EVERYTHING YOU WANTED TO KNOW ABOUT THE JPML

Judge Catherine Perry

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 87. District Courts; Venue (Refs & Annos)

28 U.S.C.A. § 1407

§ 1407. Multidistrict litigation

Currentness

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by--

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings

under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

CREDIT(S)

(Added Pub.L. 90-296, § 1, Apr. 29, 1968, 82 Stat. 109; amended Pub.L. 94-435, Title III, § 303, Sept. 30, 1976, 90 Stat. 1396.)

28 U.S.C.A. § 1407, 28 USCA § 1407
Current through P.L. 115-426. Also includes 115-428 to 115-442 and 116-1 to 116-5. Title 26 current through P.L. 116-5.

Everything You Wanted to Know about the JPML

The following written materials may be accessed online at this link:

Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation - https://www.jpml.uscourts.gov/rules-procedures

SELECTION OF LEAD COUNSEL AND STEERING COMMITTEES

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GUIDELINES AND BEST PRACTICES

FOR LARGE AND MASS-TORT MDLS

BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

(SECOND EDITION)

Duke Law School
September 2018

FOREWORD†

The Duke Law Center for Judicial Studies held a series of bench-bar MDL conferences in 2013, 2014, 2015, and 2016. The conferences revealed a growing and large number of cases centralized in a few mass-tort MDLs. These mass-tort MDLs present enormous challenges to transferee judges assigned to manage them. There is little official guidance and no rules specific to the management of mass-tort MDLs, often requiring the transferee judge to develop procedures out of whole cloth. Under the auspices of the Duke Law Judicial Studies Center, which has now become the Bolch Judicial Institute, volunteer judges and practitioners have been examining the various procedures adopted by MDL transferee judges with a view to developing and providing more uniform guidance.

Following a bench-bar conference on May 2-3, 2013, more than thirty-five practitioners, equally balanced between plaintiff and defense lawyers, and judges drafted a report containing standards and best practices governing large and mass-tort MDLs. The Center issued the report on December 19, 2014. The report has been forwarded to every transferee judge assigned a large or mass-tort MDL.

On October 27-28, 2016, the Judicial Studies Center held a bench-bar conference on Emerging Issues in Mass-Tort MDLs. Four teams consisting of thirty practitioners, equally balanced between plaintiff and defense lawyers, and seven judges volunteered to update and add new sections to the 2014 MDL STANDARDS AND BEST PRACTICES, which have been renamed GUIDELINES AND BEST PRACTICES.

Teams were formed, and team leaders selected in early 2017. In February 2017, the teams prepared outlines of new chapters and updates. They submitted drafts in the fall and winter, which were circulated among the team members, who reviewed and revised the drafts in accordance with the comments. The revised drafts were then submitted to seven judges for their comment in early 2018. The teams reviewed the judges' comments and revised their drafts.

The second edition revises and updates the 2014 MDL GUIDELINES AND BEST PRACTICES, adding: (1) new sections to Chapter 1 on the information individual plaintiffs should submit on filing a claim; (2) a new Chapter 3 on lead counsel duties, including guidance on the extent of fiduciary duties owed by the plaintiff steering committee and lead counsel to all plaintiffs; (3) a new Chapter 4 on the role of non-leadership counsel; and (4) a new Chapter 8 on settlement review and claims-processing administration.

The second edition of the MDL GUIDELINES AND BEST PRACTICES is the culmination of a process that began in October 2016. Although the Bolch Judicial Institute retained editorial control, this iterative drafting process provided multiple opportunities for the volunteers on the four teams to confer, suggest edits, and comment on the draft. Substantial revisions were made during the process. Many compromises, affecting matters on which the 30 volunteer contributors hold passionate views, were also reached. But the draft should not be viewed as

representing unanimous agreement, and individual volunteer contributors may not necessarily agree with every recommendation.

The second edition of the MDL GUIDELINES AND BEST PRACTICES is posted on the Bolch Judicial Institute at https://judicialstudies.duke.edu/conferences/publications/.

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The 2018 updated MDL BEST PRACTICES is the work product of more than thirty practitioners and seven federal judges. Eight of the practitioners assumed greater drafting responsibility and served as team leaders, including:

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The feedback and input of the judiciary have been invaluable in identifying best practices, exploring the challenges faced by judges, and the viability of the proposed standards and best practices. The ways in which these standards and best practices have benefitted from the candid assessment of the judiciary cannot be understated. It is with the greatest of thanks that we recognize the contributions of the thirteen judges, who attended the 2016 MDL conference and the seven judges who reviewed early drafts and provided comments and suggestions.

Bolch Judicial Institute
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CHAPTER 2

SELECTION AND APPOINTMENT OF LEADERSHIP

One of the first challenges in presiding over multidistrict litigation with many parties and separate counsel is the appointment of counsel to lead the litigation. Multidistrict litigation involves numerous parties with common or similar interests but with separate counsel. It is necessary to establish a leadership structure for the plaintiffs, and sometimes for the defendants as well, to ensure the effective management of the litigation. The leadership team is responsible for coordinating discovery and other pretrial work in the cases. They develop the proof necessary for trial, draft motions, work with experts, and communicate with the other side and the court. They must be able to manage all aspects of the litigation. Determining the appropriate leadership structure and selecting the right lawyers to fill the positions is one of the first and most important case-management tasks.

Behind these managerial roles lies another role for plaintiffs' leadership: funding the litigation. In large and mass-tort MDLs, this cost can be exceedingly high; for example, in *Vioxx*, the leadership fronted $41 million. Experienced transferee judges often report underestimating the extent to which finances impacted not only the appointment dynamics, but also the litigation process. Because new entrants often cannot fund (or are perceived as unable to fund) the periodic assessments in addition to their own litigation costs, finance can reinforce the repeat-player dynamic prevalent within committee appointments. Concerned by the unintended overhang of plaintiff financing, a number of judges have begun to explore ways in which the appointment process can be tailored to improve not only demographic diversity but also cognitive and skill-set diversity, as well as enhancing the overall quality of representation afforded by the appointed counsel.

This chapter focuses on the staffing and appointment practices that transferee judges have found effective in enhancing the MDL process. The chapter defines its task capaciously, focusing not only upon the appointment selection but the expectations for the MDL leadership, which will set the parameters and structure for the litigation process. As with the other chapters, the primary focus is on large and mass-tort MDLs, in order to provide the transferee judge with the broadest menu of appointment techniques from which to select in deciding what will work for any given MDL, with the expectation that in simpler cases, the transferee judge may simply select a smaller subset of these options.

> **GUIDELINE 2**: In an MDL action with many parties with separate counsel, the transferee judge should establish a leadership structure for the plaintiffs, and sometimes for the defendants, to promote the effective management of the litigation.
>
> BEST PRACTICE 2A: The transferee judge should assess the needs of the litigation in establishing an appropriate leadership structure.

There are many different ways to structure the leadership team; what works for one MDL may be too unwieldy or too streamlined for another. Several factors contribute to the determination of the roles that need to be established and filled by qualified counsel, including

the nature of the claims, the number of cases, and the variety and complexity of interests involved. The goal is to ensure that the litigation will be managed efficiently and effectively without jeopardizing fairness to the parties.[103]

> BEST PRACTICE 2B: In determining the appropriate leadership structure, the type of cases included in the MDL is often the most important consideration.

Sometimes a fairly simple structure, consisting of a lead counsel and a liaison counsel, is all that is required. Consumer, securities fraud, and employment class actions in which the plaintiffs generally assert the same or similar claims often fall into this category.[104] Sometimes the plaintiffs in these types of cases have divergent interests, and separate leadership teams (or at least separate representation on a committee) will be necessary to ensure that the interests of each group are fairly represented.[105] Similarly, antitrust MDLs often include claims on behalf of both direct and indirect purchasers who must be separately represented.[106] When separate leadership structures are required, the transferee judge may decide to appoint counsel who will be responsible for coordinating among the teams to ensure that duplication of effort is minimized.[107]

Mass tort and common disaster litigation tend to be the largest MDLs. Mass-tort litigation can be composed of thousands or even tens of thousands of individual personal-injury lawsuits, third-party payor class actions, and cases brought on behalf of governmental entities. Courts often appoint a single leadership structure for the plaintiffs in these cases, although the committees tend to be larger than in other types of cases. Instead of, or in addition to, lead and liaison counsel, courts sometimes appoint an executive committee, assigning specific responsibilities to each member (such as overall leadership of the case, communication with the court, communication with other plaintiffs' counsel, and coordination with lawyers prosecuting related cases in state court).[108]

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[103] Federal Judicial Center, *MCL* § 10.221 (2004); Federal Judicial Center & National Center for State Courts, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges* § 4 (2011).
[104] *See, e.g.*, Initial Case Management Order, *In re Wells Fargo Wage and Hour Employment Practices Litigation* (No. III), MDL 2266, No. 4:11-md-02266 (S.D. Tex. Feb. 24, 2012) (ECF No. 45); Order, *In re Swisher Hygiene, Inc., Securities and Derivative Litigation*, MDL 2384, No. 3:12-md-2384-GCM (W.D.N.C. Oct. 18, 2012) (ECF No. 34); Order Appointing Interim Co-Lead Class Counsel, *In re 5-Hour Energy Marketing and Sales Practices Litigation*, MDL 2438, No. 2:13-mo-02438-PSG-PLA (C.D. Cal. Nov. 8, 2013) (ECF No. 25).
[105] *See In re Facebook, Inc., IPO Securities & Derivative Litigation*, 288 F.R.D. 26 (S.D.N.Y. 2012); Order No. 2: Adopting of Organization Plan and Appointment of Counsel, *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, MDL 2151, No. 8:10-ml-02151-JVS-FMO (C.D. Cal. May 14, 2010) (ECF No. 169) (appointing separate leadership structures for personal injury and economic loss plaintiffs, and ensuring that both consumers and non-consumers were represented).
[106] *See, e.g.*, Case Management Order No. 2, *In re Aluminum Warehousing Antitrust Litigation*, MDL 2481, No. 1:13-md-02481-KBF (S.D.N.Y. March 6, 2014) (ECF No. 216).
[107] *See* Order for Appointment of Lead and Liaison Counsel and Preliminary Scheduling Order at 1-2, *In re Target Corporation Customer Data Security Breach Litigation*, MDL 2522, No. 0:14-md-02522-PAM (D. Minn. May 15, 2014) (ECF No. 64).
[108] Court Order: Plaintiffs' Steering Committee, *In re Actos (Pioglitazone) Products Liability Litigation*, MDL 2299, 6:11-md-2299-RFD-PJH (W.D. La. Apr. 13, 2012) (ECF No. 560).

Common disaster litigation (like the BP oil spill case) often involves the greatest diversity of interests found in MDLs. The plaintiffs may include private individuals, businesses, emergency responders, and governmental entities, and the claims can vary from personal injury to environmental clean-up to economic losses. A single leadership structure may suffice for these cases as well, although each interest should be represented on a committee.[109]

The bottom line is that there is no one-size-fits-all solution. The challenge lies in balancing the competing goals of adequately staffing and funding the litigation, while ensuring efficiency and controlling costs. The greatest challenge is often to ensure that decisions can be made without delay caused by the need to consult numerous people, while still giving all interested members of the litigation team the opportunity to provide input.

The transferee judge should also keep in mind that leadership needs may change over time. As the case progresses, it may be appropriate to add attorneys to a committee who have been particularly dedicated to the litigation and have contributed to the work on the same level as committee members.[110] It may also become necessary to appoint counsel or committees to serve specific purposes that the judge and parties did not anticipate at the commencement of the litigation. For example, it may become apparent that a proposed class action will have subclasses that require separate representation. If the parties wish to discuss settlement, the judge may decide to appoint lawyers on each side to conduct settlement negotiations, particularly in mass tort or common disaster cases where there are many individual claims and lead counsel need to focus on the ongoing litigation.[111]

> BEST PRACTICE 2C: The transferee judge typically should appoint lead counsel and liaison counsel for the plaintiffs, and often a supporting committee when the litigation is especially large or complex or composed of divergent interests.
>
> BEST PRACTICE 2C(i): In cases involving numerous defendants it may be necessary to appoint a leadership team for the defense as well.

While the responsibilities of the defendants' representatives are normally limited to receiving and distributing information and coordinating positions on non-substantive matters, the appointment of a defendants' liaison counsel or other similar representative is often helpful in simplifying the litigation and expediting motion practice. The role of a defense leadership team in multi-defendant cases is often one of coordination, in contrast to the more substantive and strategic role of plaintiffs' leadership. In many cases, it can be extremely beneficial to have leadership on the defense side, in order to carry out an information-distribution function. This function is often bidirectional, disseminating information to all defendants and providing a single point of contact to coordinate with the court and plaintiffs' counsel about logistics, scheduling, and other organizational matters. While defense leadership can coordinate responses between

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[109] Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 Miss. C. L. Rev. 237, 240-41 (2011).

[110] Second Amended Court Order: Plaintiffs' Steering Committee, *In re Actos (Pioglitazone) Products Liability Litigation*, MDL 2299, 6:11-md-2299-RFD-PJH (W.D. La. June 13, 2013) (ECF No. 2856).

[111] Case Management Order Number 6 (Unified Case Management Plan) at 6-7, *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, MDL 2385, No. 3:12-md-02385-DRH-SCW (S.D. Ill. Oct. 3, 2012) (ECF No. 42).

defendants, streamlining arguments and filings, the leadership does not bind other defendants in their responses.

Although some courts appoint firms to serve in leadership positions, it is usually preferable to appoint individual lawyers who can be held accountable and ensure that the case receives consistent attention of a senior partner, rather than risking an excessive degree of delegation to less experienced attorneys.

> BEST PRACTICE 2C(ii): The transferee judge should designate lead counsel who will act for all parties whom they are appointed to represent and are responsible for the overall management of the litigation. The judge should specify at the outset responsibilities assigned to lead counsel, as well as the structure of the entire leadership team and their respective duties.

Typical responsibilities include working with opposing counsel to develop and implement a litigation plan, initiating and conducting discovery, retaining experts, presenting written and oral argument to the court, directing the work of other plaintiffs' counsel, and engaging in settlement discussions. Lead counsel may also serve as the trial attorneys, or may designate other counsel to serve as the principal attorneys at trial. Depending on the size and complexity of the case, it may be appropriate to appoint more than one individual to serve as lead counsel. At the same time, the number should not be so large that it defeats the purpose of appointing someone to lead the litigation. Appointing a committee to support lead counsel is usually more effective than staffing the litigation with numerous co-lead counsel, which can lead to delays in decision making and unnecessary duplication of effort.

> BEST PRACTICE 2C(iii): Although every case is different, the transferee judge should not appoint more than three attorneys to serve as lead counsel in any matter, in light of the potential for inefficiencies and ineffective decision making.

> BEST PRACTICE 2C(iv): The transferee judge should consider the appointment of liaison counsel to serve an administrative role. If the court appoints a liaison, it should specifically define the roles and duties of the liaison at the outset — including responsibility for communications between the court and other counsel, maintaining records of all orders, filings and discovery, and ensuring that all counsel are apprised of developments in the litigation. An important aspect of the liaison's role is coordinating with and supporting the clerk of court.

Liaison counsel often has offices in the same location as the court, though that is not necessarily a requirement. Appointing as liaison counsel an attorney who has practiced before the transferee judge can be helpful, since the attorney will already be familiar with the local rules, the judge's practices and preferences, and other court-specific procedures. It is rarely necessary to appoint more than one individual to serve as liaison counsel, and it may be possible to appoint a liaison that is recommended by plaintiffs' counsel. If there are numerous defendants, it may be appropriate to appoint a liaison counsel to coordinate and speak for defendants as well.

BEST PRACTICE 2D: The transferee judge should consider establishing a steering committee, executive committee, or management committee, if the litigation involves numerous complex issues, if there is a substantial amount of work to be done, or if the plaintiffs have different interests that require separate representation.

The type, size, and composition of the committee (or committees) will depend on the number and requirements of the cases composing the MDL. In many cases, a committee will be necessary to support lead counsel in prosecuting the case. Committee members can perform many functions, from consulting with lead counsel on overall case strategy to developing and implementing a litigation plan, managing discovery, preparing briefs, and presenting argument to the court. The committee members may represent different interests in the litigation or bring important skills to the table. For a proposed class action, for example, a committee may include counsel who represent the interests of subclasses.

In mass-tort MDL cases it is often helpful to establish multiple committees. An executive committee, if formed, will typically consist of three to five attorneys who work closely with lead counsel on managing the litigation. Limiting the number of lead counsel and executive committee positions helps to ensure that there is a manageable number of individuals whose buy-in is required for key litigation decisions.

In contrast, the plaintiffs' steering committee is far more variable in size depending on the needs of the particular case. In some cases, the judge may decide not to appoint a steering committee, particularly if the case is simple and manageable, to avoid creating too much infrastructure and hindering rather than expediting or improving case management. In other cases ─ particularly those that are complex, have highly divergent individual fact patterns or a number of competing plaintiff typologies, or multiple defendants ─ a steering committee can ensure that adequate litigation resources are available to the plaintiffs.

Plaintiffs' steering committees are often composed of a broader set of attorneys who each focus on specific aspects of the day-to-day litigation, such as discovery, documents, technology, briefing, science, coordination with state litigation, and trial counsel.[112] The court will thus often seek to ensure that the steering committee members collectively bring diverse skill sets and relevant substantive expertise to bear upon the case. But the judge should also recognize that an important function of the steering committee in large and mass-tort MDLs is to finance the litigation. This recognition should shape not only the criteria for selection, but also is increasingly a factor in considering the appropriate size of the committee.

As noted above, the size of the steering committee is highly variable. Many MDLs proceed efficiently with no committee or only a half-dozen committee members. But particularly large and complex mass-tort MDLs may require a larger steering committee to ensure that the plaintiffs are not at a disadvantage in funding pretrial discovery and have

[112] Case Management Order No. 14, *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, MDL 2385, No. 3:12-md-02385-DRH-SCW (S.D. Ill. October 29, 2012) (ECF No. 53); Court Order: Plaintiffs' Steering Committee, *In re Actos (Pioglitazone) Products Liability Litigation*, MDL 2299, 6:11-md-2299-RFD-PJH (W.D. La. Apr. 13, 2012) (ECF No. 560).

sufficient personnel and financial resources to match the defendants. Only in exceptional cases should more than 20 attorneys be appointed to serve on a steering committee, although there are rare cases in which this is necessary and the imposition of an arbitrary limit may have undesirable consequences.

In large and mass-tort MDLs, the various leadership roles can be filled by counsel with different roles in a way that will satisfy all the needs of the litigation. For example, the co-lead counsel may provide the strong administrative and communication skills that are required to manage the litigation, while a steering committee may be composed of attorneys with specific skills and the ability to commit substantial time to the ongoing work of the case. A separate executive committee may include attorneys who can offer essential financial support or who have a significant percentage of the filed cases but will not actively participate in the day-to-day work. In particularly large and complex mass-tort MDLs, it may also be appropriate to establish separate science and discovery committees, and perhaps a law-and-motions committee.[113] Typically, the need for these committees and their staffing are determined by plaintiffs' counsel.

Finally, experienced transferee judges who have managed MDLs with and without state court liaisons have reported that they find that the appointment of a state court liaison greatly improves the MDL process, particularly in complex MDLs with a variety of state court matters. They report that while they post materials on the MDL website to keep state court judges and counsel updated on the MDL's progress and use many of the coordination techniques described in Chapter 4, a state court liaison adds additional value. Typically, one state court liaison is appointed for plaintiffs and one for the defense side. These liaisons are responsible for affirmatively reporting to the transferee judge on the progress of state court litigation, so that the transferee judge hears of updates promptly without having to proactively reach out to the state courts. Even more important for many judges is the role of the liaison in providing an "early warning" about developments in the state court litigation, so that the judge has insight into the personalities and conflicts, and is therefore well positioned to head issues off before they become problems. Beyond this single point of contact, appointing counsel to the MDL committees that have cases in both jurisdictions can provide additional sources of information or adjuncts to the appointed liaisons. (The issues of state-federal coordination are discussed in more detail in Chapter 4.)

> **GUIDELINE 3**: The transferee judge should select lead counsel, liaison counsel, and committee members as soon as practicable after the JPML transfers the litigation.[114]

Because the cases will have already experienced some delay when they arrive in the transferee court, it is important to start the process immediately. There may be motions pending that were filed before the transfer, responses to complaints due, and outstanding discovery requests. Putting a leadership structure in place promptly will allow the plaintiffs to take an

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[113] Case Management Order No. 3, *In re DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, MDL 2197, No. 1:10-md-02197-DAK (N.D. Ohio Jan. 26, 2011).

[114] Judicial Panel on Multidistrict Litigation & Federal Judicial Center, *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges* 2 (2d ed. 2014); *Managing Multidistrict Litigation in Products Liability Cases* §§ 3(b) & 4; *MCL* § 22.62.

organized approach to early case-management tasks and give defense counsel someone to communicate with about open issues.

> BEST PRACTICE 3A: Holding the initial conference at the earliest practicable time after the order transferring cases is issued allows the transferee court to promptly set in motion the procedure for appointment of counsel.[115]

> BEST PRACTICE 3A(i): The initial case-management order should inform counsel that the leadership structure will be discussed at the initial case-management conference and direct them to be prepared to identify case-specific issues that may inform the appropriate structure.[116] Counsel who intend to seek a leadership position should be required to attend.[117]

While attending to the leadership issues early, it is also important that the transferee judge take the time to carefully frame the proceedings, select the most appropriate leadership structure, and set up the necessary institutional support for the case to proceed smoothly. The most successful MDLs will move forward expeditiously, without delay but also without a rush that overlooks proper planning. Judges recognize the balance between needing to quickly get a team in place to move the litigation forward and wanting to have more time to get to know the attorneys and their work product before making the critical decision of which attorneys will lead the litigation.

> BEST PRACTICE 3A(ii): The transferee judge should take steps to ensure a smooth process for administration of the MDL by confirming that the clerk of court is prepared for and capable of handling the possible (indeed likely) influx of filings that follow transfer of the cases by the JPML,[118] and issuing initial orders that address the filing procedures for counsel to follow before the leadership team is appointed.

As noted in the previous chapter, prior to commencing the application process, the court should ensure that the clerk of the court has the resources for and is otherwise prepared for the inundation of filings that accompany the MDL generally and the appointment process in particular. Transferee judges note that courts should consider the extent to which counsel from outside the jurisdiction may be filing, because those attorneys often have issues with electronic filing and login credentials, court-specific filing procedures, and pro hac vice requirements.

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[115] *Managing Multidistrict Litigation in Products Liability Cases* § 3(b).

[116] Preliminary Order on Practice and Procedure Upon Transfer Pursuant to 28 U.S.C. § 1407(a) at 2-3, *In re Monsanto Company Genetically-Engineered Wheat Litigation*, MDL 2473, No. 1:13-md-02473-KHV-KMH (D. Kan. Feb. 3, 2014) (ECF No. 11).

[117] Pretrial Order No. 1 (Practice and Procedure Order Upon Transfer Pursuant to 28 U.S.C. § 1407(a)) at 4, *In re ConAgra Peanut Butter Products Liability Litigation*, MDL 1845, No. 1:07-md-01845-TWT (N.D. Ga. Aug. 10, 2007) (ECF No. 20).

[118] *See generally* Judicial Panel on Multidistrict Litigation & Federal Judicial Center, *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks* (2d ed. 2014).

BEST PRACTICE 3A(iii): At this stage, the transferee judge should consider appointing an interim liaison counsel[119] or encourage counsel to select a proposed liaison counsel prior to the conference, although the formal appointment will be subject to court approval.[120]

The conference gives the transferee judge an opportunity to observe counsel's demeanor and professionalism, get a sense of their leadership qualities, and assess the level of cooperation among counsel. The judge can solicit proposals for the appropriate leadership structure for the litigation and obtain input from counsel about the key substantive and procedural issues that may arise in the course of the litigation, which may impact the type of leadership roles that will be necessary.

One approach some judges have taken is to appoint leadership for a one-year term. While the transferee judge always has the power to add, rescind, or otherwise modify an appointment, a one-year appointment forewarns counsel that if they do not diligently perform their tasks, their appointment will not be renewed. Some judges recommend continuing with annual appointments, while others suggest that after the first year the attorneys' "true colors" have appeared and work habits have developed sufficiently that the enhanced certainty of a standing appointment is preferable.

But others have expressed the view that a longer interim appointment, followed by the usual standing appointment is preferable. Proponents of this approach argue that it takes the judge, and even counsel to a certain extent, months to understand the dynamics within the cases sufficiently well to understand what blocks of plaintiff interests exist. Delaying the appointment process can be helpful in assuring that the various interest groups are each represented. This allows the court to better ensure that not only those structural conflicts requiring separate counsel are represented, but that less serious but equally meaningful conflicts are represented ─ and in turn that any settlement is more likely to fairly and adequately compensate all plaintiffs.

In underscoring these different approaches, the goal is not only to present two potential ways of timing the appointment of counsel, but to identify the underlying normative challenges that transferee judges are attempting to address in their selection. As a result, the hope is that a transferee judge will be able to assess the needs of the particular MDL, including how mature or advanced the cases within the MDL are, and select an appointment structure that in the context of that MDL will maximize the extent to which all plaintiffs have a voice at the table and that appointed counsel are incentivized to offer exemplary representation to those individuals.

[119] Pretrial Order No. 1 at 2, *In re Oral Sodium Phosphate Solution-Based Products Liability Action*, MDL 2066, No. 1:09-SP-80000 (N.D. Ohio July 16, 2009) (ECF No. 12).
[120] Initial Case Management Order at 5-6, *In re Lidoderm Antitrust Litigation*, MDL 2521, No. 3:14-md-2521-WHO (N.D. Cal. Apr. 25, 2014) (ECF No. 21); *Managing Multidistrict Litigation in Products Liability Cases* § 4.

BEST PRACTICE 3B: Following the conference, the transferee judge should issue an order describing the leadership structure, the procedures for counsel to follow if they intend to seek appointment to any of the roles identified in the order, and the criteria that the transferee judge intends to use in selecting counsel to fill the roles.[121]

Historically, private ordering has been the predominant form of appointment and selection, with lawyers agreeing to who should be appointed lead counsel and to committees and presenting a "slate" of lawyers to the court for consideration.[122] However, in recent years, some scholars and many transferee judges have begun to question the results of the private-ordering process.[123] Judges have complained that as leadership appointments have increasingly become the path to substantial common benefit fund awards, the monetary stakes of appointment have generated substantial dysfunction in the incentives of counsel, leading to competitive behaviors that may not result in the appointment of the best possible counsel.

In light of these concerns, many within the MDL community have begun to press for checks by the transferee judges to correct for these systemic misalignments. Many transferee judges ─ and even those who have in the past used the private-ordering process ─ expressed the view that they now see the appointment of counsel as selecting a fiduciary for the class, which will substantially impact the course of the litigation. Thus, while valuing private ordering and the input of the other plaintiffs' attorneys, there is increasing support for the view that the transferee judge should treat the lawyers' self-selection as one of many considerations in selecting the best leadership team possible.

Some courts still prefer that counsel endeavor to organize a leadership structure themselves; this may take the form of a proposed leadership slate for the court's review and approval with the opportunity for objections.[124] But most courts now insist on a competitive process and require individual applications.

Whatever approach the judge chooses, the court's expectations should be made clear early in the process so that counsel understand them. In selecting a selection mechanism and in turn appointing a leadership team, courts should be mindful of the benefits of diversity of all types. In particular, the strong repeat player dynamic that has historically existed reduces fresh outlooks and innovative ideas, and increases pressure to go along with the group and conform, all of which may negatively impact the plaintiffs whose cases are being pursued in the MDL. At the same time, leadership needs repeat players who understand the ropes. Thus a balanced team, with diversity of skills, expertise, prior casework and role, and demographics, should be sought.

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[121] Pretrial Order No. 1 at 12-14, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, MDL 2179, No. 2:10-md-02179-CJB-SS (E.D. La. August 10, 2010) (ECF No. 2).
[122] *See MCL* § 21.272.
[123] Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, N.Y.U. L. REV. (forthcoming 2015) (draft at 25-27), available at http://ssrn.com/abstract=2437853; Jaime Dodge, *[forthcoming Emory cite]*.
[124] *Managing Multidistrict Litigation in Products Liability Cases* § 4(a); *see also* Procedural Order at 3, *In re Neurografix ('360) Patent Litigation*, MDL 2432, No. 13-md-02432-RGS (D. Mass. Apr. 5, 2013) (ECF No. 3).

BEST PRACTICE 3B(i): The transferee judge should set a schedule that will ensure that leadership is in place within three to four months after the creation of the MDL, or even sooner, to avoid unnecessary delay in proceeding with litigation of the case.

BEST PRACTICE 3C: The judge's primary responsibility in the selection process is to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent all plaintiffs, keeping in mind the benefits of diversity of experience, skills, and backgrounds.[125]

BEST PRACTICE 3C(i): The transferee judge should develop a straightforward and efficient process for counsel to apply for appointment. The process should reflect the need to avoid unnecessary divisiveness, while encouraging professionalism and honesty. The description of the application and selection process should be filed in the public docket in a manner that provides timely notice to all who may be interested in applying.

The selection process will require the transferee judge to consider the qualifications of each individual applicant, as well as the litigation needs, the different skills and experience that each of the lawyers seeking appointment will bring to the role, and how the lawyers will complement one another. The goal is to establish a diverse team capable of working together to efficiently manage a highly complex proceeding. Moreover, transferee judges repeatedly suggested that they found that those counsel who lacked ego or the ability to "strut" were often incredibly value team members, able to move the MDL to resolution through a combination of leadership, political savvy, and communication skills.

BEST PRACTICE 3C(ii): Counsel should submit written applications that describe their qualifications to serve in the positions they seek to fill.

The applications do not need to be lengthy, but they should all include the same information to facilitate comparison.[126] For an MDL involving class actions, counsel should address the considerations for appointment of interim class counsel set forth in Federal Rule of Civil Procedure 23(g).[127] If the class action involves federal securities claims, counsel must follow the procedures for the appointment of a lead plaintiff outlined by the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3).

Some courts prefer to use traditional motion practice, with an opening brief, an opposition, and a reply. Some courts make their selections based on single submissions from counsel to streamline the process and avoid ad hominem attacks. Other courts find it helpful for counsel to file short responsive briefs explaining why they should be appointed over other applicants for the same position.

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[125] *MCL* § 10.22.

[126] Professor Samuel Issacharoff & Hon. R. David Proctor, *Selection and Compensation of Counsel in Multi-District Litigation* at 17 (2012 Transferee Judges Conference Oct. 23, 2012) (on file with author).

[127] Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 7-8 (Federal Judicial Center, 3d ed. 2010).

BEST PRACTICE 3C(iii): The transferee judge should direct counsel to identify cases in which they have served in a similar leadership capacity, describe their experience in managing complex litigation and their knowledge of the subject matter, and provide information about the resources they have available to contribute to the litigation.[128]

The transferee judge should strongly consider requiring applicants to identify ongoing professional commitments such as other lead-counsel appointments that will compete for their attention and resources, because some courts have found that prominent attorneys may obtain an appointment and then delegate their principal duties to subordinates. In large and mass-tort MDLs, counsel should offer some background on their clients, including where the clients are located and the law that will govern their claims,[129] and offer a plan for keeping other plaintiffs' counsel updated on developments as the case progresses.

