to bad settlements play an important role in class action practice. Lawyers who learn of a bad settlement (whether through publicity, independently, or because they have a competing class action) may appropriately represent their clients in filing an objection to the settlement. Their goal can be to improve the terms of the settlement or to convince the court to reject the settlement entirely.

Objections can serve many good purposes, but there are objections filed by lawyers who are not sincerely invested in improving a settlement and whose only interest lies in improving their own bank balances. The proposed amendments to Subdivision (e)(5)(A) and (B) of Rule 23 address the issue of these improper objections by providing that any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval, but such an objection must state whether it only applies to the objector, to a specific subset of the class, or

to the entire class, and also must state with specificity the grounds for objection. Such an objection may be withdrawn, but only with the court's approval if it involves a payment or other consideration to an objector or objector's counsel. These rule changes are intended to prevent objectors and their counsel from merely filing boiler plate objections, collecting fees, and disappearing.

In most instances, objectors who add real value to a settlement should be paid on a lodestar basis with a multiplier. NCLC and NACA propose that the Committee Note for Subdivision (e)(5)(B) expressly should indicate, however, that the source of these fees generally should be either the defendant or class counsel. As one court noted, "the cash fund available to the class members should not be reduced by the award of attorney fees to the objectors' counsel and that the benefits to the class, both monetary and non-monetary, should not be reduced in any fashion. In keeping with this conclusion, the attorney fees awarded to objectors are to be paid by Class Counsel and [the defendant] as they may agree, but without diminution in the value afforded to the class." *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 974 (E.D. Tex. 2000); *see also Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 417 (E.D. Wis. 2002) (following *Shaw*). As a corollary, an objector who is no more than a greenmailer should receive nothing at all.

IV. CY PRES

In its November 5-6, 2015, Report the Rule 23 Subcommittee indicated that it had determined that the issue of *cy pres* awards would be taken off the agenda for the present Rule reform efforts. The Subcommittee noted that Section 3.07 of the ALI Principles of Aggregate Litigation addresses the issues of how *cy pres* awards should be handled in cases and that courts are increasingly referring to the ALI formulation in addressing these issues. The Subcommittee

concluded that a rule amendment would not be likely to improve the handling of these issues, and that it could raise the risk of undesirable side effects.

However, the proposed Committee Note to amended Subdivision (e)(1) does make the general observation that because some settlement funds are frequently left unclaimed, it is often important for a settlement agreement to address the use of those funds. The Note then goes on to recommend that "[m]any courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010)."

Overall, NCLC and NACA support the approach taken by the Committee in its note. NCLC and NACA agree that ALI Principles of Aggregate Litigation §3.07 should be used as a model for best practices in *cy pres* awards and that courts should be encouraged to use cy pres awards in circumstances where direct distributions to class members are not viable or feasible. Further discussion and guidance on how to properly handle *cy pres* awards in cases within the contours of § 3.07 may be found in the NACA Standards and Guidelines for Litigating and Settling Consumer Class Actions, 3rd ed., Guideline 7, *Cy Pres* Award, 299 F.R.D. 160, 191-200 (2014).