In addition to reviewing the submitted applications, there are many ways for a judge to learn more about the individuals who are vying for appointment. Judicial colleagues ─ and more recently special masters ─ are a valuable source of information for a transferee judge about the competence and professionalism of counsel who have appeared before them.[130] The transferee judge may want to require applicants to provide the names of judges and special masters who are familiar with their work in other MDL cases for this purpose.

BEST PRACTICE 3C(iv): In appropriate cases, the transferee judge should conduct interviews of counsel (on the record during an in-court hearing) that have submitted applications for leadership positions, in order to assess the applicants' demeanor and skills.[131]

The value of viewing counsel in a courtroom setting to see how they comport themselves and relate to each other and court staff, and of allowing the judge to inquire about concerns specific to the litigation, is a relatively contentious subject. Many judges are of the opinion that it is very helpful to see the candidates, particularly those who have not appeared before the court before. They state that the appearance is but one of many datapoints, but an important one. Some attorneys express concern that these appearances favor those attorneys whose specialty is in-court appearances, such as motion practice or trial specialists. But judges who use this approach indicate that they still look to create a team that possesses all of the skills necessary to the litigation, and that the appearance is simply helpful in assessing the in-court skills of those who will be involved in trial or motion practice. For attorneys who work behind the scenes, these judges will still observe their interactions with other counsel, but will also use the opportunity to inquire about particular areas of concern and substantive skills, putting less weight

[128] *MCL* § 22.62.
[129] Order at 2, *In re Actos (Pioglitazone) Products Liability Litigation*, MDL 2299, No. 6:11-md-02299-RFD-PJH (W.D. La. Feb. 13, 2012) (ECF No. 32).
[130] *Ten Steps to Better Case Management* at 2; *see also* Hon. Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 La. L. Rev. 391, 394 (Winter 2014).
[131] Case Management Order Number 1: Initial Conference Order and Procedural Matters at 14, *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, MDL 2385, No. 3:12-md-02385-DRH-SCW (S.D. Ill. Aug. 17, 2012) (ECF No. 4).

on "star-quality." Some transferee judges have also suggested that the in-person interview helps them assess potential new entrants, whether by identifying which new entrants who have applied are ready for a first appointment or by pressing repeat players for information about junior partners who may bring unique skills and diversity to the MDL.

In questioning applicants, many counsel suggest exploring the assertions made by counsel in their application. For example, sometimes counsel are listed on complaints with a large number of other firms in order to pool clients and allow each to appear to have a larger number of cases.

Another common complaint involves counsel who are already serving in a number of other MDLs, raising questions among other plaintiffs' counsel about whether those individuals can "really" be actively involved in the leadership of that many cases ─ or will instead be delegating work to junior partners because they are spread too thin to be heavily involved in each case. This is not to say that there is no value to be added by a "heavyweight"; rather, it is to say that the transferee judge should know what the individual will contribute in order to ensure a properly well-rounded team. It may also be that by asking the question, the judge finds that the apparent conflict does not exist ─ for example, the other cases do not require a significant time commitment (i.e., have settled) or are related cases that raise similar issues or involve the same defendant and counsel (and thus would bring unique value to leadership). The suggestion here is simply that the judge look beyond the face of the application, asking hard questions about the individual's contributions to the team in order to get the most accurate picture possible of the ways the team will come together.

Finally, a number of attorneys also suggested that judges ask more questions about financing. While the ability of an attorney to meet his or her assessment has always been a concern, with new finance mechanisms emerging some attorneys believe that there is a greater need to explore how the attorney will finance the litigation. The concern is not with whether an attorney has a cash reserve or is instead using a credit line, but with mechanisms for funding in which the funder has a voice in the litigation process, the litigation costs, or settlement sign-off. Some attorneys see the potential for the development of an undisclosed principal/agent problem in the years to come.

Some judges also informally accept input from defense counsel since they often face the same plaintiffs' lawyers in multiple cases; however, judges should be appropriately skeptical in assessing defense counsel's opinions. The transferee judge may also appoint lead and liaison counsel first, and then request that they submit a proposal for the membership of any committees the judge has determined will be necessary.[132]

[132] Order No. 4, *In re Mirena IUD Products Liability Litigation*, MDL 2434, No. 7:13-md-02434-CS-LMS (S.D.N.Y. May 22, 2013) (ECF No. 103).

BEST PRACTICE 3C(v): The transferee judge should ensure that the selection process is as transparent as possible by providing a general statement of the goals and considerations that guided the selection.

Transparency in the selection process is essential. There is often intense competition among counsel for appointment. Not only do lawyers have legitimate concerns about whether their clients' interests will be adequately represented and whether the litigation will be handled effectively, there is usually a direct correlation between a leadership position and compensation.[133] Leadership roles also confer prestige and experience, can increase the lawyer's chance of future appointments, and may help attract future clients.[134] Because the attorneys designated will be responsible for representing the interests of numerous parties who did not select them as counsel, articulating the basis for the appointments will help instill confidence in their leadership.

Requiring applicants to file their applications in the public docket, rather than submitting them in camera, will encourage professionalism and honesty and avoid the appearance of unfairness. Sensitive information, such as counsel's ability to assist with financing the litigation, may be submitted in camera. Some courts find that the interest in allowing for candid discourse with the court and avoiding the creation of ill will and hostile competition favor in camera submissions. If the transferee judge is not familiar with the attorneys who are seeking appointment, a hearing will usually be informative.[135] When there is little or no competition, it may be appropriate to make appointments without a hearing. There is no single right approach. The judge need only ensure all interested and qualified attorneys have had an opportunity to apply and that the judge has enough information to make an informed decision.

BEST PRACTICE 3C(vi): Even if counsel are able to agree upon a leadership structure themselves, the transferee judge should establish a procedure for the selected lawyers to submit written applications to ensure that they are qualified to lead the litigation.[136]

Although private ordering among counsel can streamline the selection process, it may be susceptible to abuse. For example, a proposed leadership group may include members who are not fully committed to the litigation but are included because their resumes make the group's application more appealing. Counsel may have also entered into improper arrangements to secure a leadership position.[137] The proposed leadership team may exclude lawyers who would bring useful skills or new perspectives to the litigation. The judge will therefore still need to take an active role in the formal appointment process.[138] Courts have a fundamental obligation to ensure that the proceedings will be fairly and efficiently conducted, regardless of the private arrangements among the parties. Independent review will ensure the integrity of the leadership

[133] Issacharoff & Proctor, *supra*, note 111, at 3.
[134] *Id.* at 4.
[135] *Id.* at 23; *Managing Multidistrict Litigation in Products Liability Cases* § 4(a).
[136] *MCL* § 22.62; *Managing Multidistrict Litigation in Products Liability Cases* § 4(a); Order No. 2, *In re Mirena IUD Products Liability Litigation*, MDL 2434, No. 7:13-md-02434-CS-LMS (S.D.N.Y. May 3, 2013) (ECF No. 65).
[137] *MCL* § 22.62.
[138] *See* Issacharoff & Proctor, *supra* note 111, at 15.

structure and prevent difficulties that could arise later in the litigation if self-appointed counsel become unwilling or unable to perform their duties or incur excessive fees and costs.[139]

> **GUIDELINE 4:** As a general rule, the transferee judge should ensure that the lawyers appointed to the leadership team are effective managers in addition to being conscientious advocates.

In selecting counsel, different factors may be more important depending on the nature of the litigation. Appointing lawyers with diverse perspectives and experience will create a well-rounded and effective team. At least some of the lawyers the transferee judge appoints should have past experience in leading multidistrict litigation. However, lawyers with a history of impressive positions may have spent more time seeking appointments than doing the actual work in the case. Assessing counsels' commitment to the litigation, their past management successes, and their ability to marshal the resources necessary to effectively prosecute the claims are therefore crucial aspects of the selection process.

> BEST PRACTICE 4A: In the order appointing counsel, the transferee judge should clearly define the role and responsibilities of each appointed individual within the leadership structure.

The *Manual for Complex Litigation* provides a sample order that outlines the responsibilities of lead and liaison counsel for the plaintiffs and liaison counsel for the defendants.[140] The sample order includes the appointment of a plaintiffs' steering committee but does not allocate any specific responsibilities to its members, instead directing that the members "shall from time to time consult with plaintiffs' lead and liaison counsel in coordinating plaintiffs' pretrial activities and preparing for trial."[141] Since the role that committee members play can be somewhat fluid depending on the course of the litigation, it is usually appropriate to simply note that the committee will assist lead counsel as directed and leave it to lead counsel to assign specific tasks to committee members as they become necessary.[142]

> BEST PRACTICE 4B: The transferee judge should appoint lead counsel who have excellent management skills.

The need for lead counsel to have excellent management skills cannot be overstated. Lead counsel must be able to manage a large, complex litigation involving numerous parties with potentially divergent interests. Some lawyers are high-profile litigators or experienced trial attorneys but ineffective leaders. It is critical to appoint individuals who have the proven ability to perform the administrative tasks necessary to effectively manage all of the moving parts of the case. They must also be team players who can work cooperatively with colleagues, opposing

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[139] *MCL* § 10.224; *Managing Multidistrict Litigation in Products Liability Cases* § 4(a).
[140] *See MCL* § 40.22 (Sample Order re: Responsibilities of Designated Counsel); *see also id.* at § 10.221 (describing the typical roles of liaison counsel, lead counsel, and committees).
[141] *Id.* § 40.22.
[142] *Id.* § 10.222.

counsel, and the court.[143] Keeping all lawyers involved in the litigation informed of developments in the case can be a demanding task, particularly in large and mass-tort MDLs, and lead and liaison counsel must therefore have excellent communication skills and a strong work ethic.[144]

> BEST PRACTICE 4C: The transferee judge should appoint committee members who have some demonstrated leadership ability because they too must communicate and establish effective working relationships with numerous other lawyers.[145]

Political, personal, and economic differences among counsel can easily disrupt the proceedings.[146]

> BEST PRACTICE 4C(i): It is essential that the transferee judge appoint a leadership team that is composed of lawyers with a demonstrated track record of successfully working with others, building consensus, and amicably managing disagreements. The transferee judge should be mindful of the importance of harmony among the leadership team, and between the leadership team and both the court and opposing counsel.

> BEST PRACTICE 4C(ii): The transferee judge should appoint lead counsel who are sufficiently experienced and respected to manage multidistrict litigation.

Lead counsel should have prior experience in managing multidistrict and other complex litigation or have demonstrated sufficient skill and experience to manage a complex proceeding. While it may be helpful for committee members to also have some multidistrict litigation experience, they may have other skills or experience that are equally valuable to the litigation, such as class-action expertise, prior litigation of the same claims, experience with federal practice and procedure, electronic discovery, or brief-writing skills.[147] Each case requires different talents, and new attorneys may bring fresh perspectives to the litigation.[148]

> BEST PRACTICE 4C(iii): The transferee judge may take into account whether counsel applying for leadership roles have worked together in other cases, their ability to collaborate in the past, divide work, avoid duplication, and manage costs.

The selection of lawyers who have worked together previously may be desirable, in that they have already developed a working relationship and are both to a certain extent vouching for one another. Moreover, they may have already developed certain systems for handling workflow and comparative advantages that will help expedite the case relative to a leadership committee working together for the first time. Judges should also be attuned to the potential for negative repeat player dynamics to develop, however. In considering an application by counsel who have

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[143] Duval, *supra* note 115, at 392.
[144] *Id.* at 394.
[145] *MCL* § 10.21.
[146] *Ten Steps to Better Case Management* at 3.
[147] Issacharoff & Proctor, *supra* note 111, at 10, 24.
[148] *Id.* at 24; *Managing Multidistrict Litigation in Products Liability Cases* § 4(a); *see also* Duval, *supra* note 115, at 392-93.

previously worked together, the judge may wish to solicit the input of previous MDL judges the proposed counsel appeared before. The judge should also consider the degree to which each of the counsel has individually been involved in the case in a meaningful way, as well as the risk they will form a coalition that minimizes the input or assignments given to other attorneys, or otherwise wield power in a way that is not most favorable to the plaintiffs as a whole or to other plaintiffs' lawyers. Counsel may also have developed personal and professional conflicts and antagonisms with other lawyers that would compromise their abilities to effectively manage or contribute to the present litigation, which should be considered in selection.[149]

> BEST PRACTICE 4D: The transferee judge should appoint counsel who have the commitment and resources to effectively serve in the leadership role for which they are selected. The judge should confirm that the leadership team as a whole will be able to effectively handle the demands of the litigation.[150]

> BEST PRACTICE 4D(i): The transferee judge should recognize the practical reality that the leadership team may need to finance the litigation but should not allow it to overshadow the need to appoint a functional and diverse team.

In many MDLs the leadership team bears the financial burden of funding the litigation. This burden can be significant in cases that take several years to reach trial or resolution or that involve a great deal of expert work. Financial resources should not be the primary reason for this decision, however.

> BEST PRACTICE 4D(ii): In making its selection decision, the transferee judge should consider the other demands on the applicants' time, including the number of other MDLs in which they are serving in leadership positions.

Multidistrict litigation requires consistent and dedicated oversight and management, and those serving in leadership roles must be able and willing to make the litigation a priority throughout the course of the proceedings. While some lawyers have many other lawyers and staff members available in their firms, that fact alone does not ensure that they will be able to devote the necessary time and energy to the litigation. Even lawyers with significant resources at their disposal can overextend themselves.

> BEST PRACTICE 4D(iii): The transferee judge should consider the number, type, and nature of the applicant's cases in mass tort and common disaster litigation.

Although, as a practical matter, it may be difficult to accurately ascertain the strength of the applicant's cases early in the litigation, lawyers with cases of significant value (whether because of the number, type, or quality of cases) will have a significant incentive to prosecute the litigation as vigorously as possible. The transferee judge may also consider the location of the applicant's clients because creating a leadership group that represents clients with claims in a variety of states will ensure that the differing interests are adequately represented and that unique state law issues are being given the requisite attention. Caution should be exercised when

[149] *MCL* § 10.224.
[150] Issacharoff & Proctor, *supra* note 111, at 12.

assessing this factor, however, as it could incentivize lawyers to prematurely file cases in multiple jurisdictions.[151] Also, the most experienced and effective lawyers may not have the largest number of cases.

> BEST PRACTICE 4D(iv): The transferee judge should inquire as to whether an applicant has a significant number of cases pending in related state litigation and the applicant's views about the effective coordination of those cases with the MDL proceedings.

Substantial state and federal cases have raised a concern for some judges that the applicant will have to split its attention and resources between the federal and state proceedings. But there are advantages as well, which transferee judges at times underestimate. For example, an applicant with a number of state cases could be a good candidate to serve as a liaison with the state litigation or on a settlement committee. Thus, the transferee judge should inquire about the nature and extent of the counsel's state litigation commitments and counsel's view on the effective coordination of the state and federal proceedings, then make an individualized assessment about whether the attorneys' participation will aid or detract from the MDL proceeding.

> BEST PRACTICE 4E: The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case.[152]

Mass-tort MDL cases affect a large and diverse group of people, and ensuring diversity in the leadership of the cases will enhance public trust in the courts and will improve the likelihood of consideration of diverse ideas and perspectives that MDLs require. Litigants and the civil justice system benefit from the diversity of leadership.[153] Indeed, the same way that diversity improves companies' bottom lines, litigants and the civil justice system benefit from diversity of leadership.[154] Yet historically, women and minority lawyers have not been appointed to leadership positions at rates proportionate to their representation in the plaintiffs' bar generally. It cannot be said that there are not enough talented individuals with the education, background and experience to effectively lead MDL litigation to permit greater diversity.[155]

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[151] *Id.* at 18; *see also* Duval, *supra* note 115, at 393-94.
[152] *See* Duval, *supra* note 115, at 393.
[153] *See, e.g.*, Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCIENTIFIC AMERICAN (Sept. 16, 2014), available at: http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/.
[154] *See, e.g.*, Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCIENTIFIC AMERICAN (Sept. 16, 2014) available at: http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/.
[155] *See, generally*, Jaime Dodge, *Facilitating Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. ___ (2014) (noting the "deep bench" of qualified, MDL attorneys but presenting empirical data showing a continuing gender gap in appointments); *see also* Elizabeth J. Cabraser, *Where Are All the Women in the Courtroom*?, Feb. 28, 2014, available at http://www.liefcabraser.com/blog/2014/02/where-are-all-the-women-in-the-courtroom.shtml (noting anecdotally a persistent gender gap in representation, despite outstanding outcomes obtained by female attorneys in recent MDL cases).

Repeat player dynamics continue to persist, restricting diversity across MDL leadership.[156] Research shows that having a mix of experienced and new players enhances creativity and innovation, leads to better decisionmaking and problem solving, and promotes discussion of novel concepts raised by those who historically have not been in leadership.[157]

Whatever application process is used, the court should bear in mind the value of diversity of all types as a component of obtaining the best possible representation for plaintiffs. Judges should seek to appoint a diverse group, with respect to not only prior experience and skills, but also gender, race and national origin, age, and sexual orientation. Counsel may in turn consider this in deciding not only which individuals from the firm should seek appointment, but also ─ to the extent slates are still utilized ─ in selecting the slate.

In addition to demographic diversity, the judge should be mindful of creating a team with diversity of experience, balancing the benefits of selecting leadership members who have worked well together in the past with the benefits of having a leadership team that brings different experiences that can be brought to bear in the litigation. The judge should also seek to ensure a variety of skill sets within the leadership team and the need for heightened financial resources in the executive committee.

Given the lack of commonality requirements in MDLs that are not class actions, substantially different claims may all be included in the same MDL. In these cases, particularly when there are significant differences among identifiable groups of plaintiffs, the judge should ensure that the leadership is comprised of attorneys that reflect these variations in claims.[158] In multidistrict litigation that is likely to involve the application of multiple states' laws, geographic diversity may be an important consideration as well.

By taking early control of the process through which counsel are appointed to leadership positions and clearly communicating the criteria for appointment, the court can ensure that composition of the plaintiffs' leadership team reflects the needs of the case and the available talent from a diverse pool. The court should ensure that slates or, later in the litigation, formation of committees or allocation of work assignments, do not lead to the exclusion of attorneys who bring valuable skills, resources, or perspectives to the litigation.

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[156] Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, N.Y.U. L. REV. (forthcoming 2015) (draft at 25-27), available at http://ssrn.com/abstract=2437853 presenting empirical study of repeat players in MDLs and noting gender gap within those repeat players); Jaime Dodge, *Facilitating Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. ___ (2014) (presenting empirical data on PEC, PSC, and defense-side appointments, and noting a persistent but narrowing gender gap).

[157] Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, N.Y.U. L. REV. (forthcoming 2015) (draft at 25-27), available at http://ssrn.com/abstract=2437853.

[158] See generally ALI, *Principles of the Law of Aggregate Litigation*, section 2.07 (describing structural conflicts necessitating judicial intervention). *See also* Roger H. Transgrud, *Aggregate Litigation Reconsidered*, 79 GEORGE WASHINGTON L. REV. 293, 303-05 (summarizing debate around structural conflicts of interest between plaintiffs).

BEST PRACTICE 4F: Attorneys seeking to serve in leadership positions may have entered into financial arrangements that could raise conflicts of interest. The transferee judge should guard against the possible negative implications of these types of agreements among counsel.

Side agreements regarding leadership positions or the apportionment of fees can affect how appointed counsel conduct themselves during the litigation and the positions they take.[159] Before appointing counsel to a leadership role, the transferee judge may want to direct the applicants to disclose any financial arrangements they have with other counsel to ensure that the appointments are appropriate and will not give rise to conflicts of interest or otherwise negatively impact the litigation.[160]

BEST PRACTICE 4G: The transferee judge should create a process at the outset of the case for the contemporaneous submission and review of all counsels' time and expenses.

Periodic review of time records will allow lead counsel and the transferee judge to monitor the cost of the litigation, identify and eliminate unreasonable billing practices, and, if necessary, establish a budget for the litigation.[161] The time records should include descriptions of the work performed, the hourly billing rate for each attorney and staff member, and any expenses incurred.[162] The transferee judge can either direct lead counsel to submit a proposed process for monitoring and approving time records and expenses or outline a procedure for counsel to follow.[163] The court may choose to task lead counsel, liaison counsel, or a designated committee member with collecting and reviewing the time records for all counsel on a monthly or quarterly basis. [164]

In large and mass-tort MDLs, some courts find it helpful to appoint a CPA early in the litigation to assist the committee with tracking fees and costs,[165] while other courts in large-scale MDL cases appoint a special master or magistrate judge to the role. Doing so helps to ensure that lawyers who are submitting fees and costs use an agreed-upon submission process and remain updated on the financial picture of the litigation and the standards used for approving fees and costs. If the fees and expenses are being approved or disapproved rather than merely

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[159] *MCL* §§ 10.224, 22.62; *see also In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 70-76 (E.D. Pa. 1983) (describing agreements to influence the organizational structure of the leadership team that resulted in rampant inefficiency and overbilling), *aff'd in part, rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

[160] Issacharoff & Proctor, *supra* note 111, at 16; *see also* Order Setting Initial Conference at 11, *In re Nexium (Esomeprazole) Products Liability Litigation*, MDL 2404, No. 2:12-ml-02404-DSF-SS (C.D. Cal. Jan. 23, 2013) (ECF No. 4) (requiring "full disclosure of all agreements and understandings between or among counsel (whether formal or informal, documented and undocumented" to "consider whether such arrangements are fair, reasonable, and efficient").

[161] *MCL* § 14.214.

[162] Pretrial Order No. 9, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, MDL 2179, No. 2:10-md-02179-CJB-SS (E.D. La. Oct. 8, 2010) (ECF No. 508).

[163] *See id.* at 2-3.

[164] *MCL* § 40.23 (Sample Order re: Attorneys' Time and Expense Records).

[165] Case Management Order No. 10 Appointing Accounting Firm, *In re Effexor (Venlafaxine Hydrochloride) Products Liability Litigation*, MDL 2458, No. 2:13-md-02458-CMR (E.D. Pa. June 4, 2014) (ECF No. 112).

collected and reviewed, the court may also want to incorporate a secondary review by a special master or magistrate judge to ensure fairness. Many courts require counsel to submit the time records or reports summarizing the fees and expenses to the court on a periodic basis, though it is important to guard against the communication of litigation strategy to the court or defense counsel. The *Manual for Complex Litigation* provides a sample order.[166]

> BEST PRACTICE 4H: In large and mass-tort MDLs, the transferee judge should encourage the leadership team to provide work for the common benefit of the cases to other attorneys who are qualified and available to perform the work, unless doing so would create inefficiency in the prosecution of the claims. The transferee judge should inform the leadership team at the outset if it does not want them to assign work to other counsel.

In most cases, courts expressly authorize other counsel to perform work on the case so long as the work has been assigned and is supervised by lead counsel. Even though they are not part of the leadership structure, additional plaintiffs' counsel can bring different and necessary skills and experience to the litigation and provide the support the leadership team needs to accomplish all the required tasks in the case. At the same time, lead counsel must ensure that distributing work does not lead to inefficiency and unnecessary expense. The number of attorneys participating should not be disproportionate to the needs of the case.

> *Best Practice* 4H(i): The transferee judge should inform the leadership team that the roles and primary responsibilities of lead counsel, liaison counsel, and committee members should not be delegated to other attorneys without prior permission of the court.

Many courts include a provision in the order appointing counsel instructing that leadership appointments are of a personal nature and that other lawyers, including those in the appointed lawyers' law firms, may not perform the key functions assigned to the appointed lawyers without court approval.[167] It is appropriate for the members of the leadership team to draw on the skills and experience of others in their firm in performing certain aspects of their roles, and they may and should delegate some responsibility for the day-to-day tasks to their colleagues. These tasks may include conducting or overseeing facets of offensive or defensive discovery, performing legal research, drafting motions, and working with experts. The appointed attorney must, however, remain ultimately responsible for and participate actively in the ongoing prosecution of the case, direct strategy, and communicate and coordinate with the other members of the leadership team.

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[166] *MCL* § 40.23.

[167] Case Management Order No. 6 at 3, *In re Effexor (Venlafaxine Hydrochloride) Products Liability Litigation*, MDL 2458, No. 2:13-md-02458-CMR (E.D. Pa. Oct. 31, 2013) (ECF No. 33).

BEST PRACTICE 4I: The transferee judge should direct the leadership team to implement a process for communicating key events, deadlines, and other important information to all plaintiffs' counsel.

The leadership team is responsible for keeping all counsel apprised of developments in the litigation. The judge may want to include a process for doing so in a case management order to ensure that all counsel are aware of the procedures that have been adopted. In smaller MDLs the process can be informal, but in large and mass-tort MDLs, in particular, a more formal process is usually necessary. The litigation team may assign the responsibility for communicating updates to liaison counsel or to a particular committee member, or it may assign each committee member a group of attorneys to keep updated.

BEST PRACTICE 4J: The transferee judge should create a process for receiving regular input from the leadership team and ensuring that the litigation is progressing in an effective and efficient manner.

Many courts hold regularly scheduled status conferences for this purpose, often requiring the members of the leadership team to attend, including trial counsel once trial is imminent or underway.[168] The judge may want to instruct counsel for both sides to meet in advance of the conference and submit an agenda and status conference report a few days before the conference.[169] The conferences will allow the judge to keep track of discovery, motion practice, and any unexpected developments and ensure that the litigation is not subject to unnecessary delays.[170] The judge will also be able to confirm that the leadership structure is working properly and assess whether any new members should be appointed.

Holding these conferences in open court and having a court reporter present to record scheduling changes or substantive discussions and rulings will promote transparency. Some courts allow counsel that are not part of the leadership team to participate by telephone, using a teleconference system that restricts participation to those who have obtained preapproval to speak. Sometimes informal off-the-record conferences are more productive, and one option is to combine the two by holding a short off-the-record meeting with lead and liaison counsel before the monthly conference in open court.[171] The transferee judge may also wish to allow for a "blind" (but not anonymous) process for providing written comments, perhaps initially screened by a special master or magistrate judge before bringing any issues and possible changes to the court's attention.

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[168] *Managing Multidistrict Litigation in Products Liability Cases* § 3(b); *see also In re Vioxx*, 760 F. Supp. 2d at 643 (noting that the court held monthly status conferences in open court and posted notices and transcripts of the conferences on a website dedicated to the litigation).

[169] Managing Multidistrict Litigation in Products Liability Cases § 3(b); *see also* Case Management Order No. 1 at 10, *In re Atlas Roofing Corporation Chalet Shingle Products Liability Litigation*, MDL 2495, No. 1:13-md-02495-TWT (N.D. Ga. Jan. 16, 2014) (ECF No. 15).

[170] Duval, *supra* note 115, at 394-95.

[171] *Managing Multidistrict Litigation in Products Liability Cases* § 3(b).

BEST PRACTICE 4K: The transferee judge should not hesitate to reconstitute the leadership team if it becomes necessary.

The transferee judge should make sure that the appointed lawyers are the ones doing the work, that they are giving appropriate consideration to managing the case efficiently, and that they are using fair and reasonable methods for assigning and assimilating work.[172] Some courts appoint members of the leadership team for limited terms, requiring them to reapply, along with any new applicants, on an annual basis.[173] This approach helps to ensure that they continue to fulfill their duties and offers an established procedure for replacing those who do not.[174] The transferee judge may also want to require lawyers seeking reappointment to provide their time records for their work on the case and identify the specific tasks they have performed over the prior year.[175] Requiring counsel to reapply on an annual basis may be more disruptive than beneficial in some cases, and other procedures, like holding regular status conferences, can be implemented to achieve the same accountability. By staying closely attuned to the progress of the litigation, the judge will be able to address problems as they arise.

[172] Issacharoff & Proctor, *supra* note 111, at 14, 15.
[173] *Managing Multidistrict Litigation in Products Liability Cases* § 4(a); *see also* Pretrial Order No. 8 at 2, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, MDL 2179, No. 2:10-md-02179-CJB-SS (E.D. La. Oct. 8, 2010) (ECF No. 506).
[174] Issacharoff & Proctor, *supra* note 111, at 14.
[175] Duval, *supra* note 115, at 393; *see also* Case Management Order Number 4: Appointing Plaintiffs' Leadership Positions at 3-4, *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, MDL 2385, No. 3:12-md-02385-DRH-SCW (S.D. Ill. Sept. 27, 2012) (ECF No. 36).

CHAPTER 3

LEAD COUNSEL DUTIES

A court should appoint lead counsel, liaison counsel, and plaintiffs' executive or steering committees to perform certain functions on behalf of all plaintiffs in an MDL or other similar complex, coordinated, or consolidated proceeding consistent with *Best Practice* 2D. The court must specify the existence, nature, and scope of duties that may be owed by such appointed counsel to plaintiffs in the litigation, including plaintiffs who are counsel's retained clients.

> **GUIDELINE 5:** Plaintiffs' lead counsel in an MDL does not have a fiduciary relationship with all plaintiffs in the case, notwithstanding a perception sometimes expressed to the contrary.

Despite contrary statements, the better view is that the authority of lead counsel, including liaison counsel and plaintiffs' executive or steering committees' members in an MDL, emanates solely from the court. MDL leadership appointments are distinguished from the typical attorney-client situation, in which the lawyer's authority arises from a formal retainer agreement between the attorney and the plaintiff.

Although reasonable attorney/client agreements may limit the scope of the lawyer's responsibility, it is ordinarily the case that the lawyer will undertake any and all actions reasonably necessary to achieve the desired results and objectives of the litigation. By contrast, in an MDL court-appointed counsel situation, lead counsel's authority—and concomitant responsibility—is often defined not in terms of the ultimate goals sought by plaintiffs, or by the law governing attorney-client relationships but only in terms of the procedural responsibilities conferred by the MDL court. These steps are generally set forth in an appointment order, which describes the services that lead counsel are asked and directed to perform.

> **GUIDELINE 6:** Lead counsel owes an obligation to the court to comply with all directions set out in the court's appointment order and must resolve any conflicts with obligations owed to counsel's retained clients that might otherwise interfere with lead counsel's ability to carry out the court's directions.

Ultimately, appointment of lead counsel protects the interests of the MDL plaintiffs as a whole. The primary purpose of counsels' role is to further the interests of judicial efficiency and economy for the collective benefit of those involved in the MDL. To the extent that each plaintiff has particular facts creating divergent interests, such plaintiffs are being simultaneously represented by privately-retained counsel, who remain obligated to protect their own clients' interests, diverse or not, as in any other case.[176]

[176] Retention of separate counsel by individual plaintiffs is an important distinction between a class action and an MDL coordinated or consolidated proceeding. The class action device generally presumes that the absent class members will not have their own independent economically viable claims and are therefore made parties to the litigation only by virtue of the class certification order, without individual representation. In class actions, the only attorneys representing absent plaintiffs' interests are Class Counsel.

Therefore, to the extent that lead counsel owes a duty or other obligation to plaintiffs whom they do not formally represent, such duties are: (1) limited to the specific actions that lead counsel is court appointed and authorized to undertake; and (2) owed, not to any one individual plaintiff, but to the common and collective interests of the plaintiffs as a whole.

> BEST PRACTICE 6A: The court should delineate in its appointment order the responsibilities of lead counsel in sufficient detail for counsel to advise individually-retained clients of the duty owed to the court, which is superior to any duty owed to the individually-retained client.

Appointed counsel can play various roles, including "lead counsel," "liaison counsel," "plaintiff steering committee member," and "plaintiff's executive committee member." Each position has different responsibilities, which may impact the rights of individual plaintiff clients of the lead counsel in the MDL.

In accepting appointment, lead counsel assumes the responsibility to address and resolve any potential conflicts with their individually-retained clients. Lead counsel must meaningfully disclose to their clients how their appointment as lead counsel will impact the clients' interests. Because decisions of lead counsel take priority over the interests of an individual client, it is essential that the court's appointment order fully inform counsel of what the court expects of counsel so that counsel can advise their clients of potential issues consistent with BEST PRACTICE 2C(ii).

A lawyer's appointment as lead counsel does not excuse any conflict of interest as to his or her own clients that would otherwise be impermissible or noncompliant with the relevant rules of professional conduct and legal obligations of attorneys to their clients. Lead counsel is responsible for ensuring that obligations to the court under the appointment order can be simultaneously discharged with obligations to individually-retained clients.

> BEST PRACTICE 6B: Lead counsel has a duty to perform functions affecting all plaintiffs in an MDL in a fair, honest, competent, reasonable, and responsible way.

Lead counsel has a duty to perform appointed functions in a fair, honest, competent, reasonable, and responsible way, but there is no "fiduciary" relationship with all plaintiffs in the traditional sense. The origin and nature of the relationship between lead counsel and MDL plaintiffs is judicially created, and thus differs in significant respects from common-law fiduciary relationships of agency or trust. Imposition of strict fiduciary standards to an entire MDL would be extremely burdensome for lead counsel and the court to adhere to and enforce.

Under the common law, an agency relationship is generally consensual, whereby the principal retains the right to direct and control the agent's actions, as well as power to terminate the agency. An MDL does not possess these hallmarks of traditional agency. Except for lead counsel's individually-retained clients, no underlying offer and acceptance of power of attorney or agency exists between such appointed counsel and other MDL plaintiffs. Such a relationship

is unnecessary, and would likely conflict with, that between each litigant and his or her own privately-retained attorney.

Lead counsel is ordinarily left to their good judgment and discretion in carrying out assigned tasks, and is not subject to the instruction or control of one or more of the MDL plaintiffs or their counsel. Nor does any single plaintiff, or the plaintiffs collectively, have the power to terminate lead counsel's authority to act. Only the court can alter or rescind the appointment.

Unlike privately-retained counsel, who assume as to their own clients a fiduciary relationship of trust concerning deposits, advances, and settlement proceeds, lead counsel in the typical MDL will rarely be in possession or control of plaintiff funds or other property. This remains true relative to lead counsel's litigation costs and expenses. When appointed counsel advances or incurs expenses for the common benefit of plaintiffs, appointed counsel are, at that point, simply spending their own money. Only when lead counsel seeks reimbursement is a claim made against any plaintiff funds — and such claim are almost invariably subject to court approval. MDL settlement funds are generally placed into a Qualified Settlement Fund, with an independent escrow agent, whereas most judgment or settlement proceeds are deposited into the attorney's trust account for subsequent accounting and distribution.

Finally, a strict traditional common-law duty of loyalty could not practically be imposed upon lead counsel. A fiduciary duty to hundreds or thousands (or more) of MDL plaintiffs – all with their own counsel − would create an endless series of inquiries and disputes over the extent to which potential or actual "conflicts" might exist between lead counsel, his or her retained clients and, on the other hand, every other plaintiff in the MDL. Such disputes would undermine, if not eliminate entirely, the MDL-related efficiencies and economies that justified creating the lead counsel position in the first place. A strong lead counsel role is also necessary to avoid depriving plaintiffs as a whole of the most knowledgeable, skilled, and experienced counsel and by "balkanizing" the plaintiffs into so many sub-groups that effective organization would be impossible.

> **GUIDELINE 7:** Lead counsel should not disclose information provided under a condition of confidentiality, including settlement discussions subject to confidentiality conditions, to plaintiffs or their retained counsel.

As with the duty of loyalty, it would be impractical and unwise to require lead counsel to reveal sensitive strategic concerns, confidential settlement negotiations, and other information provided under a condition of confidentiality to all plaintiffs in the litigation (or their counsel).The *Manual for Complex Litigation* explicitly recommends that lead counsel "use their judgment" in advising MDL plaintiffs and their attorneys of progress of the litigation, as "too much communication [of confidential information] may defeat the objectives of efficiency and economy." Nevertheless, lead counsel has an obligation to regularly communicate with non-lead counsel as to developments in the MDL so that non-lead counsel are properly informed and can effectively represent their respective clients.

Informational needs in complex multi-plaintiff litigation differ from single-party litigation, in at least two respects. First, in ordinary litigation, the attorney is retained to act as the plaintiff's agent, and whatever information acquired in the course of the representation "belongs" to the client. In an MDL, by contrast, lead counsel acquires information not as any particular plaintiff's agent, but because the court has directed or authorized the attorney to undertake a certain function.

Second, in a typical case, almost always the client has no interest or incentive to reveal attorney-client privileged information. An individual plaintiff divulging such confidences also does not hurt others. In an MDL, by contrast, individual litigants — and their privately-retained counsel — often, regardless of good or bad faith, perceive some advantage to themselves or a particular sub-group of plaintiffs in disseminating information more broadly. Such information, if learned by MDL defendants, can easily prejudice plaintiffs' overall position.

Individual MDL plaintiffs, or their privately-retained counsel, frequently ask lead counsel for periodic status reports, especially disclosure of settlement negotiations. Defendants, however, typically demand confidentiality for such discussions, and will discontinue the negotiations in the event of a breach. Until a settlement is actually reached, the value of such information to individual plaintiffs is of limited utility, whereas the risks and consequences of compromise are considerable and potentially severe. All settlements ultimately negotiated by lead counsel require consent of the settling plaintiffs to be binding, and such consent will require full and transparent notice and other disclosure – but only after the negotiators have reached a deal.

When settlement confidences are compromised, for whatever reason, the consequences extend beyond the plaintiff or lawyer who divulged the information to other plaintiffs with cases pending in the litigation. While different circumstances warrant different levels of disclosure to plaintiffs and their privately-retained counsel so that they can determine whether to participate, pre-agreement disclosure should not be unlimited or ongoing, given the prejudicial nature of unauthorized disclosure to the very plaintiffs whose collective interests lead counsel was appointed by the court to advance.

Deliberate withholding litigation information from plaintiffs and their retained counsel, including plaintiffs who are lead counsel's clients, must be carefully circumscribed. Court orders should specify such circumstances. Lead counsel cannot unfairly exploit their interests under a cloak of confidentiality. Thus, all plaintiffs should receive equal notice of cut-off date for cases for settlement inclusion, and lead counsel may not advantage their personal clients.

> **GUIDELINE 8:** Absent a compelling reason, lead counsel should not disclose confidential information, including confidential settlement discussions, to their own individually-retained clients.

Both traditional fiduciary standards and professional rules of conduct recognize exceptions to the general duties of disclosure if such revelations would violate a "superior duty" owed to another. Lead counsel is generally not obligated to share — and, for the reasons outlined above, generally should refrain from sharing — confidential and sensitive information gained by

virtue of their court-appointed position with even privately-retained clients, absent some compelling reason to do so.

Lead counsel is not privy to information received in their court-appointed role as the representative of their own clients. Instead, the court has placed lead counsel in that role; a role that is not intended to advance the interests of lead counsel's clients. Lead counsel serves the collective interests of all plaintiffs, and must prosecute and protect the common and collective interests of plaintiffs as a whole.

> **GUIDELINE 9:** Lead counsel must disclose to individually-retained clients their role as lead counsel.

A lawyer is barred not only from representing interests that are adverse to a client's interests but also, under some state ethical rules, from representing a client if the lawyer's professional judgment on the client's behalf might be adversely affected by the lawyer's own personal interests. Both traditional fiduciary responsibility and the professional rules of conduct impose affirmative obligations to inform clients about significant developments or decisions affecting their interests, as well as a general duty of full disclosure regarding anything related to the representation, when asked.

> BEST PRACTICE 9A: As soon as possible after appointment, lead counsel should advise individually-retained clients how the appointment may implicate the clients' interests, including participation in decision-making dealing with selection of bellwether trials, allocation of common-benefit funds, litigation management strategy, and settlement negotiations.

Lead counsel's involvement in selecting bellwether trials, allocating common-benefit funds, and making general strategic-litigation management and settlement decisions, may implicate the interests of lead counsel's individually-retained clients. Lead counsel must advise their own clients that in making these decisions, their duty to the court to act for the common and collective interest of all plaintiffs will come first.

Lead counsel must fully and meaningfully inform individually-retained clients of the implications of each of these decisions as soon as possible, so that the client can make an informed decision whether to continue the representation. For example, if expenses incurred in presenting a bellwether trial are treated as shared expenses to be paid from the common benefit fund, lead counsel should inform clients of the possible allocation.

Lead counsel should explain if the value of individual cases can be maximized in an MDL, to reduce expenses, including expenses of the individually-retained client, that would otherwise lower a net recovery in any settlement. Disclosure should also explain that neither lead counsel, nor any individual plaintiff's counsel, can compel the defendant to negotiate "globally" with all similarly-situated, or all, plaintiffs on a uniform or transparent basis. Individually-retained clients should also be told that lead counsel cannot prevent a defendant from offering favorable "inventory" settlements to some but not all parties, from making offers to bellwether or

test plaintiffs whose cases are set for trial, or from otherwise making offers or refusing to make offers to any one or more individual plaintiffs or plaintiff's counsel.

> BEST PRACTICE 9B: When considering an inventory or global settlement, lead counsel should fully inform individually-retained clients of the implications of the lead counsel appointment.

When lead counsel negotiate an individual settlement for their own clients, or a multi-plaintiff proposed settlement on behalf of their own clients and other plaintiffs in the MDL, lead counsel's duties to their privately-retained clients can conflict with the requirements of their lead counsel role.

A proposed settlement negotiated by lead counsel must, like any other settlement, be structured to bind no plaintiff unless: (1) each participating plaintiff receives affirmative and fully informed consent; or (2) a class action proceeding involving public review of the settlement agreement with absent parties protected by court approval, notice, and the right to opt out. In MDLs questions frequently arise with respect to:

- Lead counsel's negotiation of a settlement on behalf of their own clients (whether on an "inventory" basis or for some subset of individual clients) in the absence of similar settlements offered to all, or virtually all, other plaintiffs' counsel or plaintiffs;
- Lead counsel's negotiation of a settlement on behalf of their own clients simultaneously with a "global" settlement they are negotiating as lead counsel on behalf of other plaintiffs;
- Lead counsel's negotiation of a "global" settlement that arguably favors lead counsel's own clients; or
- Lead counsel's negotiation of a "global"-type settlement that excludes some of lead counsel's own clients or affords them less compensation than they arguably otherwise could have been attained.[177]

> BEST PRACTICE 9C: Lead counsel must remain faithful to their obligations to the court as delineated in the appointment order when engaging in confidential settlement discussions for individually-retained clients.

If lead counsel opens settlement negotiations for only lead counsel's own individually-retained clients, a potential conflict arises between retained clients' interests and interests of the rest of the plaintiffs. The concern exists that lead counsel will be influenced by generous settlement terms for lead counsel's individually-retained clients when making settlement demands for the MDL plaintiffs as a whole. Resignation from the lead counsel position is the surest way to avoid any appearance of impropriety, but resignation is not typical nor necessary in most instances.

[177] In all cases, lead counsel's settlement-related obligations to their own clients is subject to the usual ethical rules concerning joint settlements, including the aggregate settlement rule. *See* Principles of the Law of Aggregate Litigation §§ 3.15-17 (ALI 2010).

So long as lead counsel faithfully carries out their functions and responsibilities on behalf of all plaintiffs, as delineated in the appointment order, lead counsel can continue to serve effectively in both roles, even though lead counsel may also be able to secure an advantage for their own clients.

> BEST PRACTICE 9D: Should the court ever have a concern that a settlement negotiated on behalf of lead counsel's individually-retained clients might violate the terms of the court's order appointing lead counsel, the court should order lead counsel to disclose the settlement terms in camera to a Special Master appointed for this purpose or, if desired, to the court itself.

Should lead counsel succumb to conscious — or even only "structural" — collusion, in considering disqualification, the court must consider the loss to the plaintiffs of the knowledge, skill, experience, and insight possessed by lead counsel, both generally and as uniquely gained in the particular litigation. There is a potential risk that automatic disqualification of lead counsel who enters into client-favorable settlement agreements could encourage a defendant to enter into an early settlement with lead counsel, perhaps at a premium, in order to deprive the MDL plaintiffs of the most highly skilled representation. Such issues must be carefully weighed in considering disqualification of lead counsel.

Judicial review of "side agreement" settlements by lead counsel may be provided for in the court's appointment order as a safeguard and means to eliminate the appearance of collusion while retaining the services of the lead counsel. Such review should be conducted *in camera*, maintaining any confidentiality provisions, ideally by a Special Master so that the judge charged with deciding the merits of subsequent cases is not "tainted" with knowledge of the parties confidential settlement posture.

> BEST PRACTICE 9E: Lead counsel should maximize the common and collective interests of all plaintiffs in negotiating a global settlement consistent with appointment.

Even though lead counsel is negotiating a "global"-type settlement for all or a large majority of the plaintiffs, counsel continues to owe an undivided duty of loyalty to their own clients and must, within that framework, seek to maximize the recoveries of their own clients even if that might arguably work to the prejudice of other plaintiffs. Lead counsel's obligation to their own clients ordinarily will not preclude them from simultaneously attempting to achieve the best possible settlement for MDL plaintiffs generally,

Lead counsel participates in global settlement negotiations not by virtue of their own clients' cases but because the court appointed lead counsel to participate in such discussions on behalf of all plaintiffs. Although in such negotiations lead counsel would be drawing upon the knowledge and perspectives gained from the representation of their own clients, the appointment order should specify lead counsel's obligation, in that capacity, to maximize the common and collective interests of the plaintiffs as a whole.

The policy of such provisions is to allow lead counsel's clients to obtain the full benefit of their representation by particularly knowledgeable and skillful counsel without conferring an undue advantage solely attributable to their attorney's appointment as "lead counsel." Such an appointment premium would come at the expense of other plaintiffs in the litigation represented by other counsel.

BEST PRACTICE 9F: Consistent with existing attorney-client relationships, the court should consider entering an order authorizing confidential settlement negotiations.

Lead counsel in settlement negotiations acts in accordance with the court's appointment order for the common and collective good of the plaintiffs. Disclosing the substance of the negotiations to lead counsel's individually-retained clients could adversely affect the settlement. Provided that such individually-retained clients consent after prior notice, a court order that expressly authorizes confidentiality obviates any disclosure concern of lead counsel and provides lead counsel an effective response to clients' or other lawyers' requests to disclose confidential information.

CHAPTER 4

ROLE OF NON-LEADERSHIP COUNSEL

In a mass-tort MDL, lead counsel make up a fraction of the lawyers representing plaintiffs. Non-leadership counsel have a limited role in key decisions affecting overall strategy and settlement. Because lead counsel effectively controls the litigation, non-leadership counsel, who continue to be bound by canons of ethics to act in the best interests of their clients, face difficult problems when they disagree with lead counsel's actions and decisions. If lead counsel negotiate a global settlement, non-leadership counsel and their clients make the final decision regarding whether to participate. But, as a practical matter, rejecting the offer at that time may not seem feasible.

MDL decision-making benefits whenever lead counsel can create a process for considering input from non-leadership counsel without being subject to inefficient second-guessing. Lead counsel should engage non-leadership counsel in candid discussions early in the litigation about the case's strengths and weaknesses, including *Daubert* issues critical to acceptance of the plaintiffs' scientific position. Part of lead counsel's role is to educate non-leadership counsel about the MDL's parameters, its risks, and the general strategy being adopted, and to update counsel throughout the course of the litigation as circumstances change.

> **GUIDELINE 10:** Lead counsel should establish processes that build consensus among non-leadership counsel as to key decisions that lead to settlement.

Lawyers representing individually-retained clients keep their duty to advocate for their clients' best interests. Although having the power to accept or reject a proposed settlement, as a practical matter their bargaining position weakens the longer lead counsel are in command of the MDL. At a minimum, they should be informed of all significant actions taken in the MDL consistent with BEST PRACTICE 4I. Ideally, non-leadership counsel should be able to provide input on key decisions consistent with BEST PRACTICE 10B.

> BEST PRACTICE 10A: Lead counsel should provide equal opportunity to all willing and able counsel to participate in discovery and other MDL tasks.

Equal opportunity for non-leadership counsel to perform discovery tasks enhances consensus-building consistent with BEST PRACTICE 4H. Compensation for such work should be commensurate with the compensation leadership counsel receive for the same type of work consistent with BEST PRACTICES 12G(ii) and 12H.

> BEST PRACTICE 10B: Where the court is advised of issues that create potential conflicts among counsel, it should institute measures that permit non-leadership counsel to provide input.

Disagreements among lead and non-leadership counsel commonly arise at certain, discrete decision points in an MDL , including: (1) selection of bellwether trial counsel; (2) decisions to pursue or abandon claims/theories in discovery and bellwether trials; and (3)

resources (discovery, trial packages, experts) provided to lawyers preparing individual cases. In consultation with lead counsel, the court should develop a process whereby non-leadership counsel can report issues or concerns to the court on a regular basis (perhaps quarterly). The court may seek explanation from lead counsel as to how these matters are being handled.

In some instances, concern about resources being made available to non-leadership lawyers may not arise until the coordinated proceedings near conclusion, when remand is imminent for non-bellwether cases moving forward on an individual basis. The court should provide an avenue at an earlier stage in the litigation to address the steps lead counsel are taking to provide the necessary resources for post-remand litigation.

Settlement strategy also has a high conflict potential, but due to the nature of most mass-tort negotiations, open vetting is difficult. Settlement negotiations are typically confidential, and disclosure of ongoing discussions would likely jeopardize their success. If significant acrimony arises, the court could consider appointing a settlement master, or conduct private discussions with lead counsel or others specifically tasked with carrying out settlement discussions. Alternatively, the court could designate a liaison counsel to act as an intermediary, communicating concerns of non-leadership counsel.

> **GUIDELINE 11:** The court and lead counsel should develop practices to identify potential conflicts and disagreements early on between non-leadership counsel and lead counsel.

Court appointment authorizes lead counsel to manage the MDL on behalf of all plaintiffs and their retained counsel. Ideally, lead counsel performs these functions to maximize the common and collective good of all plaintiffs. Inevitably, disagreements over strategy, selection of bellwether trials, allocation of common benefit funds, etc., will cause conflicts, which must be kept under control. In so doing, the court must balance two important concerns: ensuring that real problems with lead counsel performance are addressed; while at the same time preventing complaints about lead counsel from being used to jockey for position or for other improper purposes. Requests to remove leadership counsel should be entertained only for very serious and acute problems.

Consistent with BEST PRACTICE 2C(iv), the court may appoint special liaison counsel to be alert for potential conflicts and disagreements. The roles and duties of such liaison should be specified at the outset — including responsibility for communications between the court and other counsel, maintaining records of all orders, filings, and discovery, and ensuring that all counsel are apprised of developments in the litigation.

> BEST PRACTICE 11A: The court should issue a case-management order delineating the roles and obligations of lead counsel, any liaison counsel, and plaintiffs' counsel in individual cases.

Potential conflicts and misunderstandings between lead and non-leadership counsel can best be avoided if their respective roles and responsibilities are clearly delineated in an early case-management order. The order should provide that non-leadership lawyers continue to have

all of their normal obligations to their clients' interests and must comply with all court orders applicable to those clients.

The roles and duties of appointed leadership may also be specified in the initial solicitation of applications and in the resultant appointment orders. Lawyers seeking leadership appointments should be required to provide the court and other counsel with specifics on how they will fulfill their obligations to work with others during the litigation and how they will provide timely and adequate communication and support to non-leadership counsel.

> BEST PRACTICE 11B: A transferee judge should be alert throughout the MDL proceedings for potential and emerging disagreements and conflicts between lead and non-lead counsel.

Many problems arising from disagreements between lead and non-leadership counsel can be avoided, or at least addressed, by active case management. Regularly scheduled status conferences, frequent conferences with liaison counsel, and attention to status reports can timely identify most potential conflicts and disagreements between lead counsel and non-leadership counsel.

Consistent with BEST PRACTICE 1B(i), the court should schedule regular status conferences. At the start of the MDL, or if the court anticipates conflicts between lead and non-leadership counsel, a monthly conference schedule is advisable. Key rulings and discussion should be on the record, and conference transcripts should be posted on the court's website or made available by plaintiffs' counsel to non-leadership counsel.

The court should require leadership counsel to prepare and distribute detailed status reports to all non-leadership counsel in advance of each conference, to confer with the court in preparing an agenda, and to distribute detailed reports to all non-leadership counsel afterward. Such documents should keep all participants in the MDL proceeding well-informed, consistent with BEST PRACTICE 4I. The court and lead counsel should also consider regular reports to non-leadership counsel about key expert opinions on causation, periodically updating lists of all counsel's inventory, and providing information on the status of company witness depositions and document production. Lead counsel should also provide *pro se* plaintiffs with a point of contact on the Plaintiff Steering Committee to whom they can direct questions.

Many MDLs have benefitted from the court creating an official website for the proceeding on which these documents (as well as status conference reports and significant orders) can be viewed consistent with BEST PRACTICE 12F. Similarly, lead counsel should consider developing a file-sharing option for non-leadership counsel to obtain MDL materials, key orders, and transcripts. Timely and adequate information about the MDL proceedings provides the means for non-leadership counsel to fulfil their responsibilities and obligations to their respective clients.

BEST PRACTICE 11C: The court should consider a reappointment process for lead counsel as a means of discovering serious conflicts, if any, between lead and non-leadership counsel.

A formal reappointment process at specified intervals, corresponding to logical points in the development of the MDL can provide opportunities for non-leadership lawyers to comment (positively as well as negatively) on the performance of leadership. Regardless of outcome, the reappointment process provides a good opportunity for the court and non-leadership counsel to receive a formal report from lead counsel on how leadership has performed its duties and for the court to address any concerns raised by comments received from non-leadership counsel. The court can also reiterate its expectations for lead counsel, which sends an important message to all parties.

The court can use the reappointment process to facilitate airing of non-leadership counsel's grievances (if any) with lead counsel, overcoming any reluctance to criticize the management of the MDL. At the same time, the reappointment process serves as an opportunity to remind non-leadership counsel that their obligations to their clients may require them to raise issues that, they believe, may prejudice their clients' interests.

The reappointment process should not occur so frequently as to impede leadership's management of the litigation, but often enough to be meaningful. Under BEST PRACTICES 3A(iii) and 4(K), reappointment after the first twelve months is usually too soon to evaluate lead counsel's performance, particularly in larger MDLs. In smaller litigation, that timing can be about right.

Many mass-tort MDLs take years to resolve. Leadership does not remain static, and circumstances beyond the control of individual lead counsel may have significant impacts. The MDL workload burden may grow to the point that lead counsel cannot continue to devote the time and financial resources necessary to allow them to continue in a leadership role, or it may shrink to the point that leadership imposes significant missed-opportunity costs. Some lawyers may not have the continuing ability or interest to fulfill true leadership roles. All of these issues may not become apparent to the court until the litigation has been underway for some time. A reappointment process ensures timely airing of these sorts of problems.

Further, non-leadership counsel may become heavily involved in the work of the MDL, or from related litigation develop a particular expertise valuable to the MDL. Such circumstances justify appointing additional lead counsel during the course of the MDL, although the appointment may not have been appropriate at the outset of litigation. A reappointment process establishes a set framework that the court can use to make necessary adjustments to accommodate changed circumstances. Lead counsel with insufficient ongoing personal involvement may have to be replaced, as may senior lead counsel when more junior lawyers are doing the actual work. Advancing more junior attorneys not only benefits those lawyers by bolstering their resumes, which can facilitate future appointments, but also is a vehicle to foster greater diversity in MDL representations.

BEST PRACTICE 11D: As part of the reappointment process, the court should require lead counsel to report on their exercise of MDL obligations, including communication with non-leadership lawyers.

Lead counsel seeking reappointment should provide information not only on how effective they have been but also on their interaction with non-leadership counsel. The reappointment process is a convenient point for inviting comment from lawyers not personally seeking leadership positions to comment on the performance of lead counsel. These steps provide the court an opportunity to address issues before they become acute. These opportunities can also estop non-leadership lawyers from raising last-minute, disruptive complaints at very late stages. Such belated complaints undermine judicial management of litigation in reliance on lead counsel's work, and generally diminishes the confidence of all parties in the MDL process. Requiring airing of grievances during the reappointment process can be a valuable tool to ward off such disruptive tactics.

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avoid assessing monetary sanctions sua sponte once the parties have reached agreement.[53]

Unless the sanction is minor and the misconduct obvious, it is advisable to put findings and reasons on the record or issue a written order.[54] The findings should clearly identify the objectionable conduct, state the factual and legal reasons for the action (including the need for the particular sanction imposed and the inadequacy of less severe measures), and cite the authority relied on. If the sanctions are appealed, such a record will facilitate appellate review and help the appellate court understand the basis for the court's exercise of its discretion.[55] There is normally no need to explain a denial of sanctions.[56]

10.2 Role of Counsel

10.21 Responsibilities in Complex Litigation

Judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, complex litigation places greater demands on counsel in their dual roles as advocates and officers of the court. The complexity of legal and factual issues makes judges especially dependent on the assistance of counsel.

Greater demands on counsel also arise from the following:

- the amounts of money or importance of the interests at stake;
- the length and complexity of the proceedings;

53. *See* Fed. R. Civ. P. 11(c)(2)(B) & committee note.

54. *See* Fed. R. Civ. P. 11(c)(3).

55. The standard of review is abuse of discretion. Buford v. United States, 532 U.S. 59, 64 (2001); Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991) (inherent power); Cooter & Gel v. Hartmax Corp., 496 U.S. 384, 405 (1990) (Rule 11); Blue v. United States Dep't of the Army, 914 F.2d 525, 539 (4th Cir. 1990) (28 U.S.C. § 1927).

56. Fed. R. Civ. P. 11 committee note. Only the First Circuit has held to the contrary. *See* Metrocorps, Inc. v. E. Mass. Junior Drum & Bugle Corps Ass'n, 912 F.2d 1, 3 (1st Cir. 1990); Morgan v. Mass. Gen. Hosp., 901 F.2d 186, 195 (1st Cir. 1990).

- the difficulties of having to communicate and establish effective working relationships with numerous attorneys (many of whom may be strangers to each other);
- the need to accommodate professional and personal schedules;
- the problems of having to appear in courts with which counsel are unfamiliar;
- the burdens of extensive travel often required; and
- the complexities of having to act as designated representative of parties who are not their clients (see section 10.22).

The added demands and burdens of complex litigation place a premium on attorney professionalism, and the judge should encourage counsel to act responsibly. The certification requirements of Federal Rules of Civil Procedure 11 and 26(g) reflect some of the attorneys' obligations as officers of the court. By presenting a paper to the court, an attorney certifies in essence that he or she, based on reasonable inquiry, has not filed the paper to delay, harass, or increase costs.[57] A signature on a discovery request, response, or objection certifies that the filing is not "unreasonable or unduly burdensome or expensive" under the circumstances of the case.[58] These provisions encourage attorneys to "stop and think" before taking action.

Counsel need to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court. They need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible. Even where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute. Model Rule of Professional Conduct 3.2 requires lawyers to make "reasonable efforts to expedite litigation consistent with the interests of the client."[59]

57. Fed. R. Civ. P. 11(b)(1). Fed. R. Civ. P. 26(g) contains substantially similar language. Case law in the circuit interpreting these provisions should be considered.

58. Fed. R. Civ. P. 26(g)(C).

59. *See also* Model Rules of Prof'l Conduct R. 3.1 (2002) (meritorious claims and contentions); Model Code of Prof'l Responsibility DR 7-102(A)(1) (1981) (action taken merely to harass).

10.22 Coordination in Multiparty Litigation—Lead/Liaison Counsel and Committees

Complex litigation often involves numerous parties with common or similar interests but separate counsel. Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and examines witnesses, may waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily. Instituting special procedures for coordination of counsel early in the litigation will help to avoid these problems.

In some cases the attorneys coordinate their activities without the court's assistance, and such efforts should be encouraged. More often, however, the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation. To do so, invite submissions and suggestions from all counsel and conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable. Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel.

10.221 Organizational Structures

Attorneys designated by the court to act on behalf of other counsel and parties in addition to their own clients (referred to collectively as "designated counsel") generally fall into one of the following categories:

- *Liaison counsel.* Charged with essentially administrative matters, such as communications between the court and other counsel (including receiving and distributing notices, orders, motions, and briefs on behalf of the group), convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions. Such counsel may act for the group in managing document depositories and in resolving scheduling conflicts. Liaison counsel will usually have offices in the same locality as the court. The court may appoint (or the parties may select) a liaison for each side,

and if their functions are strictly limited to administrative matters, they need not be attorneys.[60]

- *Lead counsel.* Charged with formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.
- *Trial counsel.* Serve as principal attorneys at trial for the group and organize and coordinate the work of the other attorneys on the trial team.
- *Committees of counsel.* Often called steering committees, coordinating committees, management committees, executive committees, discovery committees, or trial teams. Committees are most commonly needed when group members' interests and positions are sufficiently dissimilar to justify giving them representation in decision making. The court or lead counsel may task committees with preparing briefs or conducting portions of the discovery program if one lawyer cannot do so adequately. Committees of counsel can sometimes lead to substantially increased costs, and they should try to avoid unnecessary duplication of efforts and control fees and expenses. See section 14.21 on controlling attorneys' fees.

The types of appointments and assignments of responsibilities will depend on many factors. The most important is achieving efficiency and economy without jeopardizing fairness to the parties. Depending on the number and complexity of different interests represented, both lead and liaison counsel may be appointed for one side, with only liaison counsel appointed for the other. One attorney or several may serve as liaison, lead, and trial counsel. The functions of lead counsel may be divided among several attorneys, but the number should not be so large as to defeat the purpose of making such appointments.

60. *See In re* San Juan Dupont Plaza Hotel Fire Litig., MDL No. 721, 1989 WL 168401, at *19–20 (D.P.R. Dec. 2, 1988) (defining duties of "liaison persons" for plaintiffs and defendants).

10.222 Powers and Responsibilities

The functions of lead, liaison, and trial counsel, and of each committee, should be stated in either a court order or a separate document drafted by counsel for judicial review and approval.[61] This document will inform other counsel and parties of the scope of designated counsel's authority and define responsibilities within the group. However, it is usually impractical and unwise for the court to spell out in detail the functions assigned or to specify the particular decisions that designated counsel may make unilaterally and those that require an affected party's concurrence. To avoid controversy over the interpretation of the terms of the court's appointment order, designated counsel should seek consensus among the attorneys (and any unrepresented parties) when making decisions that may have a critical impact on the litigation.

Counsel in leadership positions should keep the other attorneys in the group advised of the progress of the litigation and consult them about decisions significantly affecting their clients. Counsel must use their judgment about limits on this communication; too much communication may defeat the objectives of efficiency and economy, while too little may prejudice the interests of the parties. Communication among the various allied counsel and their respective clients should not be treated as waiving work-product protection or the attorney–client privilege, and a specific court order on this point may be helpful.[62]

10.223 Compensation

See section 14.215 for guidance on determining compensation and establishing terms and procedures for it early in the litigation.

10.224 Court's Responsibilities

Few decisions by the court in complex litigation are as difficult and sensitive as the appointment of designated counsel. There is often intense competition for appointment by the court as designated counsel, an appointment that may implicitly promise large fees and a prominent role in the litigation. Side agreements among attorneys also may have a significant effect on positions taken in the proceedings. At the same time, because appointment of designated counsel will alter the usual dynamics of client representation in important ways, attorneys will have legitimate concerns that their clients' interests be adequately represented.

61. *See* Sample Order *infra* section 40.22.
62. *See id.* ¶ 5.

For these reasons, the judge is advised to take an active part in the decision on the appointment of counsel. Deferring to proposals by counsel without independent examination, even those that seem to have the concurrence of a majority of those affected, invites problems down the road if designated counsel turn out to be unwilling or unable to discharge their responsibilities satisfactorily or if they incur excessive costs. It is important to assess the following factors:

- qualifications, functions, organization, and compensation of designated counsel;
- whether there has been full disclosure of all agreements and understandings among counsel;
- would-be designated attorneys' competence for assignments;
- whether there are clear and satisfactory guidelines for compensation and reimbursement, and whether the arrangements for coordination among counsel are fair, reasonable, and efficient;
- whether designated counsel fairly represent the various interests in the litigation—where diverse interests exist among the parties, the court may designate a committee of counsel representing different interests;
- the attorneys' resources, commitment, and qualifications to accomplish the assigned tasks; and
- the attorneys' ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court—experience in similar roles in other litigation may be useful, but an attorney may have generated personal antagonisms during prior proceedings that will undermine his or her effectiveness in the present case.

Although the court should move expeditiously and avoid unnecessary delay, an evidentiary hearing may be needed to bring all relevant facts to light or to allow counsel to state their case for appointment and answer questions from the court about their qualifications (the court may call for the submission of résumés and other relevant information). Such a hearing is particularly appropriate when the court is unfamiliar with the attorneys seeking appointment. The court should inquire as to normal or anticipated billing rates, define record-keeping requirements, and establish guidelines, methods, or limitations to govern the award of fees.[63] While it may be appropriate and possibly even beneficial for several firms to divide work among themselves,[64] such an ar-

63. *See infra* section 14.21.

64. *See In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 77 (S.D.N.Y. 2000); *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 584 (3d Cir. 1984).

rangement should be necessary, not simply the result of a bargain among the attorneys.[65]

The court's responsibilities are heightened in class action litigation, where the judge must approve counsel for the class (see section 21.27). In litigation involving both class and individual claims, class and individual counsel will need to coordinate.

10.225 Related Litigation

If related litigation is pending in other federal or state courts, consider the feasibility of coordination among counsel in the various cases. See sections 20.14, 20.31. Consultation with other judges may bring about the designation of common committees or of counsel and joint or parallel orders governing their function and compensation.[66] Where that is not feasible, the judge may direct counsel to coordinate with the attorneys in the other cases to reduce duplication and potential conflicts and to coordinate and share resources. In any event, the judges involved should exchange information and copies of orders that might affect proceedings in their courts. See generally section 20, multiple jurisdiction litigation.

In approaching these matters, consider also the status of the respective actions (some may be close to trial while others are in their early stages). Counsel seeking a more prominent and lucrative role may have filed actions in other courts.

10.23 Withdrawal and Disqualification

In view of the number and dispersion of parties and interests in complex litigation, the court should remind counsel to be alert to present or potential conflicts of interest.[67]

It is advisable to deny motions for disqualification that claim the attorney may be called as a witness if such testimony probably will not be necessary and prejudice to the client will probably be minor. Disqualification on the ground that an attorney is also a witness may sometimes be denied where it would cause "substantial hardship" to the client. This exception is generally invoked

65. *See, e.g., In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000); Smiley v. Sincoff, 958 F.2d 498 (2d Cir. 1992); *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), *aff'd in part and rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

66. *See infra* section 40.51.

67. *See* Model Rules of Prof'l Conduct R. 1.7–1.9 (2002); Model Code of Prof'l Responsibility DR 5-101(A), 5-104(A), 5-105(A) (1981); *see also* Model Rules of Prof'l Conduct R. 3.7 (2002); Model Code of Prof'l Responsibility DR 5-102 (1981) (lawyer as witness).

when disqualification is sought late in the litigation, and it requires the court to balance the interests of the client and the opposing party. The motion may also be denied when the likelihood that the attorney would have to testify should have been anticipated earlier in the case.[68] Motions for disqualification should be reviewed carefully to ensure that they are not being used merely to harass,[69] and disqualification should be ordered only when the motion demonstrates a reasonable likelihood of a prohibited conflict.[70]

The court should promptly resolve ancillary legal issues requiring research into applicable circuit law, because uncertainty as to the status of counsel hampers the progress of the litigation. Additional delays may result if counsel seeks appellate review[71] or if replacement counsel are precluded from using the work product of the disqualified firm. While disqualified counsel usually must turn over their work product to new counsel upon request, it is possible that counsel will deny the request when there is a danger that confidential information will be disclosed.[72] Issues raised by disqualification motions include whether disqualification of counsel extends to the entire firm,[73] whether co-

68. Model Rules of Prof'l Conduct R. 3.7(a)(3) (2002); Model Code of Prof'l Responsibility DR 5-10(B)(4) (1981). *See* General Mill Supply Co. v. SCA Servs., Inc., 697 F.2d 704 (6th Cir. 1982).

69. Harker v. Comm'r, 82 F.3d 806, 808 (8th Cir. 1996); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 433–36 (1985); Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1050–51 (9th Cir. 1985); Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1577–80 (Fed. Cir. 1984).

70. Though often premised on violations of state disciplinary rules, disqualification in federal court is a question of federal law. *In re* Am. Airlines, Inc., 972 F.2d 605, 615 (5th Cir. 1992); *In re* Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992).

71. The denial of a motion to disqualify counsel in a civil case is not immediately appealable as a matter of right. Cunningham v. Hamilton County, 527 U.S. 198, 207 (1999); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Nor is an order granting such a motion in a criminal case, *Flanagan v. United States*, 465 U.S. 259 (1984), or in a civil case, *Richardson–Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). A petition for a writ of mandamus may be filed even if there is no right of appeal, see Fed. R. App. P. 21, but the standard of review may be more stringent. *See In re Dresser*, 972 F.2d at 542–43.

72. *See* First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201, 207–11 (7th Cir. 1978) (en banc), *and* Int'l Bus. Machs. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) (the request to turn over work product may be denied when there is a danger that confidential information will be disclosed (EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459, 1463–64 (Fed. Cir. 1984))).

73. *See* Model Rules of Prof'l Conduct R. 1.10 (2002) (imputation of conflicts of interest); Model Code of Prof'l Responsibility DR 5-105(D) (1981). *Compare Panduit*, 744 F.2d at 1577–80, *with* United States v. Moscony, 927 F.2d 742, 747–48 (3d Cir. 1991), *and* Atasi Corp. v. Seagate Tech., 847 F.2d 826, 830–32 (Fed. Cir. 1988). Timely erection of a "Chinese wall" to screen other firm members from the attorney(s) possessing confidential information may avoid imputed disqualification. *See, e.g.*, Blair v. Armontrout, 916 F.2d 1310, 1333 (8th Cir. 1990);

counsel will also be disqualified,[74] and whether counsel may avoid disqualification based on consent,[75] substantial hardship,[76] or express or implied waiver.[77] If a disqualification motion is filed in order to harass, delay, or deprive a party of chosen counsel, sanctions may be appropriate under 28 U.S.C. § 1927 or Federal Rule of Civil Procedure 11 (see section 10.15).

Kennecott Corp. v. Kyocera Int'l, Inc., 899 F.2d 1228 (Fed. Cir. 1990) (per curiam) (unpublished table decision); United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990); Manning v. Waring, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); *Atasi*, 847 F.2d at 831 & n.5; *Panduit,* 744 F.2d at 1580–82; LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257–59 (7th Cir. 1983) (screening not timely). Disqualification of an attorney on the ground that he or she will be called as a witness generally does not require disqualification of the attorney's firm. *See Optyl Eyewear*, 760 F.2d at 1048–50; Bottaro v. Hatton Assocs., 680 F.2d 895, 898 (2d Cir. 1982).

74. Disqualification of counsel generally does not extend to cocounsel. *See, e.g.*, Brennan's, Inc. v. Brennan's Rests., Inc., 590 F.2d 168, 174 (5th Cir. 1979); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 607–10 (8th Cir. 1977); Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 543–44 (3d Cir. 1977); Am. Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971). But disqualification is proper when information has been disclosed to cocounsel with an expectation of confidentiality. *See* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 235 (2d Cir. 1977); *cf.* Arkansas v. Dean Food Prods. Co., 605 F.2d 380, 387–88 (8th Cir. 1979); *Brennan's*, 590 F.2d at 174.

75. *See, e.g.,* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345–46 (9th Cir. 1981); Interstate Props. v. Pyramid Co., 547 F. Supp. 178 (S.D.N.Y. 1982); *cf.* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978).

76. Disqualification on the ground that an attorney is also a witness may be denied where it would cause "substantial hardship" to the client. Model Rules of Prof'l Conduct R. 3.7(a)(3) (2002); Model Code of Prof'l Responsibility DR 5-101(B)(4) (1981). This exception is generally invoked when disqualification is sought late in the litigation, and it requires the court to balance the interests of the client and those of the opposing party. Model Rules of Prof'l Conduct R. 3.7 cmt. ¶ 4 (2002). It may be rejected when the likelihood that the attorney would have to testify should have been anticipated earlier in the case. *See* Gen. Mill Supply Co. v. SCA Servs., Inc., 697 F.2d 704 (6th Cir. 1982).

77. *See, e.g.,* United States v. Wheat, 486 U.S. 153, 162–64 (1988) (court in criminal case may decline waiver of conflict); Melamed v. ITT Cont'l Baking Co., 592 F.2d 290, 292–94 (6th Cir. 1979) (waiver found); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 205 (N.D. Ohio), *aff'd*, 573 F.2d 1310 (6th Cir. 1977) (same); *cf. In re* Yarn Processing Patent Validity Litig., 530 F.2d 83, 88–90 (5th Cir. 1976) (waiver and consent).

Selection of Lead Counsel & Steering Committees

The following written materials may be accessed online at this link:

Duval Jr., Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases, 74 La. Law Rev. 391 (2014), https://digitalcommons.law.lsu.edu/lalrev/vol74/iss2/6/

COORDINATION WITH STATE COURTS

Judge Barbara Rothstein
Dawn Barrios
Julie Callsen

Coordination with State Courts

All written materials for this panel may be accessed online at the following links:

Multijurisdiction Litigation Website - https://multijurisdictionlitigation.wordpress.com/

G. Thomas Munsterman, James G. Apple, Paula Hannaford-Agor, Manual for Cooperation Between State and Federal Courts (1997) - https://www.fjc.gov/content/manual-cooperation-between-state-and-federal-courts-0

Barbara J. Rothstein & Catherine R. Borden, Federal Judicial Center & United States Judicial Panel on Multidistrict Litigation, Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges (2011), https://www.fjc.gov/content/managing-multidistrict-litigation-products-liability-cases-pocket-guide-transferee-judges-0.

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CHANGES TO RULE 23 AND THE FUTURE OF CLASS ACTIONS AND MDLs

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REVOLUTION V. EVOLUTION IN CLASS ACTION REFORM

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The views expressed are those of the author and do not necessarily reflect the views of the publisher.

***1302** [On April 26, 2018, the Supreme Court adopted the amendments to Fed. R. Civ. P. 23 that are discussed in this article, and directed that the amendments go into effect on Dec. 1, 2018.]

REVOLUTION V. EVOLUTION IN CLASS ACTION REFORM [*]

RICHARD MARCUS [**]

It is widely agreed that the federal-court class action became a somewhat revolutionary device after Rule 23 was amended in 1966. Since 1966, further substantial changes to the rule have been considered by the rulemakers, but more proposals have been discarded than adopted. Meanwhile, a major battle has emerged about whether class actions should primarily or solely be designed to achieve deterrence or limited to a compensatory function. That division has been central to many current debates, such as the issue of "no injury" class actions, whether courts could certify classes only after determining that they were "ascertainable" by an identified administratively feasible method, and whether the idea of cy pres could be used to justify class actions in which the defendant paid a large amount, but the class members themselves received little or nothing and the funds were instead used for good works of some relevant sort.

Changes to Rule 23 in the last half century have not directly addressed these hot-button issues. But judicial decisions—including some by the Supreme Court—have tackled some of these issues, and Congress has adopted legislation to address some alleged class action abuses, such as "coupon settlements."

This Article explores the last half century of class action reform in terms of whether further "revolutionary" changes will occur in federal class action practice. It finds that although the rulemakers ***1303** *looked at some aggressive changes in the 1990s, those amendment ideas were eventually jettisoned, and the changes actually adopted have been evolutionary rather than revolutionary.*

That trend continues with the most recent amendment package, poised to go into effect on December 1, 2018; the rulemakers are not embracing dramatic changes to the rule. Meanwhile, the possible sources of "revolutionary" change lie elsewhere. Some worry that the Supreme Court will deliver shocks to class action practice by deciding cases, though in recent terms it has not proved to be as adventurous as some thought it might. Congress has pending before it legislation that seemingly would make a fairly "revolutionary" commitment to limiting class actions to the compensatory purpose, and disavowing the deterrence purpose endorsed by many. The fate of that proposed legislation is uncertain as of this writing.

Though action by Congress or decisions by the Supreme Court might produce "revolutionary" change for class actions, this Article suggests that technology may instead be the most important source of major change. In the wired world of the twenty-

first century, the "headless" class action of the past may be replaced by the "wired" class action in which class members have regular contact with one another and class counsel. That could work a genuine revolution.<MED>

INTRODUCTION

Legal change is usually evolutionary, though those who do not like a certain change are sometimes prone to term it "radical" or ***1304** "revolutionary" as a way of emphasizing its importance and generating opposition. But at least some legal changes do turn out to be fairly revolutionary.

One such revolutionary change was the 1966 amendment of Rule 23. John Frank, a member of the committee that drafted the 1966 rule, said it was "the most radical act of rulemaking since the Rule 2 'one form of action' merger of law and equity." [1] As Judge Posner observed in 2014:

The class action is an ingenious procedural innovation that enables persons who . . . are too numerous for joinder of their claims alleging the same wrong committed by the same defendant or defendants to be feasible, to obtain relief as a group, a class as it is called. The device is especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims. [2]

But Professor Redish, the chief academic critic of class actions, warns: "The modern class action may be appropriately analogized to the invention of fire. If used properly, it can significantly advance societal goals. If misused, however, it quickly degenerates into something that causes significant harm." [3]

Charles Alan Wright characterized the 1938 version of Rule 23 as "a bold and well-intentioned attempt to encourage more frequent use of class actions." [4] But that seems to overstate the transformative character of the original Rule 23. "The current era of class action litigation began on July 1, 1966," when Rule 23 was substantively rewritten. [5] Writing as the rule amendments went into effect, Judge Frankel forecast that "it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23." [6] We have now completed a half century operating under the revised rule, a noteworthy event examined in a number of quasi-celebratory conferences. [7] Though the 1966 rule change was hotly debated, it is unlikely that those involved in drafting it foresaw its revolutionary potential. For example, Professor Wright, who was intimately involved in the reform effort, initially expected the new provisions authorizing damages class actions would be employed very ***1305** rarely, [8] though he recognized by 1969 that his prediction was wrong. [9] Other legal developments—largely an explosion of new claims not previously recognized—played a very significant role in magnifying the importance of the 1966 amendment.

Whatever their foresight about the rule's actual consequences, after 1966 the rulemakers reportedly adopted a "moratorium" on changing the rule again to see how it worked out. [10] Actually, that moratorium was fairly brief. By 1971 or so, the committee directed a study of the rule, [11] but the Advisory Committee on Civil Rules (the "Advisory Committee") abandoned the effort in 1977. [12] Whether or not heeding Judge Frankel's forecast, [13] the Advisory Committee did stay its hand for about a generation before taking up the idea of changing the rule another time. Later in the 1970s, the Carter administration developed a class action legislative package that would, if adopted, have had a fairly revolutionary potential. [14] But that legislative initiative did not reach fruition.

The rulemakers' moratorium ended in 1991, when the press of mass tort litigation in general and asbestos personal injury litigation in particular prompted the Judicial Conference to ask the Standing Committee on Rules of Practice and Procedure to direct the Advisory Committee to consider changes to the rule. [15] There followed, by the end of that decade, the first episode of consideration of rule-amendment ideas, largely focused on the certification standards for Rule 23(b)(3) class actions, the most revolutionary feature of the 1966 rewrite. Eventually, all the draft changes to the certification standards in Rule 23(b) were withdrawn. Then, in 2000—2002, a second episode produced changes in what could be called the procedural handling of class actions; these changes went into effect in 2003. Though they generated much commentary, nobody really thought them revolutionary.

Meanwhile, other actors have also been involved in the reform effort. The Supreme Court has, in the twenty-first century, decided quite a large number of class action cases. Although the outcomes were a mixed bag from the perspective of plaintiff and defense lawyers, the overall trend ***1306** was not to the plaintiffs' liking. [16] Against this background, the Advisory Committee embarked on its third serious consideration of changing Rule 23 in 2011, leading to the draft amendments published for comment in August 2016. If adopted, they could go into effect on December 1, 2018.

This Article focuses on the most recent and ongoing amendment effort. To provide context, however, it first introduces the central tension between compensation and deterrence that remains an enduring ambiguity, and profiles the evolution of the rule through the earlier rulemaking episodes. The Article then turns to the current reform effort, reporting on the variety of ideas considered and laid aside, and the ways in which the central tension about the rule's "true goal" remains somewhat unresolved. It then contrasts the rulemakers' evolutionary orientation with the potentially more dramatic changes that might emanate from the Supreme Court or Congress, or result from developments in technology. The Article

concludes that what might be called the rulemakers' studied effort to avoid monocular embrace of either compensation or deterrence will likely continue for some time. Radical change from the rulemakers is not upon us.

I. THE TENSION BETWEEN COMPENSATION AND DETERRENCE

The age-old conception of private civil litigation is that it was designed to provide compensation. Law enforcement was a public function, and undertaken by government. But over the last seventy-five years, the idea of private enforcement of public law has become a central feature of American law, one of the features that makes the American class action distinct in the world. It was not always so in America.

In a veto message in 1940, President Roosevelt asserted that "[a] 'truth in securities' act without an administrative tribunal to enforce it or a labor-relations act without an administrative tribunal to administer it, or rate regulation without a commission to supervise rates would be sterile and useless." [17] Actually, the private attorney general, an idea developed in the early 1940s, [18] offered another way. And Roosevelt's first example became an early vehicle for private enforcement implementation, as the courts began in 1946 to entertain "implied" claims for violation of the 1934 Securities Exchange Act, [19] a practice the ***1307** Supreme Court blessed in 1964. [20] Only in the Private Securities Litigation Reform Act of 1995 ("PSLRA") [21] did Congress, somewhat grudgingly, recognize the importance of securities fraud litigation. When the Court interpreted the PSLRA pleading requirements in 2007, Justice Ginsburg began by invoking that history: "This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." [22]

Class actions could magnify the effect of private enforcement. [23] As Professors Burbank and Wolff have urged, that is a questionable goal of a rule of civil procedure: "Rule 23 does not set policy on the propriety of aggregate remedies as a means of accomplishing regulatory goals—and it could not possibly do so." [24] Nevertheless, the 1966 revision to the rule seems to have bolstered private enforcement. Consider securities fraud. As Professor Coffee has noted: "Although Rule 10b-5 dates back to 1942, it did not truly become important until the modern class action was authorized by the revisions to Rule 23 of the Federal Rules of Civil Procedure, adopted in 1966." [25] The prospect for private enforcement across a wider range of topics emerged in roughly the decade after 1966 due to the multiplication of private causes of action with a seemingly regulatory purpose. [26] Frequently, legislatures—led by Congress—banned or required certain practices and also authorized private suits by those claiming injury due to the malefactor's failure to obey the law. Often these statutes also promised a minimum recovery (sometimes labeled a "penalty") and an award of attorney fees for the successful plaintiff. [27]

***1308** The usual object of these regulatory efforts was a corporation. As Professor Hodges says in his massive recent book on how law affects corporate behavior, the American legal architecture is "somewhat unique," [28] noting "the strong adherence in the United States to the ideologies of deterrence and private enforcement." [29] But "[i]n contrast to the vast doctrinal literature on the theory and practice of private enforcement and class actions in the USA, ... [t]here is almost no direct evidence on the *actual* effect of private enforcement of law, or on *how* litigation actually affects corporate decisions." [30] As Professor Fitzpatrick has recently observed, there is "virtually no empirical evidence that consumer class actions have any effect on corporate behavior." [31]

Professor Hodges also emphasizes the remarkable costs and risks of American litigation and recognizes that the prospect of being sued in the U.S. does supposedly affect corporate conduct. [32] As Professor Fitzpatrick also observed: "You would expect a rational actor to avoid litigation." [33] What we seem to have here is a recurring conundrum. Both the

plaintiff and the defense camps say that litigation in general, and class actions in particular, do affect corporate conduct. The debate is about whether that is a good thing.

From what one can call the plaintiff perspective, it must be true that more law enforcement is a good thing. Even the proponents of economic analysis of law, however, can resist overstating the value of the deterrent effect. Writing over forty years ago, for example, Professor Dam recognized that "a penalty system that induced enforcers to invest resources up the value of an optimal penalty would lead to inefficient overenforcement." [34] Thus, "[t]o the extent the class action frees the ***1309** lawyer from weighing the interests of injured class members, the result may be inefficient overenforcement." [35]

The defense-side argument is that this sort of overenforcement happens all the time, particularly due to class actions. Plaintiff class action lawyers not only force changes in behavior that do not benefit members of the class (and may be harmful to the interests of some class members), the view goes, they also profit hugely off their "clients"' claims. Hence the repeated assertion that class actions benefit only the lawyers and the antagonism to such devices as "coupon settlements" in class actions. [36] Balanced against the enforcement value of litigation in general, and class actions in particular, the defense argument is that corporations usually aspire to be good citizens and adhere to legal rules. That conclusion is also dubious, according to Professor Hodges' book. [37] Nonetheless, articles about the importance corporations place on compliance are rife in the professional literature. [38] Taken to its logical conclusion, this view might suggest that *no* enforcement effort—public or private—is needed at all. [39] But that is clearly unworkable. Indeed, one can imagine even the most ethical corporate CEO wanting enforcement to ensnare her scofflaw corporate competitors.

In sum, the strongest arguments from the two sides present diametrically opposite views. The plaintiff-side view is that without private enforcement, American companies would run roughshod over the legal rights of consumers, investors, employees, and everyone else. And the class action is an essential ingredient in this enforcement effort. The defense-side view, on the other hand, is that compliance is a result of the internal ethics of the company, while private litigation—particularly class actions—is a tax on the producers of goods and services that ***1310** enriches lawyers but has no other effect (except sometimes depriving the public of goods or services).

At least some contemporary private enforcement seems difficult for the plaintiff side to justify in a wholehearted manner. For example, consider the existence of private rights of action for penalties. Surely some of the noisome things that justify suits under such statutes seem minor. In this vein, Judge Easterbrook recently noted in a class action that "[t]his is another of the surprisingly many junk-fax suits under . . . the Telephone Consumer Protection Act." [40] And a defense-side lawyer has said that "[t]he TCPA has become a boon to plaintiffs' lawyers" due to the high cost for defendants of going through a full case. [41] Professors Burbank and Wolff have noted that "[t]here is no reason to believe that the drafters and promulgators of the 1966 revisions to Rule 23 anticipated the potentially destructive relationship between the damages class action and the creation of statutory penalties." [42] One might say the synergy between penalty claims and the class action enables plaintiff lawyers to use the litigation nuclear weapon to kill a gnat. Presented with a request for class certification in an action for "a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class" under the Truth in Lending Act ("TILA") over forty years ago, Judge Frankel simply refused. [43]

These difficulties might well prompt the sensible to favor public enforcement over private enforcement. Sensible regulators would not seek to destroy regulated enterprises for no good reason; the whole idea of prosecutorial discretion is that applying every rule to the hilt is untenable. Partly in recognition of this preference, governmental enforcers often have a freer hand in court than private litigants. For example, the EEOC need not satisfy Rule 23 when suing in its own name. [44] But there is no particular reason to think that private enforcement is unimportant. Professor Gilles uses as an illustration litigation involving a payday lender. After federal regulators settled for $325,000 in fines and

penalties, a nationwide class action produced a settlement for $54.5 million in cash and debt forgiveness.[45] Professor Coffee has carefully compared the results of SEC actions and class action recoveries and found that the private litigation often produced much ***1311** larger amounts.[46] And Professors Choi and Pritchard have found that the "conventional wisdom that the SEC targets disclosure violations more precisely" than private plaintiffs' lawyers is wrong.[47] Professor Clopton, meanwhile, has elegantly explored the more general question of "redundant" public-private enforcement.[48] And, as Professor Lemos has recently observed, public enforcement may raise its own problems of accountability.[49]

Another wrinkle to this debate is very pertinent nowadays. As Professor Farhang pointed out, private enforcement may look desirable to legislators because it is not dependent on the preferences of the executive, which can shift over time.[50] If elections cannot blunt private enforcement, then one need not rely entirely on agencies' willingness to enforce. In the Obama administration, some argued that the administration's orientation was unduly pro-enforcement. *The Economist*, for example, reported in 2014 that the U.S. government was "criminalizing the American company" and described a strategy called "derisking" as "a pre-emptive cringe in the face of American regulation."[51] There are some indications that things are very different in the Trump administration. For example, reports indicate that the Consumer Financial Protection Bureau might be a target because it "has been a little too effective in pursuing wrongdoing by banks, consumer credit reporting companies, credit issuers and student loan collectors."[52] The very people responsible for governmental enforcement reportedly "dread" the attitudes and policies of the new administration.[53]

The unique features of U.S. litigation[54] mean that private enforcers need not be secondary to public enforcers, at least when compared to enforcement outside the U.S. A striking illustration is provided by the ongoing litigation about Volkswagen air pollution devices. As is well-known, an avalanche of class action and other litigation against VW occurred in U.S. courts, eventually concentrated in U.S. District Court in San Francisco and leading to a settlement that provided a buy-back benefit to American purchasers of the affected cars. As reported by the *New York Times*, "Volkswagen owners in the United States will receive about $20,000 per car as compensation for the company's diesel ***1312** deception. Volkswagen owners in Europe at most get a software update and a short length of plastic tubing."[55] A German purchaser of a VW asked: "Why are they getting so much and we're getting nothing?"[56] The EU Commissioner of Industry told a German newspaper that "Volkswagen should voluntarily pay European car owners compensation comparable with that which it will pay U.S. consumers."[57] That seemingly did not happen, and the *Financial Times* reported in January 2017 that a major part of the reason was that "US-style class action lawsuits do not exist in Germany."[58] Moreover, there have been indications that governmental regulators in Europe responded less vigorously to VW's behavior than parallel officials in the U.S.

The foregoing presents at most a tiny introduction to the vast literature about the competing virtues and vices of private enforcement. As Professor Mullenix has said in a slightly different context, this debate "inevitably deteriorates into a boilerplate conclusory swearing contest between rule supporters and opponents."[59] Meanwhile, "academics writing in this area either have been so ideologically committed to the private attorney general concept or so implacably opposed to it that, in either case, they have missed the divergences between theory and practice."[60] Little wonder, then, that the framers of the modern class action rule—presented with the choice between a compensation and deterrence rationale—chose to "muddle through without picking sides."[61] As we shall see, the debates during the current rulemaking effort significantly reflect competing conceptions of this divide, and one could say that there is again a studied effort by the rulemakers to avoid embracing the strongest position on either side.

II. THE FIRST TWO EPISODES OF RULE 23 REFORM

Between 1966 and 1991, much happened as class action practice evolved and matured. After an initial burst of enthusiasm, much uneasiness developed, leading to something of a retreat from the broadest use of class actions.[62] In addition, there were legislative proposals to make major revisions in the handling of class actions.[63] But the rule remained unchanged.

The most significant development was that, with increasing frequency, the parties reached a settlement before the court decided ***1313** whether to certify the class, and the possibility of "settlement class certification" appeared. By the time mass torts emerged in the 1980s, defendants realized that class action settlements could offer an upside because their binding effect could permit an enterprise to close its books on an episode at a fixed expense.[64] At the extreme, such arrangements could be seen as substituting a court-approved remedy for the tort law regime that would otherwise apply.[65]

Class action claims administration emerged as something of an industry unto itself. In the settlement setting, exacting claims requirements could come close to turning victory into defeat for the "prevailing" class. Claims rates following settlements were often low.[66] Even sophisticated class members often did not apply for the money due them from a settlement fund.[67] Sometimes the claims processes themselves seemed almost to be designed to deter claims.[68] Sometimes settlement agreements would include "reversion" provisions that permitted the defendant to get back unclaimed funds at the end of the claims period,[69] which possibly gave it an incentive to make the claims process arduous. Class counsel, meanwhile, might be able to claim attorney fees based on the face "value" of the claims fund created for the class rather than the relief actually received by class members who submitted claims.[70] This is not to say that such practices were pervasive or even frequent, but this collection of concerns did tend to besmirch the reputation of American class actions.

In terms of potentially revolutionary change, the first two experiences with amending Rule 23 produced an evolution away from revolution that has continued through the most recent episode.

A. 1991—1998

In 1991, after a quarter century of muddling through without picking sides in the compensation/deterrence debate, the Advisory Committee was asked to study possible changes to Rule 23,[71] and it embarked on a ***1314** five-year study of ideas for changing the rule. At first, rather aggressive changes were given serious consideration. The first draft considered by the Advisory Committee retained Rule 23(a) unchanged but collapsed the categories under Rule 23(b) into a single superiority inquiry that invited consideration of seven factors.[72] It also broadened the right to opt out to all class actions but provided that allowing opt-outs was discretionary with the court, which could condition exclusion on a prohibition against assertion of certain claims that would be concluded by the class action.[73] The amendment would also have adopted a uniform notice requirement for all class actions, to be given in a manner subject to the court's discretion.[74] In addition, it dealt explicitly with such questions as deciding the merits before class certification[75] and immediate appeal of the class-certification order.[76]

Frankly, in light of what has happened since, this early discussion draft appears fairly aggressive, if not revolutionary. Features of it resemble proposals made before the Advisory Committee began work.[77] It would have introduced a whole new ball game into the question of whether a case should be certified as a class. It would have made predominance of common questions—so important in current practice—only a factor in assessing superiority, not the major factor as it has been in most cases to date.

This initial draft was only a starting point. It was succeeded by further drafts and meeting minutes that fill some 275 pages of the compilation of the Committee's class action work. [78] Ultimately, it led to the publication of a proposed amendment package in 1996. [79] As Professor Mullenix viewed it, during this period the Committee "moved from a wholesale rule revision to a more 'minimalist' approach to revamping the existing class action rule" [80] —from a possibly revolutionary to an evolutionary posture. Nevertheless, what it proposed was denounced as ***1315** revolutionary. A Steering Committee to Oppose Proposed Rule 23 was organized by a dozen prominent law professors (including one former Reporter of the Committee), and it submitted a six-page critique of the preliminary draft that was eventually signed by 144 law professors. [81] Many witnesses appeared at the public hearings to object to the amendment proposals. Eventually Judge Niemeyer, the Chair of the Advisory Committee, had all the material generated in the amendment effort published as a four-volume set. [82]

Much of the controversy resulted from the proposal to add a new factor (F) to the list of considerations bearing on whether to certify under Rule 23(b)(3): "whether the probable relief to individual class members justifies the costs and burdens of class litigation." [83] Although the amendment proposal came with an introduction that recognized the potential importance of deterrence as a justification for class certification, [84] this provision became a lightning rod in the public comment period. For example, the opposition letter signed by 144 law professors observed:

Proposed Rule 23(b)(3)(F) ignores the importance of deterring wrongful conduct that injures each individual slightly but in the aggregate costs society a good deal. Rule 23(b)(3) was conceived originally as a procedural device to facilitate the enforcement of laws that prohibit socially costly behavior that involves small wrongs to large numbers of people. Proposed Rule 23(b)(3)(F) would operate to defeat those same laws. [85]

After the public comment period, the Advisory Committee met to consider the response. As reflected in the minutes:

Perhaps the greatest attention was drawn by proposed Rule 23(b)(3)(F), which would allow a court to deny class certification ***1316** because the probable relief to individual class members does not justify the costs and burdens of class litigation. The reactions to this proposal demonstrated that it goes to the very heart of the purpose of Rule 23. [86]

After a discussion about "philosophical questions as to the proper role of Rule 23" [87] and "cosmic choices about public law regulation through Rule 23," [88] the Committee decided not to recommend adoption of that factor (or any other change to Rule 23(b)(3)) but to continue considering it. At its fall meeting in October 1997, after a discussion about "a philosophical chasm on small-claims classes," the Committee voted (with one dissent) to abandon further consideration of this factor. [89] More generally, of all the features of the preliminary draft of possible amendments, only Rule 23(f), on discretionary review of class-certification decisions, went forward. Perhaps one could say the Committee continued "muddl[ing] through." [90]

B. 2000—2003

In 2000, the Advisory Committee resumed working on Rule 23. As introduced when the resulting amendment proposals emerged in 2001, "[t]he class action rule ha[d] been the subject of close study by the Civil Rules Advisory Committee over the past ten years." [91] This time, the Committee "turned its attention away from the substantive standards for certification to matters of process and procedure." [92] Thus, the proposed amendments did not on their face seem to engage with the challenging question of the purpose of class actions. [93]

Nevertheless, somewhat similar concerns emerged from the public hearings. One proposed amendment would have called for "notice by means calculated to reach a reasonable number of class members" whenever a class action was certified. [94] Previously, the only notice required upon class certification was in Rule 23(b)(3) class actions, which meant that actions certified under Rule 23(b)(1) or 23(b)(2) could proceed to judgment without there ever having been notice to class members. The new provision was explained by a draft Committee Note:

***1317** Members of classes certified under Rules 23(b)(1) or (b)(2) cannot request exclusion, but have interests that should be protected by notice. These interests often can be protected without requiring the exacting efforts to effect individual notice to identifiable class members that stem from the right to elect exclusion from a (b)(3) class. [95]

Though this addition to the rule may seem moderate, it met with strong resistance, particularly among the civil rights community. The concern was that even a very moderate notice requirement would deter lawyers from taking civil rights cases and thus defeat the law-implementation purpose of class actions. [96] After the public comment period, this directive was removed, and there still is no requirement in the rule of any notice to class members in (b)(1) or (b)(2) cases unless they are settled.

III. THE EVOLUTION OF THE 2016 PACKAGE: OUTREACH AND ISSUES DEFERRED

In 2011, the Advisory Committee again returned to Rule 23. In part, that was because enough time had passed since the 2003 amendments to permit reflection on the operation of the rule as amended that year. In part, that was because Congress had in 2005 passed the Class Action Fairness Act ("CAFA"), which made a review of practice under the new statute appropriate. In part, that was because the Supreme Court had decided quite a few class action cases, and examination of the operation of the rule in light of those cases seemed warranted. The task was assigned to a Rule 23 Subcommittee.

As it was in 1991—2001, the process was deliberative. By spring 2012, the Subcommittee had identified a series of "front burner" issues: (1) settlement class certification; (2) consideration of the merits in connection with class certification; (3) issue classes; (4) criteria for settlement review; and (5) monetary relief in actions certified under Rule 23(b)(2). [97] Shortly thereafter, the Advisory Committee's full energies were absorbed by the completion and public comment process regarding the discovery and related amendments that went into effect in 2015. [98]

In 2014, the Subcommittee resumed work on Rule 23. One part of this work involved outreach. Members of the Subcommittee attended and ***1318** participated at more than a dozen bar gatherings involving a broad array of litigators. [99] Within the Committee, this effort was sometimes jokingly referred to as the Subcommittee's "Grand Tour," but it paid dividends in providing nuance to the Subcommittee's understanding of the issues. Indeed, this outreach was even commented upon favorably by some who appeared before the Advisory Committee during the public comment period addressing the preliminary draft of proposed amendments. [100]

In September 2015, the Subcommittee held a mini-conference with lawyers from a spectrum of backgrounds to discuss its evolving list of issues. As of that point, the topics focused upon were: (1) "frontloading" of specifics about proposed settlements; (2) expanded treatment of the settlement approval criteria; (3) guidance in handling cy pres provisions; (4) improvements in the rules regarding objections by class members to proposed settlements; (5) class definition and "ascertainability"; (6) settlement class certification; (7) issue class certification; (8) notice methods attuned to twenty-first century communication realities; and (9) pick-off settlement offers to the named plaintiff early in proposed class actions. [101]

At its November 2015 meeting, the Advisory Committee approved removing several of these issues from the active agenda, and perhaps entirely removing them from the agenda [102]: cy pres, ascertainability, settlement class certification, issue classes, and pick-off offers. Although some of these issues are remote from the central tension between compensation and deterrence, in general they have overtones of that conundrum and illustrate the ongoing challenge of emphatic embrace of either the pure compensation or the pure deterrence rationale. In particular, cy pres, ascertainabilty, and the "no injury" class especially point up the compensation-deterrence tension, so they merit a closer look.

***1319** *A. Cy Pres*

At almost the same time that Rule 23 was transformed in 1966, the Supreme Court of California confronted a proposed state court class action involving alleged overcharges by Yellow Cab in Los Angeles, supposedly accomplished by setting the meters to charge a rate higher than was authorized by the Public Utilities Commission. [103] The named plaintiff in *Daar v. Yellow Cab Co.* [104] alleged that he had ridden in cabs and paid the inflated rate, and he sued on behalf of a class of all those who had also paid the inflated rate. [105] The problem was that, although Yellow Cab had records from which the amount of the overcharges could be calculated, there was no obvious way to identify the other passengers who had paid the inflated rates. [106] The trial court held that it was not a proper class action under California standards.

The state supreme court held that the case was a proper class action even though the specific identities of mulcted passengers could not then be determined. Its rationale emphasized the deterrence objective:

[A]bsent a class suit, recovery by any of the individual taxicab users is unlikely. . . . It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit allegedly injured parties to recover the amount of their overpayments is to be preferred over the foregoing alternative. [107]

In a footnote, the court recognized that the Attorney General of California, as amicus curiae, had proposed that the solution to this problem was to have the total amount of the overcharges deposited with the trial court, permit class members to obtain reimbursement by presenting proof that they had been overcharged, and direct that the uncollected portion of the money escheat to the state as abandoned funds at the end of seven years. [108] The Supreme Court said that this idea was "prematurely raised," and that the trial court should "determine the manner in which any further proceedings will be conducted." [109] Thereafter, the parties settled with a provision that some $950,000 of the settlement amount be provided by having Yellow Cab lower its meters below the authorized fare. [110]

From this acorn, a mighty oak of cy pres doctrine and creativity has grown. As the Ninth Circuit put it in a 2017 decision, defense arguments against certification in that case ran up against "our court's longstanding ***1320** *cy pres* jurisprudence." [111] So also elsewhere; the prevalence of cy pres arrangements proliferated to a possibly unnerving point. As a 2007 article in the *New York Times* put it: "Judges all over the country have gotten into the business of doling out leftover class action settlement money, sometimes to organizations only tangentially related to the subject of the lawsuit. Hospitals are popular, as are law schools and legal aid societies." [112] Sometimes charities even lobbied judges to obtain favorable treatment. [113] Uneasiness with these practices understandably rose.

Two very different conceptions of the cy pres phenomenon can be imagined.

Maximalist use of cy pres: In a case like *Daar*, cy pres seems to approach a perfect solution. On the one hand, although it is not guaranteed that the beneficiaries of the lowered taxi meter rates are exactly the same people who paid the higher rates during the earlier period, it is likely that many of them are. More generally, the benefits are conferred on users of taxis in Los Angeles, which corresponds pretty closely to the class definition.

Beyond that, and in a sense more significantly from the perspective of the adherent of the maximalist view, this method denies the wrongdoer the spoils of the wrongdoing. As Professor Tidmarsh put it recently: "I take as a given the basic argument for cy pres relief: courts should attempt to achieve the greatest feasible level of deterrence." [114] That objective, of course, does not depend on delivering the money to the victims, much as that result may be applauded. Realism shows that (as in *Daar*) it may be very difficult or impossible to identify all the victims. Surely that circumstance should not enable the wrongdoer to retain the spoils.

The argument can be carried further. If the cost or difficulty of identifying the victims makes that prospect uninviting, one may identify organizations that serve the public interest that are in dire need of funding. Cy pres funding could be an important source of that funding. In California, there is even a statute that directs that the court order class action funds left unclaimed to be paid to nonprofit organizations that benefit the class or promote the law consistent with the objectives of the claim asserted in the case, or alternatively to "child advocacy programs; or nonprofit organizations providing civil legal services to the indigent." [115] At least in California, then, state court judges are supposed to deploy unclaimed class action funds to "Good Works" of the sort blessed by the legislature. The Advisory Committee has been urged to foster use of cy pres to achieve similar ends, at least in the settlement setting. [116]

***1321** Putting aside issues of self-dealing ("Let's direct the money to the judge's favorite charity"), this activity might be unnerving to many judges. One might almost regard it as a form of taxation by courts that intrudes on the legislature's authority to make appropriation choices. [117] Concerns have arisen about federal agencies or the executive using funds for purposes not authorized by Congress. [118] Judicial "funding" may seem even more dubious. But were one to embrace fully the deterrence rationale for class actions and disregard the compensation goal, this maximalist attitude could support regular use of settlement funds properly taken from wrongdoers to do Good Works.

Minimalist use of cy pres: As one would expect, this approach is very different from the maximalist use. The starting point is that it is very rare (or perhaps unknown) that any class action claims process achieves 100% payout. The Advisory Committee was repeatedly told that during the public comment period. [119] There's always somebody who doesn't cash the check. [120] In view of that recurrent reality, disregarding the problem of a residue after the claims process may be creating more problems.

The American Law Institute Aggregate Litigation Principles grappled with these issues and concluded that settlement funds "are ***1322** presumptively the property of the class members." [121] Of course, that view need not be absolute; the possibility that the undistributed residue would revert to the defendant points to a different view. [122] From its starting point, the ALI reasoned that ordinarily the remaining funds should be paid to class members as additional compensation unless that is infeasible. [123] Thus, cy pres could be employed only when—either because of the cost of distribution or because class members cannot be identified—additional payments to class members are not possible. In those cases, payment should be to "a recipient whose interests reasonably approximate those being pursued by the class." [124] Obviously, the ALI approach hews rather closely to the compensation orientation and is "minimalist" because it permits payment to others only when there is no feasible alternative.

Eventually, the Advisory Committee decided not to address cy pres by rule amendment.

B. Ascertainability

For decades, it has been recognized that a class must be defined. It does not suffice for a court to certify a class of "all those similarly situated" to the plaintiff. One must explain what similarity suffices. Indeed, since 2003 Rule 23 itself has said

that the court's certification order "must define the class." [125] That can be important when it comes time to send notice of certification to the class. [126] It also is important when there is a settlement [127] or the court is considering class counsel's request for attorney fees. [128] The definition is also central to the preclusive effect of the class action judgment. [129]

One simple way might be to define the class as "all those injured by defendant's actions," or something of the sort. But that creates the "fail-safe" problem, because the existence of the class depends on the plaintiff winning. [130] In another sort of case, one might define the class as including all those wishing to engage in certain types of activity. Along ***1323** these lines, the First Circuit found it sufficient to describe a class in a suit about police surveillance of a class consisting of all persons "who wish to . . . engage, in the City of Fall River, in peaceful political discussion . . . without surveillance." [131] But the definition of a class dependent on the subjective state of mind of class members early was found too problematical. [132] More objective criteria are needed.

Objective criteria may sometimes be hard to apply as well, however. Recall *Daar*, the 1967 California Yellow Cab case. [133] The named plaintiff alleged that Yellow Cab had set its cab meters in Los Angeles at a rate higher than authorized and thus overcharged passengers over an extended period. In reviewing the trial court's refusal to recognize a class action, the Supreme Court of California said that its first job was to determine "whether [the complaint] sets forth facts sufficient to show the requisite ascertainable class." [134] The problem was that the plaintiff could not point to a method of determining who had taken Yellow Cab cabs during the pertinent period. The court found this difficulty unimportant:

Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. . . . The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class. Presumably an accounting in the suit at bench will determine the total amount of the alleged overcharges; any judgment will be binding on all the users of taxicabs within the prior four years. However, no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof. [135]

Lately, that "ascertainability" problem has assumed considerable importance in consumer deception suits. The Third Circuit has insisted in such a case that, in order to obtain class certification, the plaintiff specify an "administratively feasible" method for identifying actual consumers who bought the product in question. [136] A California district judge has reacted that this decision "eviscerates low purchase price consumer class actions in the Third Circuit." [137] The Seventh Circuit has rejected the "heightened" ascertainability requirement, [138] and other courts seem to have sided more often with the Seventh Circuit. [139]

***1324** It is difficult to detach this debate from the underlying uneasiness about the real purposes of the class action device. If it is entirely to deter, one could probably design reasonably accurate measures of "unjust" profit for the producer of mislabeled consumer products. But if the main goal is to compensate those actually misled, that solution is incomplete. And some recommended versions of an ascertainability "fix" surely seemed to be overbroad. At least one proposal was to add an ascertainability requirement to Rule 23(a), which applies to all class actions, including injunctive relief class actions under Rule 23(b)(2). [140] As the Third Circuit has recognized, its ascertainability jurisprudence does not apply to such cases. [141]

After considerable discussion, the Advisory Committee decided not to attempt to resolve the ascertainability debate by rule amendment. During the public comment process, some urged that it do so while others praised the Committee for desisting. [142] The Committee has not since taken up the issue.

C. "No Injury" Classes

The concept of legally compensable injury is surely a challenging one. The gradual recognition of tort claims for infliction of emotional distress is one illustration. On the other hand, certain kinds of harms seem obvious candidates for legal protection. For example, racial discrimination is almost surely thought to inflict compensable harm whether or not it produces physical or economic harm.

But there may be claims that seem far from that model, particularly in regard to some statutory claims. Consider the Telephone Consumer Protection Act, 1991 legislation amended by the Junk Fax Prevention Act in 2005. [143] Although it would seem that the day of junk faxes has passed—who really uses the fax machine anymore? —junk fax lawsuits have multiplied. According to the *Wall Street Journal*, only forty-four such suits were filed in 2009, but that number rose to 1,136 cases in 2012 and 4,860 in 2016. [144] "The dollar amounts awarded from the cases can be large, particularly in the small percentage of cases certified as class actions." [145] As Judge Easterbrook recently noted, [146] it is surprising how many junk fax class actions there are.

There may be a viable question whether the harm of receiving a junk fax is sufficient to support a suit. There may be some modest expense, ***1325** but it is difficult to regard as comparable to suffering racial discrimination. The plaintiff quoted in the *Wall Street Journal* story explained that "[i]t's super annoying." [147] In a 2016 case defense-side lawyers hoped would put an end to such class actions, the Supreme Court held that a statutory claim must be based on a "concrete" injury, but its decision did not entirely resolve the matter. [148]

Meanwhile, the Advisory Committee was urged to revise Rule 23 to put an end to the "no injury" class action. [149] The submission directly countered the deterrence argument for class actions on behalf of low value claims: "[P]rivate enforcement of regulation tends to overdeter legitimate behavior and can hamstring governmental attempts to regulate public risks. Unchecked private enforcement can also disrupt the balance that regulatory agencies strive to achieve through their own regulation and enforcement." [150] In support, the submission relied on a study by Professor Shepherd to show that "no injury" class actions during the period from 2005 to 2015 had resulted in defendant payouts of some $4 billion, but that only about nine percent of that amount actually found its way into the pockets of class members. [151]

The Shepherd study found that about 20% of the identified class actions could be classified as "no injury" because the researchers concluded that they exhibited at least one of the following four conditions: (1) the plaintiffs suffered no actual or imminent concrete harm giving rise to an injury-in-fact; (2) the only harm was a technical statutory violation; (3) any economic loss was negligible or infinitesimal; or (4) the sought recovery was typically unrelated to compensating plaintiffs for economic or other harm. [152] One might speculate that the level of claiming by class members in such suits might be low; in any event, the report concluded that it was in fact usually low.

Plaintiff lawyers, meanwhile, reportedly received over one third of the settlement amounts in these "no injury" cases. [153] From the standpoint of compensation, then, these class actions do not perform. "Moreover, although plaintiff compensation is irrelevant to whether defendants are deterred from future harmful behavior, achieving deterrence through private class actions is exceptionally imprecise and inefficient." [154] Actions by public enforcement authorities are preferable, Professor Shepherd explained, particularly because guaranteed awards and attorney's fee ***1326** recoveries in private actions encourage "frivolous suits in order to extort settlements." [155]

There are reasons to suspect that private profit-seeking enforcement can produce anomalous incentives and outcomes. Perhaps some spam fax suits fit that model. And taking a firm stand on limiting class actions to compensatory goals might

support changing Rule 23 to prevent overenforcement. But picking and choosing between the "valid" and "frivolous" statutory claims would be a curious feature of a procedure rule. And the Advisory Committee did not take up this suggestion.

IV. THE ACTUAL 2016 PACKAGE

As Professor Fitzpatrick has observed, the Advisory Committee's actual amendment package is "pretty modest stuff." [156] The Committee proposed amendments primarily designed to (1) require "frontloading" of information regarding proposed class action settlements; [157] (2) articulate a relatively short list of "core" considerations bearing on whether a proposed settlement should be approved as "fair, adequate, and reasonable"; [158] and (3) curb or defeat the efforts of "bad faith objectors" to exploit the settlement process for personal gain. [159]

At least some were disappointed at the modesty of the package. [160] In addition, even though the "modest" package did not include any of the issues central to the tension between compensation and deterrence, the public comment period provided examples of people reading positions on these issues into the package.

Cy pres: The Committee Note regarding the "frontloading" provision calls for the parties to present details bearing on the proposed settlement up front. Among other things, it observes that "because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds." [161] As noted above, there are different visions of cy pres. At a pragmatic level, one could regard the invitation to address the question of disposition of a residue of settlement ***1327** funds as tending toward the "minimalist" view. [162] Failure to address this question might often burden the case at a later stage. Moreover, addressing it in a way that is accessible to class members could support arguments that they had in a sense assented to this disposition of unclaimed funds. If one regards the funds as the property of the class members, that could be important.

"Claims rate": As the study by Professor Shepherd [163] suggests, much attention may focus on the extent to which class members actually claim and collect settlement funds. The proposed amendment to the settlement approval standards included consideration of "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." [164] The proposal also invited attention to "the terms of any proposed award of attorney's fees, including timing of payment." [165]

The Committee Note followed up on those rule provisions. It observed that "[i]f the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on actual claims experience." [166] It also observed that "[p]rovisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement." [167]

The idea of deferring payment of some of the attorney's fee award corresponds to some suggested ways of dealing with the potentially corrupting effect of cy pres arrangements. If the attorney's fee is set as a percentage of the "fund" without regard to whether any of the class members actually get the money, that could rob class counsel of the incentive to make efforts to get money to the class members. Professor Wasserman has suggested that reducing class counsel's attorney's fees in light of the actual payout to class members would be a desirable idea. [168] To do so would call into question situations where the attorney's fee award to class counsel exceeded the payout to class members. But to do so rigidly might erode the value of class actions that produce creative compensation schemes like the reduced fare fix in *Daar*. [169]

Despite the caution in the proposals, some who commented reported that they feared that these amendments would inadvertently adopt the compensatory rationale. [170]

***1328** *"No injury" class*: Others took the reference to "claims rate" as leading to the conclusion that the rule should make clear that the court had to define the class in a way that ensured that every member had Article III standing. [171] But that does not appear to be a constitutional requirement, [172] and the amendment package does not require it by rule either.

V. OTHER POTENTIAL SOURCES OF REVOLUTIONARY CHANGE

The sensitivity of observers about dramatic changes resulting from the current amendment package suggests considering the potential of other actors to effect revolutionary change.

A. The Supreme Court

As Professors Burbank and Farhang show in their recent book, the Supreme Court has recently curtailed private enforcement in federal court. [173] Whether this is a revolutionary development could be debated, but it is clear that the quantity of its class action decisions has recently been considerable. By way of contrast: "Between 1980 and 1997, the Supreme Court issued only two decisions with lasting importance for ***1329** class action doctrine." [174] But in the last decade the Court has issued multiple decisions, some of which have had important implications. [175] To some extent, it may be that the practicing bar's treatment of these decisions partakes of what I have called "*Comcast* Bombast." [176] But surely some of these decisions have had a major impact on class action practice. [177]

In a way, one could find in the Court's decisions some features that resemble features of the Advisory Committee's amendment package. The package includes a "frontloading" provision with regard to judicial review of proposed settlements, [178] and Professor Freer has said that "there is a clear trend toward 'front-loading' class litigation" in the Court's decisions. [179] But it can hardly be said that the rulemaking process has responded strongly to the Court's decisions, unless one counts its decision not to proceed with a possible rule provision on settlement classes after the Court's decision in *Amchem Products, Inc. v. Windsor*. [180]

Characterizing the Court's class action jurisprudence can be a bit challenging. Professor Mullenix, at least, asserted that during the thirty years Justice Scalia (not a great fan of class actions) served on the Court, "well more than half of [the Court's class action] decisions are fairly characterized as favoring plaintiffs' interests in class litigation. If anything, the Court has been more pro-plaintiff in its class action jurisprudence than pro-business." [181]

Dire warnings, however, often attend the Court's consideration of class action issues. The Court's 2015 term, for example, was characterized as presenting "existential threats to the class action device." [182] A year later, however, Professor Issacharoff characterized the ***1330** 2015 term as "the term that wasn't." [183] The same lawyer who had a year before foreseen "existential threat[s]" to the class action concluded after the term was finished that "the era where the Supreme Court is interested in radically curbing the class action device is over." [184] Similarly, Dean Chemerinsky said of that term that "the biggest news for class actions was what didn't happen." [185]

B. Action by Congress

Congress can fuel class action filings by enacting penalty statutes with private enforcement provisions. Congress can also enact class action limitations. In 2005, it passed CAFA, which opened federal courts to a larger swath of state law class

actions. [186] Specifics in the bill dealt with such particular matters as "coupon settlements." [187] Much as the legislative debate was heated, CAFA was not a revolutionary bill, though it has some consequential provisions.

The current Congress, however, has taken up possible legislation that might have a significant impact on class actions —the Fairness in Class Action Litigation Act of 2017. [188] One could say that several provisions of the bill represent a strong endorsement of the "compensation" purpose for class actions, and a corresponding rejection of the "deterrence" justification for these lawsuits. That is not a criticism of the legislation but instead recognizes that Congress might grasp the nettle in a way that the Advisory Committee has not done. [189] The stated purpose of the legislation is to "diminish abuses in class action . . . that are undermining the integrity of the U.S. legal system." [190]

Moreover, the pending legislation has several features that correspond with topics that have arisen during the Advisory Committee's recent class action work. Thus, it contains a provision that seemingly addresses one aspect of the cy pres question, commanding that "[i]n no event shall the attorneys' fee award exceed the total amount of money directly distributed to and received by all class members." [191] The bill additionally contains a provision that seems directly addressed to the ascertainability question. [192] It also contains a requirement that seems ***1331** addressed to the "no injury" question. [193] Indeed, a somewhat similar proposal was made to the Advisory Committee. [194] Additional provisions of the bill require that any attorney's fees awarded to class counsel not be paid until distribution to the class of monetary recoveries. [195]

It is uncertain whether this proposed legislation will ultimately be adopted. [196] If it is enacted, there will likely be a need for the courts to interpret its requirements. But it is also likely that many would describe some features of it as revolutionary, not evolutionary.

C. Technology

Tech gurus routinely tell everyone else that they are going to "disrupt" everything with their Digital Revolution. Lawyers are not immune. It seems that digital technology has had a greater effect on doctors than on lawyers, [197] and I have argued that the effect of communications breakthroughs on the legal profession has been more evolutionary than revolutionary. [198]

***1332** At the same time, it is hard to deny that technology has affected litigation in important ways. For one thing, it has made vastly more information potentially available through discovery, leading to amendments in 2006 to the rules. [199] Amidst these discovery challenges, there may be good news for class actions. As Elizabeth Cabraser has recently said, electronic communications provide the prospect of a "complete revolution in the relationships between members of the class, their counsel and the court." [200] Although class counsel formerly would communicate with class members only once or twice over the life cycle of a class action, "[w]e are in a completely different situation today and that process has accelerated so quickly that many of us don't fully even realize yet where we are." [201] This is of particular relevance to the current amendment package, which focuses on management of proposed class action settlements. According to Professor Issacharoff: "By the time you get to the class settlement, the old image that we have that these are anonymous, non-participating individuals, gives way to a very active block of participation." [202]

There is an interesting parallel in reactions to the current Rule 23 amendment package. One feature of the package is an effort to take account of this transformation of communications technology as it relates to class action notice. In 1974, the Supreme Court seemed to say that the rule required individual notice of class certification in a Rule 23(b)(3) class

action to be by first class mail.[203] That was the ordinary way of communicating about a wide variety of topics forty years ago. But that has changed. Consider, for example, a recent Ninth Circuit case:

Initial e-mail notice of the settlement was provided to some 35 million class members. Notice was mailed to more than 9 million class members whose email addresses were invalid such that the email notice "bounced back." . . . . The notice encouraged class members to visit the class website for more details. In response to the notice, 1,183,444 claims were submitted.[204]

The Ninth Circuit case was not an anomaly; use of more "modern" methods of giving notice to class members has grown in recent years. So the current amendment package recognized this change in society by stating with regard to notice of certification in (b)(3) class actions that "[t]he notice may be by United States mail, electronic means, or other appropriate means."[205] The accompanying Committee Note attempted to ***1333** explore and evaluate the concerns that would bear on using one or another form of notice.[206]

Somewhat surprisingly, this proposal generated at least as much controversy as any other piece of the package. Several very prominent and well-respected notice professionals vehemently denounced the proposed change as fostering a "race to the bottom" in which inexperienced bottom feeder vendors would win out over reputable providers by offering to provide effective notice at rock-bottom rates.[207] Others commented that they supported the amendment because it recognized current realities.[208] Despite these adverse comments, the Rule 23 Subcommittee resolved after the public comment period to adhere to its proposal, though with a change to recognize that more than one method of giving notice might be suitable in a given case.[209]

It may be that electronic communications could affect class action practice more broadly, and even supplant it to some extent. One alternative is something like the "mass action" that CAFA classified as a class action for purposes of its jurisdictional provisions.[210] Such collaborative litigation may be fostered by contemporary communication methods. Recall that European customers of VW reportedly have complained that American purchasers are getting a better deal through class action settlements.[211] As the *New York Times* has reported, "[l]awyers in Berlin, Paris and elsewhere in Europe are teaming up with new online services to recruit clients en masse to try to get around the usual restrictions on consumer lawsuits."[212] This new form of litigation is possible because "the internet has made it possible to recruit huge numbers of consumers who have similar gripes."[213] Professor Coffee has reported on somewhat similar high-tech efforts to recruit groups of plaintiffs to sue VW for securities fraud.[214]

CONCLUSION

In sum, revolutionary change to class action practice is not currently emerging from the rules process. Some have urged the Advisory ***1334** Committee to move more aggressively, both to insist that the device be limited purely to compensatory purposes and to fortify the deterrence rationale. Instead, the current package does not include rule provisions directly addressing such issues as cy pres, ascertainability, and the "no injury" class action. It may be, as Professor Bone has recently written, that a complete resolution of those sorts of issues depends on developing "a normative theory of adjudicatory legitimacy."[215] But just as the original framers of the modern class action chose to "muddle through without picking sides" in the debate on the "true" purpose of class actions,[216] the current rulemakers have not rushed to resolve those debates. Indeed, as things now stand, it seems that the entity most likely to take a firm position is Congress, which has pending legislation that seems forcefully to embrace the compensation rationale.[217] Besides that, the most likely source of revolutionary change for class action practice may not be legal change, but technological innovation.[218]

Footnotes

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** Coil Chair in Litigation, University of California, Hastings College of the Law. I am indebted to Steve Burbank, Scott Dodson, and Mary Kay Kane for comments on a draft. I did not accept all their suggestions.

Since 1996, I have served as Associate Reporter of the Advisory Committee on Civil Rules. In that role, I was present for the end of the first episode of class action rule reform in 1996–1998, and directly involved in the second and third episodes. To a substantial extent, I draw on those experiences in this Article. As a consequence, it is a travelogue of the reform trail. But I am speaking only for myself, not for the Advisory Committee or anyone else.
At several points in this Article, I do rely on official documents of the rulemaking process such as agenda books for meetings of rules committees. These materials are publicly accessible on the website of the Administrative Office of the U.S. Courts: www.uscourts.gov. In addition, on occasion I report on events in which I was involved, and I do sometimes do not cite to those official documents (some of which I authored) because I am reporting on events in which I was personally involved

1 John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 325 n.10 (2005) (quoting Minutes, Advisory Committee On Civil Rules 15 (Apr. 28–29, 1994), http://www.uscourts.gov/sites/default/files/fr_import/CV04-1994 -min.pdf [https://perma.cc/3QSH-XBN8]).

2 Eubank v. Pella Corp., 753 F.3d 718, 719 (7th Cir. 2014).

3 Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659, 1660 (2014) (footnote omitted).

4 Charles Alan Wright, *Class Actions*, 47 F.R D. 169, 170 (1969).

5 David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 588 (2013); see also Epic Systems Corp. v. Lewis 138 S. Ct.___ (2018) (slip op at 11) ("Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966").

6 Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F. R. D. 39, 52 (1967).%

7 *See* Symposium, *1966 and All That: Class Actions and Their Alternatives After Fifty Years*, 165 U. PA. L. REV. 1495 (2017); Conference, *Rule 23 50: The 50th Anniversary of Rule 23*, 92 N.Y.U. L. REV. 767 (2017).%

8 *See* Charles Alan Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F. R. D. 552, 567 (1966) (predicting that not very many class actions would be certified under Rule 23(b)(3)); *see also* Rabiej, *supra* note 1, at 334 & n.43 (reporting Wright's view, and observing that it was one of the rare instances when Wright was wrong about a legal development).%

9 *See* Wright, *supra* note 4, at 179 (recognizing that his earlier prediction that Rule 23(b)(3) would be little used had "proved quite ill-founded").

10 Rabiej, *supra* note 1, at 328 (referring to "a self-imposed moratorium on further amendments").%

11 *See* D. Marcus, *supra* note 5, at 615.%

12 *See id.* at 618–19.%

13 *See supra* text accompanying note 6.%

14 *See* David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. 1531, 1531 (2017).%

15 *See* Memorandum from Patrick E. Higginbotham, Chair, Advisory Comm. on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Comm. on Rules of Practice and Procedure (May 17, 1996), *reprinted in* 167 F.R.D. 535, 535–36 (1996) (transmitting Rule 23 revisions that "result from a course of Committee study that began when, in March, 1991, the Judicial Conference requested that [the Standing] Committee 'direct the Advisory Committee on Civil Rules to study whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation.'").%

16 *See generally* Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 504–16 (2016) (reviewing these developments).

17 Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (quoting 86 CONG. REC. 13,942, 13,943 (1940) (Walter-Logan Bill—Veto Message)).

18 William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2130 & n.2 (2004) (noting that Judge Jerome Frank introduced the phrase in 1943).%

19 *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E. D. Pa. 1946) (finding an implied private cause of action in the Securities Exchange Act). Note that in 1949, the Supreme Court said that the derivative action was the "chief regulator of corporate management." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949). Without meaning to detract from that device, it is difficult to think that a contemporary lawyer would say the same.%

20 *See* J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

21 Private Securities Litigation Reform Act of 1995, Pub L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2012)).

22 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007).%

23 *See* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 175 tbl.9.1 (2015) (comparing dollar amounts recovered by the SEC and private class actions; the figure obtained through private class actions dwarfs the SEC recoveries).

24 Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 21 (2010).

25 John C. Coffee, Jr., *"Loser Pays": The Latest Installment in the Battle-Scarred, Cliff-Hanging Survival of the Rule 10b-5 Class Action*, 68 SMU L. REV. 689, 689–90 (2015) (footnote omitted).

26 Thus, Professor Miller, who was present during the creation of the 1966 amendment as an assistant to Reporter Benjamin Kaplan (and was later himself Reporter to the Committee) in 2014 offered the following recollection of how matters stood as the 1966 amendments were under study:

Those were relatively simple days in the world of litigation. The Committee obviously could not predict the great growth in complicated federal and state substantive law that would take place in such fields as race, gender, disability, and age discrimination; consumer protection; fraud; products liability; environmental safety; and pension litigation, let alone the exponential increase in class action and multiparty/multi-claim practice that would flow from the expansion of those legal subjects.

Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L. J. 293, 293–95 (2014).%

27 *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 104 n.5 (2009) (offering examples of federal statutes imposing statutory damages). Professor Scheuerman observes: "When combined with the procedural device of the class action, aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent." *Id.* at 104.%

28 CHRISTOPHER HODGES, LAW AND CORPORATE BEHAVIOUR: INTEGRATING THEORIES OF REGULATION, ENFORCEMENT, COMPLIANCE AND ETHICS 67 (2015).%

29 *Id.* at 70.%

30 *Id.* at 70–71. Professor Hodges adds, "[t]he basic assumption is that since economic theory postulates that the imposition of a financial penalty *will* deter later wrongdoing, it must be so." *Id.* at 71.

31 Perry Cooper, *Are Class Actions About Compensation or Deterrence?*, 16 CLASS ACTION LITIG. REP. (BNA) 1249, 1249 (2015) (quoting Fitzpatrick). Professor Fitzpatrick added that there is also no evidence that class actions do not have a deterrent effect. *Id.*%

32 HODGES, *supra* note 28, at 79 (reporting that U.S. corporate chief executives and small business owners say that they have closed companies, discontinued products, or decided not to release new products due to the risk of lawsuits). It must be emphasized that one need not accept the claim that fear of litigation produces these results at face value.
To the extent the prospect of litigation has played a major role in such decisions, class actions are hardly the only reason. Besides class actions, the U.S. legal system operates under a set of rules that are extremely plaintiff-friendly compared to the regimes in the rest of the world—lax pleading requirements, very broad discovery without the need for advance judicial authorization, the right to jury trial and the resulting limits on judges' deciding plaintiffs lacked sufficient evidence, frequent grounds for recovery of large amounts for emotional distress, occasional grounds for recovery of punitive damages, and the American Rule under which the successful defendant ordinarily cannot recover its attorney fees from the plaintiff.

33 Cooper, *supra* note 31, at 1249.

34 Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975). For a sophisticated contemporary law and economics analysis of how a variety of other matters—filing fees, loser pays rules, and burdens of proof—bear on optimal private enforcement, see LOUIS KAPLOW, OPTIMAL DESIGN OF PRIVATE LITIGATION 1–8 (Harvard Law Sch., Discussion Paper No. 928, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017443 [https://perma.cc/G9LG-RDMQ].%

35 Dam, *supra* note 34, at 61.%

36 *See* 28 U.S.C. § 1712 (2012) (limiting the attorney fees paid class counsel who negotiate coupon settlements of securities fraud class actions).

37 *See* HODGES, *supra* note 28, 655–706 (emphasizing that corporate ethics and ethos are the prime ingredients of corporate compliance).

38 For example, the May 2016 issue of the Metropolitan Corporate Counsel contained a number of articles about the high importance of vigilance regarding corporate compliance. *See, e.g.*, Yogesh Bahl, *Continuous Compliance Improvement Using Psychology and Behavior*, METROPOLITAN CORP. COUNS., May 2016, at 37, 37. An interview in the magazine is entitled "Enforcement Goes Into Hyperdrive," with the tagline "In today's stormy risk environment, a strong culture is the safest harbor." Richard H. Girgenti & Timothy P. Hedley, *Enforcement Goes Into Hyperdrive*, METROPOLITAN CORP. COUNS., May 2016, at 8, 8. Similarly, the former general counsel of General Electric has written of "the inside counsel revolution that began in the late 1970s and that has increased in scope and power ever since." Benjamin W. Heineman, Jr., *The Inside Counsel Revolution*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Mar. 29. 2016), https://corpgov.law.harvard.edu/2016/03/29/the-inside-counsel-revolution [https://perma.cc/C289-2D4G]. It has been asserted as well that insurance companies foster corporate compliance. *See, e.g.*, Shauhin Talesh, *Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as "Compliance Managers" for Business*, 43 L. & SOC. INQUIRY (forthcoming 2018) (manuscript at 1) (on file with the North Carolina Law Review) (asserting that "insurance companies play a critical, yet unrecognized, role in assisting organizations in complying with privacy laws").

39 Of course, if the inclination of the public enforcers to enforce abates, the compliance efforts of the companies may abate also. On this point, the transition from the Obama administration to the Trump administration may usher in a striking contrast in attitudes toward governmental efforts to force corporations to comply with the law.

40 Chapman v. First Index, Inc., 796 F.3d 783, 784 (7th Cir. 2015); *see also* Sask. Mut. Ins. Co. v. CE Design, Ltd., 865 F.3d 537, 539 (7th Cir. 2017) (describing the proposed class representative in a junk fax case as "an Illinois corporation whose business now appears to center on litigating claims under the federal Telephone Consumer Protection Act").

41 Daniel R. Stoller, *CVS Subsidiary Swallows $9.25M Class Junk Fax Pill*, 17 CLASS ACTION LITIG. REP. (BNA) 1308, 1308 (quoting David Almeida, partner at Sheppard, Mullin, Richter & Hampton LLP).

42 Burbank & Wolff, *supra* note 24, at 74.

43 Ratner v. Chem. Bank N. Y. Tr. Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972). Congress later amended the statute to limit the size of the penalty in a TILA class action. Amendments to the Truth in Lending Act, Pub. L. No. 93-495, sec. 408, § 130, 88 Stat. 1517, 1518–19 (1974) (codified as amended at 15 U.S.C. § 1640 (2012)).

44 EEOC v. Bass Pro Outdoor World, L. L. C., 826 F.3d 791, 797 (5th Cir. 2016) ("[T]he EEOC is not required to adhere to Rule 23 when bringing 'an enforcement action . . . in its own name.'" (omission in original) (quoting Gen. Tel. Co. v. EEOC, 446 U.S. 318, 323 (1980))).

45 Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L. J. 1531, 1542 (2016).%

46 *See* COFFEE, *supra* note 23, at 175 tbl.9.1.

47 Stephen J. Choi & A.C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIRICAL LEGAL STUD. 27, 29 (2016).%

48 *See* Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 285 (2016).%

49 *See* Margaret Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 929 (2017).%

50 SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATIONS AND PRIVATE LAWSUITS IN THE U.S. 34–37 (2010).%

51 *A Mammoth Guilt Trip*, ECONOMIST, Aug. 30, 2014, at 21; *Poor Correspondents*, ECONOMIST, June 14, 2014, at 77 (reporting on "derisking" efforts to banks).

52 Gretchen Morgenson, *A Watchdog Too Good at its Job*, N.Y. TIMES, Feb. 12, 2017, at BU1; Alan Rappeport, *Consumer Watchdog Faces Attack by House Republicans, Memo Reveals*, N.Y. TIMES, Feb. 10, 2017, at A14.

53 Michael D. Shear & Eric Lichtblau, *Civil Servants Sense "Dread" in Trump Era*, N. Y. TIMES, Feb. 12, 2017, at A1 (referring to worries among staff when the president "recruited cabinet secretaries hostile to the agencies they lead").%

54 *See supra* note 32 and accompanying text.

55 Jack Ewing, *New Strategy Against VW*, N.Y. TIMES, Aug. 16, 2016, at B1.%

56 *Id.*

57 Robert A. Weninger, *The VW Diesel Emissions Scandal and the Spanish Class Action*, 23 COLUM. J. EUR. L. 91, 99 (2016).

58 Patrick McGee, *VW Sued in Germany Over Car Emission Test Scandal*, FIN. TIMES, Jan. 4, 2017, at 3.

59 Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997) (discussing the Rules Enabling Act).%

60 COFFEE, *supra* note 23, at 219.

61 D. Marcus, *supra* note 5, at 597.

62 For discussion, see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 676–82 (1979).%

63 *See supra* text accompanying note 14.

64 On this topic, see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 370–75 (2000).

65 For discussion, see Richard L. Marcus, *They Can't Do That, Can They? Mass Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 859 (1995).

66 *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119 (2007) ("It is not unusual for only 10 or 15% of the class members to bother filing claims."); *cf.* Zimmer Paper Prods., Inc. v. Berger & Montague, P. C., 758 F.2d 86, 92–93 (3d Cir. 1985) (holding that class counsel did not have a fiduciary duty to follow up with another notice after notice by first class mail resulted in submission of claims by only 12% of class members).%

67 *See, e.g.*, James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 413 (2005) (describing failure of financial institutions to make claims in securities class actions).%

68 *See, e.g.*, Pearson v. NBTY, Inc., 772 F.3d 778, 783 (7th Cir. 2014) (describing the online claim form in a consumer class action as "bound to discourage filings").

69 For an early example of a reversion provision in a litigated case, see Boeing Co. v. Van Gemert, 444 U.S. 472, 477 (1980) (unclaimed funds in class action would revert to defendant after claims period).%

70 *See id.* at 482 (holding that counsel fees should be charged against the entire damages award in a class action, even though many class members did not claim their share).%

71 *See* Memorandum from Patrick E. Higginbotham to Honorable Alicemarie H. Stotler, *supra* note 15, at 535.%

72 *See* 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 3–18 (May 1, 1997) [hereinafter 1 WORKING PAPERS], http://www.uscourts.gov/sites/default/files/workingpapers-vol1.pdf [https://perma.cc/B6G4- P795 (staff uploaded archive)]. The four-volume compilation of the various drafts considered, minutes of the pertinent meetings, transcripts of the various hearings, and written comments submitted during the public comment period, is an invaluable source on the development of the 1996 package of draft amendments. It is worth noting that during the 2011–2017 reform episode there was at least one proposal for a comprehensive rewriting of the certification standards in Rule 23(a) and (b). *See* Letter from Adam Steinman, Professor, Univ. of Ala. Sch. of Law, to Edward Cooper, Robert Klonoff & Richard Marcus, Members, Rule 23 Subcomm. (Feb. 24, 2015), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0003 [https://perma.cc/7FWG-AKLM] (follow attachment).%

73 *See* 1 WORKING PAPERS, *supra* note 72, at 6–7.%

74 *See id.* at 7–8.%

75 *See id.* at 9–10.%

76 *Id.* at 11–12.%

77 *See* AM. BAR ASS'N SECTION OF LITIG., REPORT & RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CLASS ACTION IMPROVEMENTS, *reprinted in* 110 F. R. D. 195, 200–03 (1986). The ABA's recommendation proposes replacing Rule 23(b) with a single category keyed to whether a class action would be superior and making that determination turn on multiple factors. It also called for notice in all class actions and made opting out discretionary with the court. It also explicitly authorized pre-certification resolution of merits motions.%

78 *See* 1 WORKING PAPERS, *supra* note 72, at 19–296.%

79 *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, 167 F. R. D. 523, 540–66 (Aug. 1996).

80 Mullenix, *supra* note 59, at 616. For an intriguing retrospective on the various more aggressive amendment ideas for Rule 23, see Scott Dodson, *A Negative Retrospective on Rule 23*, 92 N.Y.U. L. REV. 917, 921–25 (2017).%

81 *See* 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 1–9 (May 1, 1997) [hereinafter 2 WORKING PAPERS], http://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf [https://perma.cc /SY4M- V2VR (staff uploaded archive)].%

82 *See supra* note 72.%

83 *See* Preliminary Draft of Proposed Amendments, 167 F.R.D. at 559. The other principal concern of the law professors was a proposal to add a new Rule 23(b)(4), authorizing certification of a (b)(3) class for purposes of settlement "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." *Id.* at 559. The professors objected that this proposal was standardless and "lends official approval to an extremely controversial practice, one plagued by serious agency problems and risks of collusion." 2 WORKING PAPERS, *supra* note 81, at 1.

84 The official publication included draft minutes from the Advisory Committee meeting:
Class actions have become an important element of private attorney-general enforcement of many statutes. . . . [T]here may be indirect benefits to the public at large in deterring wrongdoing, and in some cases, it may be desirable to force disgorgement of wrongful profits without regard to individual benefits. The question is in part whether it is wise to rely on private enforcement through Rule 23 rather than specific Congressionally mandated private enforcement devices—and whether the question is different as to statutes enacted before Rule 23 enforcement had become well recognized than as to more recent statutes.
Preliminary Draft of Proposed Amendments, 167 F.R.D. at 541.

85 2 WORKING PAPERS, *supra* note 81, at 6.

86 Minutes, Advisory Committee On Civil Rules 4 (May 1–2, 1997), http://www.uscourts.gov/sites/default/files/fr_import/cv5-97.pdf [https://perma.cc/9K3W-7CEJ].%

87 *Id.* at 9.%

88 *Id.* at 19.

89 Minutes, Advisory Committee On Civil Rules 21 (Oct. 6–7, 1997), http://www.uscourts.gov/sites/default/files/fr_import/cv10-97.pdf [https://perma.cc/ZL7W-JZ7Z].%

90 *See* D. Marcus, *supra* note 5, at 597.%

91 Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and Rules of Evidence, 201 F.R.D. 560, 587 (Aug. 15, 2001).%

92 *Id.* at 590.

93 Among the changes were a modification of the rule's timing requirement from directing that class certification be decided "as soon as practicable" to calling for decision "at an early practicable time," requiring that the order certifying a class describe the class claims and defenses, and directing that notice of certification be in "plain, easily understood language." The package also contained new subdivisions 23(g) (appointment of class counsel) and 23(h) (attorney fee awards in class actions). *Id.* at 603–06.%

94 *See id.* at 606.%

95 *Id.* at 611.%

96 *See* Report of the Civil Rules Advisory Committee, *in* AGENDA BOOK OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 1, 145–58 (June 2002), http://www. uscourts.gov/sites/default/files/fr_import/ST2002-06–2˙.pdf [https://perma.cc/CSW7-T92R].%

97 Rule 23 Subcommittee Report, *in* AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 449, 455–64 (Mar. 2012), http://www.uscourts.gov/sites/default/files/fr _import/ CV2012-03.pdf [https://perma.cc/B4H8-DJD8].

98 The 2015 amendments attracted an unprecedented amount of interest. More than 2,300 written comments were submitted between August 2013 and February 2014. Each of the three public hearings was oversubscribed, and some 120 witnesses testified in the hearings. The Senate Judiciary Committee held a hearing on the amendment package on November 5, 2013, before the Advisory Committee had even held its first hearing. Shortly after the amendments went into effect, Chief Justice Roberts devoted most of his year-end message to the rule changes.%

99 *See* Report of the Advisory Committee on Civil Rules, *in* AGENDA BOOK OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 189, 190–91 (Jan. 2016), http://www.uscourts.gov/sites/default/files/2016-01-standing-agenda-book.pdf [https:// perma.cc/7FRX-QALU] (listing the following events: (1) ABA 18th Class Action Institute, Chicago, Oct. 23–24, 2014; (2) Lawyers for Civil Justice Membership Meeting, New York, Dec. 4–5, 2014; (3) Impact Fund 13th Annual Class Action Conference, Berkeley, Feb. 26–27, 2015; (4) George Washington University Roundtable on Settlement Class Actions, Washington, Apr. 8, 2015; (5) ALI discussion of Rule 23 issues, Washington, May 17, 2015; (6) ABA Litigation Section meeting, San Francisco, June 19, 2015; (7) American Association for Justice Annual Meeting, Montreal, July 12, 2015; (8) Civil Procedure Professors' Conference, Seattle, July 17, 2015; (9) Duke Law Conference on Class-Action Settlement, Washington, July 23–24, 2015; (10) Defense Research Institute Conference on Class Actions, Washington, July 23–24, 2015; (11) Rule 23 Subcommittee Mini-Conference, DFW Airport, Sept. 11, 2015; (12) National Consumer Law Center Consumer Class Action Symposium, San Antonio, Nov. 14–15, 2015; (13) Association of American Law Schools Annual Meeting, New York, Jan. 8, 2016).
The Subcommittee received more than twenty-five written submissions about possible changes to Rule 23 during the time it was considering possible rule change ideas. *Id.* at 191.%

100 *See* Summary of Comments and Testimony, *in* AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 131, 132–33 (Apr. 2017), http://www.uscourts.gov/sites/default /files/2017-04-civil-agenda_book.pdf [https://perma.cc/NYA6-WYX3] (summarizing testimony at hearings).%

101 *See* Memorandum Prepared for Mini-Conference, *in* AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 187, 187–88 (Nov. 2015), http://www.uscourts.gov/sites /default/files/2015-11-civil-agenda_book_0.pdf [https://perma.cc/L5T3-PGB4].

102 *See* Rule 23 Subcommittee Report, *in* AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 101, at 87, 89–91.%

103 *See* Daar v. Yellow Cab Co., 433 P.2d 732, 735–36 (Cal. 1967).

104 433 P.2d 732 (Cal. 1967).%

105 *Id.* at 736.%

106 *Id.* at 740.%

107 *Id.* at 746.%

108 *See id.* at 746 n.15.%

109 *Id.*

110 *See* 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS 30 n.13 (4th ed. 2002) (describing settlement). It is important to note that in federal court cy pres provisions are limited to settlement situations. The California court could authorize this sort of substantive remedy as part of its class action process, but trying to do the same thing by rule in the federal court system would raise serious questions about the rulemaking power.

111 Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1129 (9th Cir. 2017).

112 Adam Liptak, *Doling Out Other People's Money*, N. Y. TIMES, Nov. 26, 2007, at A14.%

113 *See id.*

114 Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 773 (2014).%

115 CAL. CIV. PROC. CODE § 384(b)(3)(C) (West, Westlaw through Ch. 2 of 2018 Reg. Sess.).%

116 *See, e.g.*, Letter from Christine Pedigo Bartholomew, Assoc. Professor of Law, Univ. at Buffalo Law Sch., to Rebecca A. Womeldorf, Rules Comm. Support Office (Apr. 7, 2015), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0017 [https://perma. cc/K9NA-52W0] (follow attachment) (submitting a draft of her article *Saving Charitable Settlements*, 83 Fordham L. Rev. 3241 (2015), which asserts that "[c]haritable settlement challengers raise basic questions about whether the purpose of a damages class action is compensation or social justice," *id.* at 3245, and that "[t]he better view is that compensation is just a by-product of a class action's regulatory function," *id.* at 3258); Letter from Jocelyn D. Larkin, Exec. Dir., Impact Fund, to Comm. on Rules of Practice & Procedure 4 (Feb. 27, 2017), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0063 [https:// perma.cc/7LNL-GBZZ] (follow attachment) (noting that "*cy pres* funds are providing, in many cases, a vital source of funding to legal services programs across the country"); Letter from Sheila O'Sullivan, Exec. Dir., & Noah C. Samuels, Deputy Dir., NW Consumer Law Ctr., to the Advisory Comm. on Rules of Civil Procedure 2 (May 15, 2015), https://www.regulations.gov/documentD=USC-RULES-CV-2016-0004-0021 [https://perma.cc/6E54-JD4Y] (follow attachment) (asserting that "[*c*]*y pres* awards are a crucial source of funding for organizations like the Northwest Consumer Law Center . . ., which strengthens our economy by empowering and protecting the consumers who contribute to it every day"); Letter from Nat'l Legal Aid & Def. Ass'n et al., to Comm. on Rules of Practice Procedure 4 (Sept. 8, 2015), https://www.regulations.gov /document?D=USC-RULES-CV-2016-0004-0026 [https://perma.cc/87L8-4FYX] (follow attachment) (referring to cy pres grants as "a critical funding source for legal services organizations and foundations"); Letter from Diane L. Webb, Chief Program Officer & Gen. Counsel, Legal Aid at Work, to Comm. on Rules of Practice and Procedure 3 (Feb. 15, 2017) https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0086 [https://perma.cc/86PT-ZQDW] (follow attachment) (asserting that "*cy pres* is essential to our organization's mission and its continued sustainability").

117 For an example of such an argument, see Judge Brown's dissenting opinion in Keepseagle v. Perdue, 856 F.3d 1039, 1058–79 (D.C. Cir. 2017). The case involved disposition of the $380 million residue of funds allocated by Congress to settle a class action. *Id.* at 1058. Judge Brown argued that the distribution of this money violated the Constitution's Appropriations Clause, asserting that "this case exposes a peril to the public fisc with which the framers never reckoned: *cy pres*." *Id.* at 1059.%

118 *See, e.g.*, Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L. J. 1677, 1686–1701 (2017) (discussing efforts by the executive to underwrite large-scale economic entitlements without clear statutory authority).%

119 *See* Summary of Comments and Testimony, *supra* note 100, at 134–44 (summarizing testimony and comments received).%

120 *See, e.g.*, Michael R. Pennington, Transcript of Proceedings, Advisory Committee Meeting on the Rules of Civil Procedure 8 (Feb. 2017), http://www.uscourts.gov/sites /default/files/transcript_of_2-16-17_hearing_0.pdf [https://perma.cc/C337-Q8RF] (asserting that claims rates will always be lower than 100%)

121 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (AM. LAW INST. 2010).

122 The ALI view rejects reversion because it "would undermine the deterrence function of class actions." *Id.*

123 One could contend that these class members would be unjustly enriched. But as the ALI recognized, "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members." *Id.*%

124 *Id.* § 3.07(c).%

125 *See* FED. R. CIV. P. 23(c)(1)(B).%

126 *See id.* 23(c)(2)(B) (directing "individual" notice in (b)(3) class actions).%

127 *See id.* 23(e)(1) (saying that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal [for settlement]").

128 *See id.* 23(h)(1) (directing that notice of a motion for a fee award "must be . . . directed to class members in a reasonable manner").

129 Rule 23(c)(3) says that for (b)(1) and (b)(2) classes the judgment must "include and describe those whom the court finds to be class members." For (b)(3) classes, the judgment must "include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members."

130 As the Sixth Circuit put it:
The class the district court initially certified was flawed in that it only included those who are "entitled to relief." This is an improper fail-safe class that shields the putative class members from receiving an adverse judgment. Either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment. Randleman v. Fid. Nat'l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011).

131 Yaffe v. Powers, 454 F.2d 1362, 1364 (1st Cir. 1972) (omission in original).%

132 *See, e.g.*, Simer v. Rios, 661 F.3d 655, 669 (7th Cir. 1981) (refusing to certify a class of all those "chilled" from applying for governmental aid by an improper requirement for applying).%

133 *See supra* notes 103–10 and accompanying text (discussing *Daar v. Yellow Cab Co.*).

134 Daar v. Yellow Cab Co., 433 P.2d 732, 739 (Cal. 1967)%

135 *Id.* at 740.%

136 Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir. 2012)).

137 McCrary v. Elations Co., No. EDCV 13–00242, 2014 WL 1779243, at *8 (C. D. Cal., Jan. 13, 2014).

138 Mullens v. Direct Dig., LLC, 795 F.3d 654, 657 (7th Cir. 2015).%

139 *See, e.g.*, *In re* Petrobras Sec., 862 F.3d 250, 265 (2d Cir. 2017); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1123 (9th Cir. 2017).%

140 *See, e.g.*, Letter from Lawyers for Civil Justice, to Advisory Comm. on Civil Rules 6 (Oct. 3, 2016), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0039 [https://perma.cc/4XZW-Q7EC] (follow attachment) (recommending the addition of a new Fed. R. Civ. P. 23(a)(5): "The members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden").%

141 *See* Shelton v. Bledsoe, 775 F.3d 554, 561 (3d Cir. 2015) (noting that ascertainability is not required for certification of a class seeking only injunctive relief).%

142 *See* Summary of Comments and Testimony, *supra* note 100, at 182–84.%

143 *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (codified as amended at 47 U.S.C. § 227 (2016)).

144 Sara Randazzo, *Taking Unwanted Faxes to Court*, WALL ST. J., Mar. 25, 2017, at B4.%

145 *Id.*

146 Chapman v. First Index, Inc., 796 F.3d 783, 784 (7th Cir. 2015).

147 Randazzo, *supra* note 144, at B4.%

148 *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).%

149 *See* Letter from Lawyers from Civil Justice, to Advisory Comm. on Civil Rules & Rule 23 Subcomm. 5 (Mar. 14, 2016), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0033 [https://perma.cc/GNT5-C96C] (follow attachment).%

150 *Id.* at 3 (footnote omitted)

151 JOANNA SHEPHERD, AN EMPIRICAL SURVEY OF NO-INJURY CLASS ACTIONS 1–2 (Emory Univ. Sch. of Law, Legal Studies Research Paper Series No. 16-402, 2016), https://papers. ssrn.com/sol3/papers.cfm?abstract_id=2726905 [http://perma.cc/8MLQ-Q3EE].%

152 *Id.* at 1.

153 "[A]lthough 60 percent of the total award may be available to class members, in reality, they typically receive less than 9 percent of the total. In comparison, class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class." *Id.* at 2.%

154 *Id.* at 4.%

155 *Id.*

156 Perry Cooper, *Solutions Afoot for Curbing Class Action Gadflies*, 17 CLASS ACTION LITIG. REP. (BNA) 699, 700 (quoting Brian Fitzpatrick).%

157 *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 212–13 (Aug. 2016) [hereinafter Preliminary Draft], https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0002 [https: //perma.cc/8GAD-BKUE] (follow link to view document) (proposed amendment to Rule 23(e)(1)).%

158 *See id.* at 213–14.%

159 *See id.* at 215–17. There are other features to this package, including extending the time for filing a request for appellate review under Rule 23(f) to 45 days in cases in which the federal government is a party, *id.* at 217, and recognizing the wider variety of methods of giving notice to class members available in the twenty-first century, a subject examined in Section V. C. below, *see id.* at 211–12.%

160 *See* Summary of Comments and Testimony, *supra* note 100, at 182–91 (recounting additional issues brought up by commenters).

161 Preliminary Draft, *supra* note 157, at 222–23. This comment was followed by a further observation: "Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation." *Id.* at 223.%

162 *See supra* text accompanying notes 119–24.%

163 *See supra* text accompanying notes 151–55.

164 Preliminary Draft, *supra* note 157, at 214 (proposed Rule 23(e)(2)(C)(ii)).%

165 *Id.* (proposed Rule 23(e)(2)(C)(iii)).%

166 *Id.* at 222.%

167 *Id.* at 227.%

168 *See* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 136–40 (2014).%

169 *See supra* text accompanying notes 103–110.%

170 *See, e.g.*, Letter from Julie Braman Kane, President, Am. Ass'n for Justice, to Rebecca A Womeldorf, Sec'y, Comm. on Rules of Practice and Procedure 4–7 (Feb. 14, 2017), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0066

[https://perma. cc/B3NL-YQ75] (follow attachment) (warning that the reference to "claims rate" and the suggestion of deferring fee awards could be misconstrued to have broad application); Letter from DRI, to Advisory Comm. on Civil Rules 5–6 (Feb. 7, 2017), https://www. regulations.gov/document?D=USC-RULES-CV-2016-0004-0072 [https://perma.cc/NSM4-BVFL] (follow attachment) (stating that claims rate is not an appropriate consideration when considering the fairness of a settlement because what matters is the relief offered, not how many class members claim that relief); Letter from Scott L. Nelson & Allison M. Zieve, Pub. Citizen Litig. Grp., to Advisory Comm. on Rules of Civil Procedure 3 (Feb. 15, 2017), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0081 [https://perma. cc/X9YS-FH9Y] (follow attachment) (urging that the criterion about distribution of relief should be clarified to make clear that no absolute rule requiring complete distribution is mandated); Thomas Sobol, Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure 15–16 (Jan. 4, 2017), http://www.uscourts.gov/sites/default/files/2017-01-04-transcript_of_civil_rules_hearing_in_phoenix_0.pdf [https://perma.cc/ZA2A-AHYB] (saying that there is a risk that the amendment referring to claims rate would be interpreted to say that, for all cases, there is an absolute standard of distribution effectiveness, and that the court should reject any proposal that does not satisfy that absolute standard); Letter from Hassan A. Zavareei, Tycko & Zavareei LLP, & Gary E. Mason, Whitfield Bryson & Mason LLP, to Comm. on Rules of Practice and Procedure 1–2 (Feb. 13, 2017), https://www. regulations.gov/document?D=USC-RULES-CV-2016-0004-0065 [https://perma.cc/X2HG-RMH7] (follow attachment) (urging that the amendment and Note improperly overemphasize claims rates and are not consistent with current law because they make claims rate the most important factor in determining fees).%

171 *See, e.g.*, Memorandum from Yvonne McKinsey & Anthony Vale, Pepper Hamilton LLP, to Comm. on Rules of Practice and Procedure 2–4 (Feb. 15, 2017), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0069 [https://perma.cc/8QSA-GHQ9] (follow attachment). This comment agrees that "the relief that the settlement is expected to provide to class members is a central concern." *Id.* at 2. But it asserts that the rule does not go far enough and fails to address directly a concern that has come to the fore in consumer class actions, which are brought based on technical violations of a law but without any real injury. *Id.* at 2–4. The commenters argue the rule should be clarified to make it clear that the class definition limits membership to those with Article III standing. *Id.* at 3–4. They state that one way to do that would be to amend Rule 23(a)(3) on typicality to insist that all members of the class have an injury similar to that alleged by the proposed class representative. *Id.* at 4.

172 *See* Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015) (holding that there is no constitutional requirement that all class members satisfy Article III so long as at least one class representative does satisfy it).

173 *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 130–81 (2017) (discussing procedural "retrenchment" by Supreme Court decision).

174 D. Marcus, *supra* note 5, at 644.

175 For discussion, see Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 745–823 (2013).

176 The reference is to *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). *See also* Marcus, *supra* note 16, at 512–16 (describing seeming overstatements about the significance of some Supreme Court decisions).

177 Primary among those decisions are rulings that enable businesses to insert arbitration clauses into their contracts with customers and forbid class action litigation as well. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–10 (2013) (enforcing class action waiver in the face of arguments that only a class action would allow any litigation due to the expense of proving the statutory claim); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (upholding applicability of class action waiver in arbitration provision in contract for cell phone service); *cf.* Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2071 (2013) (holding that an arbitrator's decision to allow class arbitration cannot be overturned if it was based on the arbitrator's interpretation of the parties contract).%

178 *See supra* text accompanying note 157.

179 Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 723 (2015).

180 521 U.S. 591 (1997). For discussion of the 1996–1998 amendment episode with regard to proposed Rule 23(b)(4) on "settlement class certification" see *supra* text accompanying notes 79–90.

181 Linda Mullenix, *False Narratives: Justice Scalia's Impact on Class Action Litigation*, 17 CLASS ACTION LITIG. REP. (BNA) 568, 568 (2016).

182 Perry Cooper & Kimberly Robinson, *Class Action War Heads to SCOTUS*, 16 CLASS ACTION LITIG. REP. (BNA) 1041, 1041 (2015) (quoting Deepak Gupta).

183 Perry Cooper, *Class Actions at SCOTUS: The Term that Wasn't*, 17 CLASS ACTION LITIG. REP. (BNA) 751, 751 (2016) (quoting Samuel Issacharoff).%

184 *Id.* (quoting Deepak Gupta).

185 Erwin Chemerinsky, *A Class Action Shift*, TRIAL, Sept. 2016, at 54. He added: "The Court did not impose additional restrictions. More generally, Justice Antonin Scalia's death likely means that there is no longer a majority on the Court to limit class actions." *Id.*; *see also* Perry Cooper, *Supreme Court Scorecard: Not the Class Action Rout Defendants Had Hoped For?*, 17 CLASS ACTION LITIG. REP. (BNA) 560, 560–61 (2016) (presenting chart showing plaintiffs as "winners" in more cases than defendants).

186 For analysis, see Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1788–1808 (2008).%

187 *See* 28 U.S.C. § 1712 (2012).

188 H. R. 985, 115th Cong. (2017) (as passed by House, Mar. 9, 2017).%

189 *See* Part I.

190 H. R. 985 § 102.%

191 *Id.* § 103 (proposing new 28 U.S.C. § 1718(b)(2)).%

192 *See id.* (adding a new 28 U.S.C. § 1718(a), providing as follows: "A Federal court shall not issue an order granting certification of a class action seeking monetary relief unless the class is defined with reference to objective criteria and the party seeking to maintain such a class action affirmatively demonstrates that there is a reliable and administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a substantial majority of class members any monetary relief secured for the class.").%

193 *See id.* (adding a new 28 U.S.C. § 1716(a) that would provide: "A Federal court shall not issue an order granting certification of a class action seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives."). This provision seems out of step with the rulings of courts. *See, e.g.*, *In re* Nexium Antitrust Litig., 777 F.3d 9, 14 (1st Cir. 2015).

194 *See* Lawyers for Civil Justice, *supra* note 140, at 4 (proposing that Rule 23(a)(3) be amended as follows: "the claims, or defenses*, and type and scope of injury* of the representative parties are typical of the claims, or defenses*, and type and scope of injury* of the class").

195 H. R. 985 § 103 (proposing new 28 U.S.C. § 1718(b)(1)). The bill also contains a provision dealing with issues classes, something the Advisory Committee considered but did not include in its amendment package. Thus, H.R. 985 would add a new 28 U.S.C. § 1720(a) providing:
A Federal court shall not issue an order granting certification of a class action with respect to particular issues pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure unless the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites of Rule 23(a) and Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3).
Id.

196 Interestingly, a group of conservative Republican representatives called the House Liberty Caucus issued a statement on March 9, 2017, the date the House passed the bill, strongly opposing it, partly on the ground that class actions are preferable to direct government regulation:
Class action lawsuits are a market-based solution for addressing widespread breaches of contract, violations of property rights, and infringements of other legal rights. They are a preferable alternative to government regulation because they impose damages only on bad actors rather than imposing compliance costs on entire industries.
Press Release, House Liberty Caucus, House Liberty Caucus Statement on H. R. 985, Fairness in Class Action Litig. Act of 2017 (Mar. 9, 2017) https://static1.squarespace. com/static/559b2478e4b05d22b1e75b2d/t/58c3277d86e6c02103c56eec/1489184638338/3-9-17+HLC+statement+on+HR+985+-+FINAL.pdf [https://perma.cc/3FBX-8UFA].%

197 *See* Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 265–73 (2009) (contrasting effect of technology on medical practice and legal practice).%

198 *See* Richard Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. L. REV. 1827, 1829 (2008). For a more recent report, see Steve Lohr, *I, Robot, Esq? Not Just Yet*, N.Y. TIMES, Mar. 20, 2017, at B1 (reporting that even recent artificial intelligence breakthroughs have not replaced the individual one-on-one tasks of many lawyers).

199 For discussion, see Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 7–19 (2004).

200 Perry Cooper, *Points for Participation: Class Members Increasingly Active*, 18 CLASS ACTION LITIG. REP. (BNA) 89, 89 (2017) (quoting Cabraser).%

201 *Id.* (quoting Cabraser). The story notes that Cabraser reportedly makes a point of personally responding to every email from a class member in the VW case in which she is lead plaintiffs' counsel. *Id.*%

202 *Id.* (quoting Issacharoff).

203 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173–75 (1974).%

204 *In re* Online DVD-Rental Antitrust Litig., 779 F.3d 934, 941 (9th Cir. 2015).

205 Preliminary Draft, *supra* note 157, at 211–12.%

206 *Id.* at 218–20.%

207 *See* Summary of Comments and Testimony, *supra* note 100, at 134–44 (summarizing testimony and comments on this amendment proposal).%

208 *See id.*; *see also* Alexander Aiken, Comment, *Class Action Notice in the Digital Age*, 165 U. PA. L. REV. 967, 971–72 (2017) (endorsing proposed amendment regarding manner of giving notice).%

209 *See* Rule 23 Subcommittee Report, *in* AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 100, at 103, 105 (reporting a proposal to change the amendment to say: "The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.").%

210 *See* 28 U.S.C. § 1332(d)(11)(B)(i) (2012) (describing a "mass action" as any action "in which the monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact"). As a possible example, see Burr & Forman v. Blair, 470 F.3d 1019, 1023 (11th Cir. 2006) (suit on behalf of 3,000 plaintiffs for toxic contamination).%

211 *See supra* text accompanying note 56.

212 Ewing, *supra* note 55, at B1.%

213 *Id.*%

214 *See* John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture and Incentives*, 165 U. PA. L. REV. 1895, 1908–11 (2017).

215 *See* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debate Over Ascertainability and Cy Pres*, 65 KAN. L. REV. 913, 954 (2017).%

216 *See* D. Marcus, *supra* note 5, at 597.%

217 *See supra* text accompanying notes 189–95.%

218 *See supra* text accompanying notes 197–214.

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICES AND PRODUCT LIABILITY LITIGATION	)	MDL Case No. 17-ml-2792-D
THIS DOCUMENT RELATES TO ALL CASES	)	

ORDER

Before the Court is Plaintiff's Unopposed Motion for Preliminary Approval of Settlement ("Motion") [Doc. No. 108]. New Jersey Plaintiffs Colleen Kennedy, David Foster and Mitchell Orenstein (collectively "New Jersey Plaintiffs") filed their Memorandum in Opposition to Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement [Doc. No. 122]. Plaintiffs' filed a reply in support of preliminary approval [Doc. 123]. Defendants filed a notice of their position on New Jersey Plaintiffs' opposition [Doc. 124].

On November 29, 2018, the Court held a hearing on the Motion. The Court heard argument from Plaintiffs, Defendants, and the New Jersey Plaintiffs. Through the briefs, exhibits attached thereto, and argument at the hearing, the Court has thoroughly examined and considered the proposed preliminary settlement agreement presented by the MDL parties, the proposed settlement and related filings pending in the New Jersey cases, and the New Jersey Plaintiffs' opposition to the settlement.

BACKGROUND AND PROCEDURAL POSTURE

Plaintiffs filed numerous putative class-action lawsuits ("Lawsuits") in various jurisdictions against Defendants Samsung Electronics America, Inc. ("SEA") and Samsung Electronics Co., Ltd. ("SEC") (together, "Defendants"), and in some cases against a number of retailers.[1] Plaintiffs alleged, among other things, that certain Samsung top-load washing machines (the "Washers," defined in the Settlement Agreement[2] as a specific set of model and serial numbers) had their top detach from the washing machine chassis during operation, and some had drain pumps fail. Plaintiffs asserted claims for breach of express warranty, breach of implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act, strict product liability, violations of various states' consumer protection statutes, fraud, negligence, negligent misrepresentation, unjust enrichment, and declaratory and injunctive relief. On October 4, 2017, the Lawsuits were consolidated into MDL No. 2792 (*In re: Samsung Top-load Washing Machine Marketing, Sales Practices and Products Liability Litigation*) ("MDL") by the United States Judicial Panel on Multidistrict Litigation ("JPML"), and transferred to this Court for pretrial proceedings.

New Jersey Plaintiffs are class representatives in putative class actions ("New Jersey cases") filed on August 7, 2014, and June 15, 2015, in the District of New Jersey against

[1] Defendant retailers are Best Buy Co., Inc., The Home Depot, Inc., Home Depot U.S.A., Inc., Lowe's Companies, Inc., Lowe's Home Centers, LLC, and Sears Holding Corporation (collectively, "Retailer Defendants"). Sears Holding Corporation was subsequently dismissed from all Lawsuits on December 5, 2018. [Doc. No. 136].

[2] Capitalized terms not defined here have the meaning assigned to them in the Settlement Agreement. [Doc. No. 92-1].

Defendant SEA.[3] The relevant procedural history of the New Jersey cases as it relates to this MDL is set forth in this Court's Orders of June 14, 2018 [Doc. No. 95], and August 2, 2018 [Doc. No. 116], and will not be restated here. However, of particular relevance to the instant Motion are: (1) settlement negotiations between New Jersey Plaintiffs and SEA in the summer of 2017; (2) an unexecuted settlement agreement; and (3) the Order to enforce that unexecuted settlement which was entered by Judge William J. Martini on May 21, 2018. *See* [Doc. No. 95]; [Doc. No. 116].

On March 30, 2018, the MDL parties informed the Court that they had reached a global settlement. [Doc. No. 75 at 1]. The MDL Plaintiffs, Defendants, and Retailer Defendants executed a Settlement Agreement [Doc. No. 92-1] ("MDL Settlement") on May 26, 2018, setting forth terms and conditions of the settlement and providing for the dismissal of the Lawsuits with prejudice.

On June 19, 2018, the JPML issued a Conditional Transfer Order [JPML Doc. No. 47] transferring the New Jersey cases to this MDL. The New Jersey Plaintiffs filed a Motion to Vacate Conditional Transfer Order [JPML Doc. No. 54] on June 26, 2018. On July 9, 2018, MDL Plaintiffs moved for an Order preliminarily approving the proposed MDL Settlement pursuant to Federal Rule of Civil Procedure 23(e) and approving notice to the Settlement Class as more fully described *infra*.

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[3] *Kennedy v. Samsung Electronics America, Inc.*, Case No. CIV-14-4987 (D.N.J. 2014); *Orenstein v. Samsung Electronics America, Inc.*, Case No. CIV-15-4054 (D.N.J. 2015).

The Court granted New Jersey Plaintiffs' Motion to Intervene on August 2, 2018. [Doc. No. 116]. New Jersey Plaintiffs filed their Opposition to Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement [Doc. No. 122] on September 4, 2018. Plaintiffs filed their Reply [Doc. No. 123] and Defendants filed their Notice of Position [Doc. No. 124] on September 19, 2018. The JPML issued a Transfer Order [Doc. No. 69] on October 4, 2018, transferring the New Jersey cases to the MDL over the New Jersey Plaintiffs' objections. New Jersey Plaintiffs make three arguments in support of their opposition to the Unopposed Motion for Preliminary Approval: (1) the settlement was not fairly and honestly negotiated; (2) the settlement violates the first-to-file rule; and, (3) approval would "nullify" Judge Martini's Order to enforce settlement.

Upon reviewing the record, Settlement Agreement, MDL Plaintiffs' Motion and accompanying exhibits, and all briefing relating to the proposed settlement in the New Jersey cases, and having considered the arguments at the hearing, the Court enters the following order.

STANDARD OF DECISION

"Preliminary approval of a proposed settlement is the first of two steps required before a class action may be settled." *In re Motor Fuel Temperature Sales Practices Litig.*, 286 F.R.D. 488, 492 (D. Kan. 2012) (citing *Am. Med. Ass'n v. United Healthcare Corp.*, No. 00 Civ. 2800 (LMM), 2009 WL 1437819, at *3 (S.D.N.Y. May 19, 2009)). At the preliminary approval stage, the Court examines "the fairness of the proposed settlement and determines whether it has any reason to not notify the class members of the proposed settlement or to not hold a fairness hearing." *In re Motor*, 286 F.R.D. at 492 (citing *Am.*

Med. Ass'n, 2009 WL 1437819 at *3 and *Gautreaux v. Pierce,* 690 F.2d 616, 621 n. 3 (7th Cir.1982)). The Court's obligation at the preliminary approval stage is not to determine the ultimate question of fairness; that is the focus of the final approval hearing. Although, the standard for preliminary approval is less stringent than for final approval, "a higher degree of scrutiny applies when determining the fairness of a settlement which is negotiated before class certifications." *Id.* (citing *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001)).

The Court may grant preliminary approval and direct notice to be given to the class if it finds that it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Pursuant to Rule 23(e)(2), the Court may only approve a proposed settlement "after a hearing and after finding that it is fair, reasonable, and adequate." Such a finding can only be made "after considering whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length, (C) the relief provided for the class is adequate"; and, "(D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A), (B), (C) and (D); *see also, In re Motor*, 286 F.R.D. at 492 (quoting *Am. Med. Ass'n*, 2009 WL at *3) (Stating that preliminary approval is ordinarily granted "where the proposed settlement 'appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval."). In determining the adequacy of the relief for the class, the Court must take into account: "(i) the costs, risks, and delay of trial

and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-members claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). Rule 23(e)(3) requires notification to the Court of "any agreement made in connection with the proposal."

DISCUSSION

Fair and Honest Negotiation of the Settlement.

New Jersey Plaintiffs limit their assertions regarding fair and honest negotiation to Defendant SEA's conduct before the JPML, the District Court of New Jersey, and this Court. The thrust of their argument is as follows:

> We submit that Samsung's conduct before Judge Martini, this court and the JPML has not been fair and honest and provides the strong basis to deny preliminary approval unless Samsung's misconduct is remedied. Not once has Samsung's counsel explained to Judge Martini, this MDL Court, or the JPML the reasons why they settled the *Kennedy/Orenstein* matter and then used a different failure claim in *Wagner* to nullify the prior settlement. Not once did they acknowledge that nullifying the *Kennedy/Orenstein* settlement would save Samsung over $600,000 in attorney's fees and class representative premiums.

[Doc. No. 122 at 8]. New Jersey Plaintiffs did not address the negotiations between MDL Plaintiffs and Defendants in their opposition brief or during the preliminary approval hearing. New Jersey Plaintiffs do not contend the MDL parties failed to "vigorously advocate[] their respective positions throughout the pendency of the case." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) (citing *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D.Colo.1997)).

The focus at the preliminary approval stage regarding the quality of negotiations is whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). The Court "assesses the reasonableness of the compromise, taking into account the context in which the parties reached settlement. *In re Motor Fuel Temperature Sales Practices Litig.*, 286 F.R.D. 488, 492 (D. Kan. 2012) (citing *Nat'l Treasury Emp. Union v. United States,* 54 Fed.Cl. 791, 797 (2002)). Defendant SEA's conduct with regard to New Jersey Plaintiffs, Judge Martini, the JPML or any other party outside of the MDL settlement negotiations does not bear on the quality of the negotiations between Defendants and MDL Plaintiffs in reaching the proposed MDL Settlement.

First-to-File Rule

The first-to-file rule is not controlling in this case. The New Jersey cases and, therefore, the proposed settlement in those cases, are now before this Court pursuant to the JPML Certified Transfer Order [Doc. No. 125]. "Simply because a court is the first to obtain jurisdiction does not necessarily mean that it should decide the merits of the case." *Buzas Baseball, Inc. v. Bd. of Regents of Univ. Sys. of Georgia*, 189 F.3d 477, (10th Cir. 1999) (unpublished) (quoting *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1164 (10th Cir.1982) (emphasis in original). The purpose of the first-to-file rule is "to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result." *Cherokee Nation v. Nash*, 724 F. Supp. 2d 1159, 1166 (N.D. Okla. 2010) (quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir.1999) (internal quotations omitted)). Moreover, "district court judges can, in the exercise of their discretion, dispense with the first-filed

principle for reasons of equity." *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 629 (9th Cir. 1991).

This MDL was created for the purpose of judicial economy. The JPML determined that the New Jersey cases involve product defects and a putative class overlapping with those of the cases already transferred to this district. In fact, the JPML apparently considered both the New Jersey and MDL proposed settlements in finding that "absent transfer there is a significant risk of inconsistent rulings as to class certification and waste of judicial resources" and that "[t]ransfer will ensure that a single judge oversees the common issues." [Doc. No. 125 at 2]. The JPML decided that the balance of convenience favors the MDL proceeding and the determination of related pre-trial matters in this jurisdiction. Judge Martini determined likewise when he stayed the New Jersey cases in favor of potential transfer to the MDL.

Transfer of the New Jersey cases to this MDL effectively renders moot the New Jersey Plaintiffs' objection based on the first-to-file rule. There are now two competing and overlapping proposed settlements before this Court, and the Court must consider each when weighing MDL Plaintiffs' Motion for preliminary approval pursuant Rule 23(e).

Collateral Attack on the New Jersey Order to Enforce Settlement.

In their opposition brief, New Jersey Plaintiffs repeat the argument they made in their Motion to Intervene [Doc. No. 103-1], that preliminary approval of the settlement by the MDL parties would amount to a collateral attack and nullification of Judge Martini's Order to enforce settlement in the New Jersey cases. [Doc. No. 122 at 15]. The Court addressed this in its Order granting permissive intervention:

> Black's Law Dictionary defines "collateral attack" as "[a]n attack on a judgment in a proceeding other than a direct appeal." *Collateral Attack*, Black's Law Dictionary (10th ed. 2014); *see also*, *Wall v. Kholi*, 562 U.S. 545, 552, 131 S. Ct. 1278, 1284 (2011) (quoting *Black's Law Dictionary*, 298 (9th ed.2009)); *Fransen v. Conoco, Inc.*, 64 F.3d 1481, 1487 (10th Cir. 1995) (referring to the Oklahoma statutory definition of "collateral attack": "A collateral attack is an attempt to avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial.") (quoting *Woods Petroleum Corp. v. Sledge*, 632 P.2d 393, 396 n. 4 (Okla.1981)).
>
> Judge Martini's Enforcement Order was not a final order or judgment. In order for a settlement in a class action to be final, it must be approved by a court pursuant to Fed. R. Civ. P. 23(e). No hearings were conducted as to the fairness, reasonableness and adequacy of the terms of the *Kennedy/Orenstein* settlement, notice was not provided to all class members as to the proposed settlement, and an objection period was not provided. Judge Martini merely issued an order finding that the parties had reached an agreed settlement. Again, he made no rulings pursuant to Fed. R. Civ. P. 23(e) as to the terms of the settlement.

[Doc. No. 116 at 7-8]. The Court finds New Jersey Plaintiffs' re-argument of this position unpersuasive and adopts its previous reasoning. Judge Martini's Order to enforce settlement is not a final order subject to the doctrine of collateral attack. The proposed New Jersey settlement remains unapproved under Rule 23(e) and, therefore, no settlement has been effectively and fully adjudicated in the New Jersey cases.

For these reasons, the Court is not persuaded by the arguments of the New Jersey Plaintiffs, and will not reject the proposed MDL Settlement on those bases.[4] The Court now turns to the evaluation of the MDL Plaintiff's Motion, and proposed MDL Settlement, pursuant to Rule 23(e), and further orders as follows:

[4] In their opposition brief, the New Jersey Plaintiffs request alternative relief in the event preliminary approval of the MDL Settlement is granted. Such request will be considered at the appropriate time.

1. The Court adopts all defined terms as set forth in the MDL Plaintiffs' Settlement Agreement.

Certification of Settlement Class

2. Defendants and Retailer Defendants do not contest certification of the Settlement Class solely for purposes of the Settlement but retain their objections to the Lawsuits proceeding as a litigation class.

3. The Court hereby certifies the Class proposed in the MDL Settlement Agreement for purposes of settlement only. The Settlement Class is defined as: every resident of the United States or its territories who was the original purchaser of a new Washer for household use. The Settlement Class excludes: (1) officers, directors, and employees of Defendants and Retailer Defendants, (2) insurers of Settlement Class Members, (3) subrogees or all entities claiming to be subrogated to the rights of a Washer purchaser or a Settlement Class Member, and (4) all third-party issuers or providers of extended warranties or service contracts for the Washers.

4. Pursuant to Rule 23, and for Settlement purposes only, the Court appoints the MDL Plaintiffs as Class representatives. The Court previously appointed William B. Federman of Federman & Sherwood and Jason L. Lichtman of Lieff Cabraser Heimann & Bernstein, LLP as Co-Lead Counsel for Plaintiffs in the Consolidated MDL Lawsuit, and now appoints them as Class Counsel pursuant to Rule 23(g).

Preliminary Approval of the MDL Settlement

5. The Court has scrutinized the MDL Settlement Agreement carefully. It finds that the MDL Settlement is the product of extensive, non-collusive, arm's-length

negotiations between experienced counsel who were thoroughly informed of the strengths and weaknesses of the case through discovery and motion practice, and whose negotiations were supervised by accomplished mediator Michael N. Ungar over the course of nine days of formal mediation sessions. The Court also finds that the MDL Settlement is within the range of possible approval because it compares favorably with the expected recovery balanced against the risks of continued litigation, does not grant preferential treatment to Plaintiffs or Class Counsel, and has no obvious deficiencies.

6. In considering the MDL Settlement the Court must, by necessity, compare it to any possible overlapping proposed settlement and examine the terms of both to determine the superiority of one over the other. *See* Order [Doc. No. 128 at 2]. In this case, the Court considered all pertinent briefing filed in the MDL and the New Jersey cases with respect to the overlapping proposed settlement agreements, as well as oral arguments during the November 29, 2018, hearing. Having heard from all parties and having examined both proposed settlements, the Court finds that the MDL Settlement is objectively superior to the proposed New Jersey settlement. For instance, the total relief for the class as a whole, and individually, is significantly greater in the MDL Settlement, the MDL Settlement covers future failures for a longer period of time, and, significantly, no proof of purchase is required in order for class members to assert their rights under the MDL Settlement. *See*, *e.g.*, MDL Plaintiffs' Memorandum in Response to Motion to Intervene and Stay Proceedings, Exhibit G [Doc. No. 111-7].

7. The Court hereby preliminarily approves the MDL Settlement, as memorialized in the MDL Settlement Agreement, as fair, reasonable, and adequate, after

having considered whether: (1) the class was adequately represented; (2) the proposal was negotiated at arm's length; (3) the relief provided to the class is adequate taking into account the factors of Rule 23 (e)(2)(C); and, (4) the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). In addition, the Court notes that the parties have identified no agreements made in connection with the proposal. Fed. R. Civ. P. 23(e)(3). The Court finds that the MDL Settlement is in the best interest of Plaintiffs and the other Settlement Class Members, subject to further consideration at the Fairness Hearing to be conducted as described below.

8. The Court hereby stays this Litigation pending final approval of the MDL Settlement (hereafter "Settlement"), and enjoins, pending final approval of the Settlement, any actions brought by Settlement Class Members concerning a Released Claim.

Manner and Form of Notice

9. The Court approves the Settlement Notice and FAQ substantially in the form attached as Exhibit 1 and Exhibit 2, respectively, to MDL Plaintiffs' Notice of Voluntary Dismissal of Defendant Sears Holding Corporation [Doc. No. 136]. The Court likewise approves the Claim Forms substantially in the form attached as Exhibits 4-7 to Plaintiffs' Motion [Doc. No. 108]. The Court finds that the proposed notice plan is reasonably calculated, under the circumstances, to apprise Settlement Class Members of: the pendency of this Litigation; the effects of the proposed Settlement on their rights (including the Released Claims contained therein); Class Counsel's upcoming motion for attorneys' fees, expenses, and service awards; their right to submit a claim form; and their right to object to any aspect of the proposed Settlement. The notice plan includes dissemination of the

Settlement Notice via First-Class Mail to every Settlement Class Member who can be identified by Defendants with reasonable cooperation by the Retailer Defendants, as well as the creation of a Settlement Website and a toll-free phone number providing information to Settlement Class Members, along with the issuance of Publication Notice. The Settlement Notice provides due, adequate, and sufficient notice to Settlement Class Members, and satisfies the requirements of Rule 23, due process, and all other applicable law and rules. The date and time of the Fairness Hearing shall be included in the Settlement Notice before it is disseminated.

10. The Court hereby appoints KCC, LLC to serve as the Settlement Administrator to supervise and administer the notice process, establish and operate a Settlement Website and a toll-free number, administer the Claims process, including the determination of Valid Claims, and perform any other duties of the Settlement Administrator provided for in the Settlement Agreement.

11. Defendants shall provide the Settlement Administrator with the names and mailing addresses of the Settlement Class Members who can reasonably be identified for the purpose of disseminating the Settlement Notice, at no expense to the Settlement Class or Class Counsel.

12. The Settlement Administrator shall provide notice of the Settlement and the Fairness Hearing to Settlement Class Members as follows:

a. As soon as practicable, but no later than sixty (60) calendar days after the entry of this Order, the Settlement Administrator shall send or cause to be sent by First-Class Mail with the United States Postal Service a copy of the Settlement Notice to every

Settlement Class Member who can be identified by reasonable efforts of Defendants and reasonable cooperation by the Retailer Defendants.

b. At approximately the same time as the Settlement Administrator mails the Settlement Notice, the Settlement Administrator shall provide Publication Notice to the Settlement Class Members.

c. As soon as practicable following the entry of this Order, and no later than the mailing of the Settlement Notice, the Settlement Administrator shall establish the Settlement Website and the toll-free telephone number pursuant to the terms of the Settlement Agreement. The Settlement Website shall permit Settlement Class Members to read the Settlement Notice and FAQ, and to complete, review, and submit a Claim Form online, including the ability to upload and submit supporting documentation. The Settlement Website shall also permit Settlement Class Members to complete, review, and submit an Opt-out Form online.

d. Within ninety-five (95) calendar days after this Order, the Settlement Administrator shall provide a declaration of compliance with these notice requirements.

Participation in the Settlement

13. Members of the Class who wish to participate in the Settlement and receive a benefit under the Settlement, as specified in Section IV of the Settlement Agreement, must complete and submit a Claim Form in accordance with the instructions contained therein. Unless the Court orders otherwise, all Claim Forms must be submitted no later than one-hundred-and-fifty (150) calendar days after the Notice Date. Each Claim Form shall be deemed to be submitted when posted, if received with a postmark indicated on the

envelope and if mailed by First-Class Mail and addressed in accordance with the instructions thereon. In all other cases, the Claim Form shall be deemed to have been submitted when it was actually received by the Settlement Administrator.

14. To be valid, the Claim Form submitted by each Class Member must satisfy the following conditions: (i) it must be properly completed, signed, and submitted in a timely manner in accordance with the provisions of the preceding paragraph; (ii) it must be accompanied by adequate supporting documentation, when and as needed; and (iii) it must be complete, and contain no material deletions or modifications of any of the printed matter contained therein, and must be signed under penalty of perjury.

The Fairness Hearing

15. The Court will hold a Fairness Hearing on August 1, 2019, at 10:00 a.m., Central Time, in the United States District Court for the Western District of Oklahoma, Courtroom 503, 200 NW 4th Street, Oklahoma City, OK 73102, for the following purposes: (i) to determine whether the Settlement should be approved as fair, reasonable, and adequate and in the best interests of the Settlement Class; (ii) to rule upon Class Counsel's application for an award of attorneys' fees and expenses; (iii) to rule upon Class Counsel's application for service awards for the Class Representatives; and (iv) to consider any other matters that may properly be brought before the Court in connection with the Settlement.

16. The Court reserves the right to: (a) adjourn or continue the Fairness Hearing without further notice to Settlement Class Members; and (b) approve the Settlement Agreement with modification and without further notice to Settlement Class Members. The

Parties retain their rights under the Settlement Agreement to terminate the Settlement if the Court rejects, materially modifies, materially amends or changes, or declines to grant final approval of the Settlement.

17. Class Counsel's application for an award of attorneys' fees and expenses, and Class Counsel's application for service awards, will be decided in an order separate from the order that addresses the fairness, reasonableness, and adequacy of the Settlement. Any appeal from any orders relating solely to Class Counsel's application for an award of attorneys' fees and expenses, or Class Counsel's application for service awards, or any reversal or modification thereof, shall not operate to terminate or cancel the Settlement, or affect or delay the finality of the judgment approving the Settlement and the Settlement Agreement.

18. If the Settlement is approved, all Settlement Class Members who do not exclude themselves will be bound by the proposed Settlement provided for in the Settlement Agreement, and by any judgment or determination of the Court affecting Settlement Class Members. All Settlement Class Members who do not exclude themselves shall be bound by all determinations and judgments in this Litigation concerning the Settlement, whether favorable or unfavorable to the Settlement Class.

19. Papers in support of Class Counsel's application for attorneys' fees and expenses, and service awards, shall be filed no later than ninety-five (95) calendar days after this Order. Papers in support of final approval of the Settlement shall be filed no later than one-hundred-and-thirty-five (135) calendar days after this Order. If any reply papers

are necessary, they shall be filed no later than seven (7) calendar days prior to the Fairness Hearing.

Objections and Appearance at the Fairness Hearing

20. Any Settlement Class Member may appear at the Fairness Hearing and show cause why the proposed Settlement should or should not be approved as fair, reasonable, and adequate and in the best interests of the Settlement Class, or why judgment should or should not be entered, or to present opposition to Class Counsel's application for attorneys' fees and expenses or to Class Counsel's application for service awards. However, no Settlement Class Member or any other person shall be heard or entitled to contest the approval of the terms and conditions of the Settlement, or if approved, the judgment to be entered approving the Settlement, or Class Counsel's application for an award of attorneys' fees and expenses or for service awards, unless that Settlement Class Member or person filed with the Clerk of the United States District Court for the Western District of Oklahoma, and contemporaneously served on Class Counsel and Defendants' counsel, an entry of appearance and notice of intention to appear at the Fairness Hearing setting forth the basis of their objections and summarizing the nature and source of any evidence they intend to present at the Fairness Hearing no later than one-hundred-and-fifty (150) calendar days after the entry of this Order. An objector not represented by an attorney seeking to appear at the Fairness Hearing must state the same in the objection that they file with the Court or submit to the Settlement Administrator or Class Counsel.

21. For an objection to be considered by the Court, the objection must be filed with the Court no later than one-hundred-and-fifty (150) calendar days after the entry of

this Order and must set forth: (a) the objector's full name, address, and telephone number and, if represented by counsel, the name, address, and telephone number of his or her counsel; (b) a statement whether the objector intends to appear at the Fairness Hearing, either in person or through counsel; (c) all grounds for his or her objection, accompanied by any legal support for the objection and supporting documents; (d) a statement of whether the objector or his or her counsel will ask to speak at the Fairness Hearing and, if so, the amount of time the objector or counsel requests for speaking; and (e) the objector's handwritten signature. Counsel's signature is not a substitute for the objector's signature.

22. Any Settlement Class Member who does not make his or her objection in the manner provided for herein shall be deemed to have waived such objection. By objecting, or otherwise requesting to be heard at the Fairness Hearing, a person shall be deemed to have submitted to the jurisdiction of the Court with respect to the objection or request to be heard and the subject matter of the Settlement, including but not limited to enforcement of the terms of the Settlement.

23. Any Settlement Class Member may enter an appearance in the Consolidated MDL Lawsuit, at his or her own expense, individually or through counsel of his or her own choice. If a Settlement Class Member does not enter an appearance, he or she will be represented by Class Counsel.

Exclusion from the Settlement Class

24. Any requests for exclusion must be received no later than one-hundred-and-fifty (150) calendar days after the entry of this Order, which is the opt-out and objection deadline. Any person who would otherwise be a member of the Settlement Class who

wishes to be excluded from the Settlement Class must mail or submit online a completed Opt-out Form, and such submission must be postmarked by the United States Postal Service or actually received by the Settlement Administrator no later than one-hundred-and-fifty (150) calendar days after the entry of this Order. The completed Opt-out Form must include the Settlement Class Member's name, address, and telephone number, a statement that the Settlement Class Member wishes to be excluded from the Settlement, and be signed by the Settlement Class Member. All Settlement Class Members who submit valid and timely notifications of exclusion in the manner set forth in this paragraph shall have no rights under the Settlement Agreement, shall not share in the forms of relief provided by the Settlement, and shall not be bound by the Settlement Agreement, any orders of the Court, or any final judgment.

25. Any Settlement Class Member who does not notify the Settlement Administrator of his or her intent to exclude himself or herself from the Settlement Class in the manner stated in this Order shall be deemed to have waived his or her right to be excluded from the Settlement Class, and shall forever be barred from requesting exclusion from the Settlement Class in this or any other proceeding, and shall be bound by the Settlement and the judgment, including but not limited to, the release of the Released Claims against the Releasees provided for in the Settlement Agreement and the judgment, if the Court approves the Settlement.

26. The Settlement Administrator shall also provide a final report to the Parties, no later than one-hundred-and-thirty-five (135) calendar days after the entry of this Order,

that summarizes the number of opt-out notifications received to date, and other pertinent information as set forth in the Settlement Agreement.

Termination of the Settlement

27. If the Settlement fails to become effective in accordance with its terms, or if the judgment is not entered or is reversed, vacated, or materially modified on appeal (and, in the event of material modification, if either Party elects to terminate the Settlement), this Order shall be null and void, the Settlement Agreement shall be deemed terminated (except for any paragraphs that, pursuant to the terms of the Settlement Agreement, survive termination of the Settlement Agreement), and the Parties shall return to their positions without prejudice in any way, as provided for in the Settlement Agreement.

The Use of This Order

28. As set forth in the Settlement Agreement, the fact and terms of this Order and the Settlement, all negotiations, discussions, drafts, and proceedings in connection with this Order and the Settlement, and any act performed or document signed in connection with this Order and the Settlement, shall not, in this or any other court, administrative agency, arbitration forum, or other tribunal, constitute an admission, or evidence, or be deemed to create any inference against any party, including, but not limited to: (i) of any acts of wrongdoing or lack of wrongdoing; (ii) of any liability on the part of Defendants or Retailer Defendants to the Class Representatives, the Settlement Class, or anyone else; (iii) of any deficiency of any claim or defense that has been or could have been asserted in these Lawsuits; (iv) that Defendants or Retailer Defendants agree that a litigation class is proper in these Lawsuits; (v) of any damages or lack of damages suffered by the Class

Representatives, the Settlement Class, or anyone else; or (vi) that any benefits obtained by the Settlement Class pursuant to the Settlement Agreement or any other amount represents the amount that could or would have been recovered in these Lawsuits if they were not settled at this point in time. The fact and terms of this Order and the Settlement, all negotiations, discussions, drafts, and proceedings in connection with this Order and the Settlement, including but not limited to the judgment and the release of the Released Claims provided for in the Settlement Agreement and the judgment, shall not be offered or received in evidence or used for any other purpose in this or any other proceeding in any court, administrative agency, arbitration forum, or other tribunal, except as necessary to enforce the terms of this Order and/or the Settlement.

29. The Court retains exclusive jurisdiction over this Consolidated MDL Lawsuit to consider all further matters arising out of, or connected with, the Settlement.

IT IS SO ORDERED this 8th day of January, 2019.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: THE BANK OF NEW YORK MELLON ADR FX LITIGATION	16-CV-00212-JPO-JLC ECF Case
This Document Relates to: ALL ACTIONS	

ORDER APPROVING
ISSUANCE OF NOTICE

WHEREAS, a putative class action is pending in this Court captioned *In re: The Bank of New York Mellon ADR FX Litigation*, 16-CV-00212-JPO-JLC (S.D.N.Y.) (the "Action");

WHEREAS, (i) David Feige, International Union of Operating Engineers Local 138 Annuity Fund[1], and Annie L. Normand (collectively, "Named Plaintiffs") and Diana Carofano and Chester County Employees Retirement Fund ("Intervenor Plaintiffs" and, together with Named Plaintiffs, "Lead Plaintiffs"), on behalf of themselves and the Settlement Class (as defined below), and (ii) The Bank of New York Mellon ("Defendant" or "BNYM") have determined to settle the Action with prejudice on the terms and conditions set forth in the Stipulation and Agreement of Settlement dated January 15, 2019 (the "Stipulation") subject to approval of this Court (the "Settlement");

[1] The operative complaint in the Action named International Union of Operating Engineers Local 138 Pension Trust Fund rather than International Union of Operating Engineers Local 138 Annuity Fund. Lead Plaintiffs' Counsel represent that the proper Named Plaintiff is International Union of Operating Engineers Local 138 Annuity Fund and that they will take such steps to substitute the proper Named Plaintiff as are necessary to effectuate the Settlement.

WHEREAS, Lead Plaintiffs have made a motion, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an order that will, among other things, direct notice of the Settlement to Settlement Class Members, as more fully described herein;

WHEREAS, Defendant does not oppose Lead Plaintiffs' motion;

WHEREAS, the Court has read and considered: (a) Lead Plaintiffs' motion for approval of the proposed form and manner of notice to be sent to the proposed Settlement Class, and the papers filed and arguments made in connection therewith; (b) the Stipulation and the exhibits attached thereto; and (c) the record in the Action, and found good cause for entering the following Order.

NOW THEREFORE, IT IS HEREBY ORDERED:

1. **Incorporation of Definitions** – This Order hereby incorporates by reference the definitions in the Stipulation, and all capitalized terms, unless otherwise defined herein, shall have the same meanings as set forth in the Stipulation.

2. **Approval of the Settlement** – The Court hereby finds that the Parties have shown the Court that it will likely be able to approve the proposed Settlement, as embodied in the Stipulation, as being fair, reasonable and adequate to the Settlement Class under Rule 23(e)(2) of the Federal Rules of Civil Procedure, subject to further consideration at the Final Approval Hearing to be conducted as described below.

3. **Final Approval Hearing** – The Court will hold a settlement hearing ("Final Approval Hearing") on June 17, 2019 at 3:00 p.m.[2] in Courtroom 706 of the Thurgood

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[2] The Parties have respectfully requested that the Court schedule the Final Approval Hearing no earlier than 135 days after the date of entry of this Order, so that, among other things, they may comply with the provisions set forth in the Class Action Fairness Act, 28 U.S.C. § 1715(b), and the Publication Notice Plan, as set forth in paragraphs 22 through 31 of the Stipulation, can be fully completed and sufficient time provided for Settlement Class Members to object or request exclusion from the Settlement Class if they wish to do so.

Marshall United States Courthouse, 40 Foley Square, New York, NY 10007, for the following purposes: (a) to determine whether the proposed Settlement on the terms and conditions provided for in the Stipulation is fair, reasonable, and adequate to the Settlement Class, and should be approved by the Court; (b) to determine whether an Order and Final Judgment substantially in the form attached as Exhibit B to the Stipulation should be entered dismissing the Action with prejudice against the Defendant; (c) to determine whether the proposed Plan of Allocation for the net proceeds of the Settlement is fair and reasonable and should be approved; (d) to determine whether Lead Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses (including Service Awards to Lead Plaintiffs) should be approved; and (e) to consider any other matters that properly may be brought before the Court in connection with the Settlement. Notice of the Settlement and the Final Approval Hearing shall be given to Settlement Class Members as set forth in ¶ 8 of this Order.

4. The Court may adjourn the Final Approval Hearing without further notice to the Settlement Class, and may approve the proposed Settlement with such modifications as Lead Plaintiffs and Defendant may agree to, if appropriate, without further notice to the Settlement Class.

5. **Findings as to the Settlement Class**– The Settlement defines the Settlement Class as all entities and individuals who at any time during the period January 1, 1997 through the date of this Order held (directly or indirectly, registered or beneficially), or otherwise claim any entitlement to any payment (whether a dividend, rights offering, interest on capital, sale of shares, or other distribution) in connection with, any American Depositary Share (sometimes known as an American Depositary Receipt) ("ADR") for which BNYM acted as the depositary sponsored by an issuer that is identified in the Appendix attached to the Stipulation (the "Settlement Class").

For avoidance of doubt, Settlement Class Members include all entities, organizations, and associations regardless of form, including investment funds and pension funds of any kind. BNYM and its officers, directors, legal representatives, heirs, successors, corporate parents, subsidiaries, and/or assigns, other than Investment Vehicles (which are not excluded), are excluded from the Settlement Class only to the extent that such persons or entities had a proprietary (i.e., for their own account) interest in any such ADR and not to the extent that they hold or held such ADR in a fiduciary capacity or otherwise on behalf of any third-party client, account, fund, trust, or employee benefit plan that otherwise falls within the definition of the Settlement Class. Also excluded from the Settlement Class are any persons and entities who or which exclude themselves from the Settlement Class by submitting a request for exclusion that is accepted by the Court.

6. Solely for purposes of effectuating the proposed Settlement, the Court finds, pursuant to Rule 23(e)(1), that the prerequisites for class action certification under Rules 23(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure are likely to be found to be satisfied as: (a) the members of the Settlement Class are so numerous that joinder of all Settlement Class Members in the Action is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of Lead Plaintiffs are typical of the claims of the Settlement Class; (d) the interests of all Settlement Class Members are adequately represented by Lead Plaintiffs and Lead Plaintiffs' Counsel; (e) the issues common to Settlement Class Members predominate over any individualized issues; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These findings shall be vacated if the Settlement is terminated or if for any reason the Effective Date does not occur.

7. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and solely for the purposes of effectuating the Settlement, Lead Plaintiffs are appointed as representatives for the

Settlement Class and Lead Plaintiffs' Counsel are appointed as counsel for the Settlement Class. Solely for the purposes of effectuating the proposed Settlement, Lead Plaintiffs' Counsel are authorized to act on behalf of Lead Plaintiffs and other Settlement Class Members with respect to all acts or consents required by or that may be given pursuant to the Stipulation, including all acts that are reasonably necessary to consummate the Settlement. These designations shall be vacated if the Settlement is terminated or if for any reason the Effective Date does not occur.

8. **Retention of Administrators and Manner of Providing Notice** – Lead Plaintiffs' Counsel are hereby authorized to retain (i) Kurtzman Carson Consultants LLC (the "Claims Administrator") to supervise and administer the notice procedure in connection with the proposed Settlement as well as to process Claims as more fully set forth below and (ii) HF Media, LLC (the "Publication Notice Plan Administrator" and, together with the Claims Administrator, the "Administrators") to conduct the Publication Notice Plan for the Settlement. Notice of the Settlement and the Final Approval Hearing shall be given by the Administrators, under the supervision of Lead Plaintiffs' Counsel, as follows:

(a) **Notice to Registered Holder Settlement Class Members** –

(i) beginning no later than forty (40) business days after the date of entry of this Order (the "Notice Date"), the Claims Administrator shall cause a copy of the Post-Card Notice, substantially in the form attached hereto as Exhibit 2, to be mailed by first-class mail to Registered Holder Settlement Class Members at the addresses set forth in the records of BNYM's transfer agent;[3]

[3] Each Post-Card Notice will contain a unique Claim Number and PIN allowing Registered Holder Settlement Class Members to access their relevant holding and cash distribution information via a portal contained on the website www.bnymadrfxsettlement.com.

(ii) contemporaneously with the mailing of the Post-Card Notice, the Claims Administrator shall cause copies of the Notice and Claim Form, substantially in the forms attached hereto as Exhibits 1 and 5, to be posted on a website to be developed for the Settlement (www.bnymadrfxsettlement.com), from which copies of the Notice and Claim Form can be downloaded;

(iii) not later than seven (7) calendar days prior to the Final Approval Hearing, Lead Plaintiffs' Counsel shall serve on Defendant's Counsel and file with the Court proof, by affidavit or declaration, of such mailing and posting.

(b) **Notice to Non-Registered Holder Settlement Class Members** –

(i) beginning no later than ten (10) calendar days after the entry of this Order, the Publication Notice Plan Administrator shall commence the Publication Notice Plan as described in the Declaration of Jeanne C. Finegan, APR submitted to the Court with Lead Plaintiffs' motion for an order approving the form and manner of notice to the Settlement Class on January 15, 2019, which will consist of banner and search advertisements ("Banner Ads"), in the form attached hereto as Exhibit 4, and a Publication Notice to be published in various newspapers and magazines, in the form attached hereto as Exhibit 3;

(ii) the Publication Notice Plan shall last at least sixty (60) calendar days; and

(iii) not later than seven (7) calendar days prior to the Final Approval Hearing, Lead Plaintiffs' Counsel shall serve on Defendant's Counsel and file with the Court proof, by affidavit or declaration, of such Publication Notice Plan and the results thereof.

9. **Approval of Form and Content of Notice** – The Court (a) approves, as to form and content, the Notice, Post-Card Notice, Publication Notice, and Banner Ads, annexed hereto as

Exhibits 1, 2, 3 and 4, respectively, and (b) finds that the mailing and distribution of the Post-Card Notice to Registered Holder Settlement Class Members, the Publication Notice Plan to Non-Registered Settlement Class Members, and the posting of the Notice on the Settlement website substantially in the manner and forms set forth in ¶ 8 of this Order (i) is the best notice practicable under the circumstances; (ii) constitutes notice that is reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Action, their right to exclude themselves from the Settlement Class, the effect of the proposed Settlement (including the Releases to be provided thereunder), Lead Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses (including Service Awards to Lead Plaintiffs), their right to object to the Settlement, the Plan of Allocation and/or Lead Plaintiffs' Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses, and their right to appear at the Final Approval Hearing; (iii) constitutes due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (iv) satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure, the Constitution of the United States (including the Due Process Clause), and all other applicable laws and rules. The date and time of the Final Approval Hearing shall be included in the Notice, Post-Card Notice, and Publication Notice before they are posted, mailed, and published, respectively. No Settlement Class Member shall be relieved from the terms of the proposed Settlement, including the Releases provided for therein, based solely upon the contention or proof that such Settlement Class Member failed to receive adequate or actual notice.

10. **Participation in the Settlement** – Registered Holder Settlement Class Members (i.e., Settlement Class Members who hold (or held) their eligible securities directly and are listed in the records of BNYM's transfer agent with respect to such holdings and whose contact, holding,

and distribution information has been provided by BNYM's transfer agent) do not have to take any action in order to participate in the Settlement and be eligible to receive a payment from the Net Settlement Fund. However, Non-Registered Holder Settlement Class Members (i.e., Settlement Class Members who are not listed in the records of BNYM's transfer agent or whose contact, holding, and distribution information has not been provided by BNYM's transfer agent) who wish to participate in the Settlement and be eligible to receive a payment from the Net Settlement Fund must complete and submit a Claim Form in accordance with the instructions contained therein. Unless the Court orders otherwise, all Claim Forms must be postmarked no later than one hundred fifty (150) calendar days after the Notice Date. Notwithstanding the foregoing, Lead Plaintiffs' Counsel may, at their discretion, accept for processing late Claims provided such acceptance does not delay the distribution of the Net Settlement Fund to Authorized Recipients. By submitting a Claim, a person or entity shall be deemed to have submitted to the jurisdiction of the Court with respect to his, her, or its Claim and the subject matter of the Settlement.

11. Each Claim Form submitted must satisfy the following conditions: (a) it must be properly completed, signed and submitted in a timely manner in accordance with the provisions of the preceding paragraph; (b) it must be accompanied by adequate supporting documentation for the ADRs held and the cash distributions received as a result of such holdings reported therein, in the form of broker year-end account statements, an authorized statement from the broker containing the information regarding cash distributions that would be found in a year-end account statement, or such other documentation as is deemed adequate by Lead Plaintiffs' Counsel or the Claims Administrator; (c) if the person or entity executing the Claim Form is acting in a representative capacity, a certification of his, her, or its current authority to act on behalf of the

Settlement Class Member must be included in the Claim Form to the satisfaction of Lead Plaintiffs' Counsel or the Claims Administrator; and (d) the Claim Form must be complete and contain no material deletions or modifications of any of the printed matter contained therein and must be signed under penalty of perjury.

12. Any Non-Registered Holder Settlement Class Member that does not timely and validly submit a Claim Form or whose Claim is not otherwise approved by the Court: (a) shall be deemed to have waived his, her, or its right to share in the Net Settlement Fund; (b) shall be forever barred from participating in any distributions therefrom; (c) shall be bound by the provisions of the Stipulation and the Settlement and all proceedings, determinations, orders, and judgments in the Action relating thereto, including, without limitation, the Order and Final Judgment and the Releases provided for therein, whether favorable or unfavorable to the Settlement Class; and (d) will be barred from commencing, maintaining, or prosecuting any of the Released Claims against each and all of the Releasees, as more fully described in the Stipulation and Notice. Notwithstanding the foregoing, late Claim Forms may be accepted for processing as set forth in ¶ 10 above.

13. **Exclusion From the Settlement Class** – Any member of the Settlement Class who wishes to exclude himself, herself, or itself from the Settlement Class must request exclusion in writing within the time and in the manner set forth in the Notice ("Request for Exclusion"), which shall provide that: (a) any such Request for Exclusion from the Settlement Class must be mailed or delivered such that it is received no later than thirty-five (35) calendar days prior to the Final Approval Hearing, to: *Bank of New York Mellon ADR FX Settlement*, EXCLUSIONS, c/o KCC Class Action Services, P.O. Box 505030, Louisville, KY 40233-5030, and (b) each Request for Exclusion must (i) state the name, address, and telephone number of the person or entity requesting

exclusion, and in the case of entities, the name and telephone number of the appropriate contact person; (ii) state that such person or entity "requests exclusion from the Settlement Class in *In re: The Bank of New York Mellon ADR FX Litigation*, 16-CV-00212-JPO-JLC"; (iii) identify by CUSIP the ADRs listed on the Appendix to the Stipulation owned by such person or entity and the cash payments such person or entity received per eligible ADR during the relevant time period; and (iv) be signed by the person or entity requesting exclusion or an authorized representative. A Request for Exclusion shall not be effective unless it provides all the required information and is received within the time stated above, or is otherwise accepted by the Court.

14. Any person or entity who or which timely and validly requests exclusion from the Settlement Class in compliance with the terms stated in this Order and is excluded from the Settlement Class shall not be a Settlement Class Member, shall not be bound by the terms of the Settlement or any orders or judgments in the Action, and shall not receive any payment out of the Net Settlement Fund.

15. Any Settlement Class Member who or which does not timely and validly request exclusion from the Settlement Class in the manner stated in this Order: (a) shall be deemed to have waived his, her, or its right to be excluded from the Settlement Class; (b) shall be forever barred from requesting exclusion from the Settlement Class in this or any other proceeding; (c) shall be bound by the provisions of the Stipulation and Settlement and all proceedings, determinations, orders, and judgments in the Action, including, but not limited to, the Order and Final Judgment and the Releases provided for therein, whether favorable or unfavorable to the Settlement Class; and (d) will be barred from commencing, maintaining, or prosecuting any of the Released Claims against any of the Releasees, as more fully described in the Stipulation and Notice.

16. **Appearance at Final Approval Hearing and Objections** – Any Settlement Class Member who does not request exclusion from the Settlement Class may enter an appearance in the Action, at his, her, or its own expense, individually or through counsel of his, her, or its own choice, by filing with the Clerk of Court and delivering a notice of appearance to both Lead Plaintiffs' Counsel and Defendant's Counsel, at the addresses set forth in ¶ 17 below, such that it is received no later than thirty five (35) calendar days prior to the Final Approval Hearing, or as the Court may otherwise direct. Any Settlement Class Member who does not enter an appearance will be represented by Lead Plaintiffs' Counsel.

17. Any Settlement Class Member who does not request exclusion from the Settlement Class may file a written objection to the proposed Settlement, the proposed Plan of Allocation, and/or Lead Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses (including Service Awards to Lead Plaintiffs) and appear and show cause, if he, she, or it has any cause, why the proposed Settlement, the proposed Plan of Allocation and/or Lead Plaintiffs' Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses should not be approved; *provided, however*, that no Settlement Class Member shall be heard or entitled to contest the approval of the terms and conditions of the proposed Settlement, the proposed Plan of Allocation, and/or the motion for attorneys' fees and reimbursement of Litigation Expenses unless that person or entity has filed a written objection with the Court and served copies of such objection on Lead Plaintiffs' Counsel and Defendant's Counsel at the addresses set forth below such that they are received no later than thirty-five (35) calendar days prior to the Final Approval Hearing.

Lead Plaintiffs' Counsel

Sharan Nirmul, Esq.
Kessler Topaz Meltzer
& Check LLP
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New York, NY 10013-1413

Defendant's Counsel

Elizabeth M. Sacksteder, Esq.
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064

18. Any objections, filings, and other submissions by the objecting Settlement Class Member must: (a) state the name, address, and telephone number of the person or entity objecting and be signed by the objector; (b) indicate whether the objection applies only to the objector, to a specific subset of the Settlement Class, or to the entire Settlement Class; (c) provide a full explanation of all reasons for the Settlement Class Member's objection or objections, and state with specificity the ground(s) for each objection, including any legal and evidentiary support the Settlement Class Member wishes to bring to the Court's attention; and (d) include documents that identify by CUSIP the ADRs listed on the Appendix to the Stipulation owned by such objecting Settlement Class Member and the cash distributions received in connection with those holdings in order to prove membership in the Settlement Class. Objectors who enter an appearance and desire to present evidence at the Final Approval Hearing in support of their objection must include in their written objection or notice of appearance the identity of any witnesses they may call to testify and any exhibits they intend to introduce into evidence at the hearing.

19. Any Settlement Class Member who or which does not make his, her, or its objection in the manner provided herein shall be deemed to have waived his, her, or its right to object to any aspect of the proposed Settlement, the proposed Plan of Allocation, and Lead Plaintiffs' Counsel's

motion for an award of attorneys' fees and reimbursement of Litigation Expenses (including Service Awards to Lead Plaintiffs), and shall be forever barred and foreclosed from objecting to the fairness, reasonableness, or adequacy of the Settlement, the Plan of Allocation, or the requested attorneys' fees and Litigation Expenses, or from otherwise being heard concerning the Settlement, the Plan of Allocation, or the requested attorneys' fees and Litigation Expenses in this or any other proceeding.

20. **Stay and Temporary Injunction** – Until otherwise ordered by the Court, the Court stays all proceedings in the Action other than proceedings necessary to carry out or enforce the terms and conditions of the Stipulation. Pending final determination of whether the Settlement should be approved, the Court bars and enjoins Lead Plaintiffs and all members of the Settlement Class from prosecuting any and all of the Released Claims against any of the Releasees.

21. **Notice and Administration Costs** – All reasonable costs incurred in notifying Settlement Class Members of the Settlement as well as in administering the Settlement shall be paid as set forth in the Stipulation without further order of the Court.

22. **Settlement Fund** – The contents of the Settlement Fund held by Huntington National Bank (which the Court approves as the Escrow Agent) shall be deemed and considered to be *in custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such time as they shall be distributed pursuant to the Stipulation and/or further order(s) of the Court.

23. **Taxes** – Lead Plaintiffs' Counsel are authorized and directed to prepare any tax returns and any other tax reporting form for or in respect to the Settlement Fund, to pay from the Settlement Fund any Taxes and Tax Expenses owed with respect to the Settlement Fund, and to otherwise perform all obligations with respect to Taxes and any reporting or filings in respect

thereof without further order of the Court in a manner consistent with the provisions of the Stipulation.

24. **Termination of Settlement** – If the Settlement is terminated as provided in the Stipulation, the Settlement is not approved, or the Effective Date of the Settlement otherwise fails to occur, this Order shall be vacated, rendered null and void, and be of no further force and effect, except as otherwise provided by the Stipulation, and this Order shall be without prejudice to the rights of Lead Plaintiffs, the Settlement Class Members, and Defendant, and Lead Plaintiffs and Defendant shall be deemed to have reverted *nunc pro tunc* to their respective litigation positions in the Action immediately prior to the execution of the Term Sheet on October 16, 2018, as provided in the Stipulation. Except as otherwise provided in the Stipulation, in the event the Settlement is terminated in its entirety or if the Effective Date fails to occur for any reason, the balance of the Settlement Fund including interest accrued therein, less any Notice and Administration Costs paid, incurred, or owing and less any Taxes and Tax Expenses paid, incurred, or owing, shall be refunded to BNYM (or such other persons or entities as BNYM may direct) in accordance with the Stipulation.

25. **Use of this Order** – Neither this Order nor the Stipulation (whether or not consummated), nor any negotiations, proceedings, or agreements relating to the Stipulation, the Settlement, nor any matters arising in connection with the settlement negotiations, proceedings, or agreements, shall be offered or received against any or all of the Released Parties for any purpose, and in particular:

(a) do not constitute, and shall not be offered or received against Defendant or the other Releasees as evidence of, or construed as, or deemed to be evidence of, any presumption, concession, or admission by Defendant or the Releasees with respect to the truth of any fact alleged

by Lead Plaintiffs or any other Settlement Class Member or the validity of any claim that has been or could have been asserted in the Action or in any litigation or other proceeding, including but not limited to the Released Claims, or of any liability, damages, negligence, fault, or wrongdoing of Defendant or the Releasees;

(b) do not constitute, and shall not be offered or received against Defendant or the other Releasees as evidence of, a presumption, concession, or admission of any fault, misstatement, or omission with respect to any statement or written document approved or made by Defendant or the Releasees, or against Defendant, the Releasees, Lead Plaintiffs, or any other member of the Settlement Class as evidence of any infirmity in the claims or defenses that have been or could have been asserted in the Action;

(c) do not constitute, and shall not be offered or received against Defendant or the other Releasees as evidence of, a presumption, concession, or admission with respect to any liability, damages, negligence, fault, infirmity, or wrongdoing, or in any way referred to for any other reason against Defendant or the Releasees, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation;

(d) do not constitute, and shall not be construed against Defendant or the other Releasees as an admission or concession that, the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; and

(e) do not constitute, and shall not be construed as or received in evidence as, an admission, concession, or presumption against Lead Plaintiffs or any other Settlement Class Member that any of their claims are without merit or infirm, that a class should not be certified, or

that damages recoverable under the complaints filed in the Action would not have exceeded the Settlement Amount.

26. **Supporting Papers** – Lead Plaintiffs' Counsel shall file and serve the opening papers in support of the proposed Settlement, the Plan of Allocation, and Lead Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses (including Service Awards to Lead Plaintiffs) no later than forty-nine (49) calendar days prior to the Final Approval Hearing; and reply papers, if any, shall be filed and served no later than seven (7) calendar days prior to the Final Approval Hearing.

27. The Court retains exclusive jurisdiction over the Action to consider all further matters arising out of or connected with the Settlement.

SO ORDERED this 17th day of January, 2019.

J. PAUL OETKEN
United States District Judge

EXHIBIT A-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: THE BANK OF NEW YORK MELLON ADR FX LITIGATION	16-CV-00212-JPO-JLC ECF Case
This Document Relates to: ALL ACTIONS	

NOTICE OF (I) PENDENCY OF CLASS ACTION AND PROPOSED SETTLEMENT; (II) FINAL APPROVAL HEARING; AND (III) MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

TO: All entities and individuals who at any time during the period January 1, 1997 through _____, 2019 held (directly or indirectly, registered or beneficially), or otherwise claim any entitlement to any payment (whether a dividend, rights offering, interest on capital, sale of shares, or other distribution) in connection with, any American Depositary Share (sometimes known as an American Depositary Receipt) ("ADR") for which The Bank of New York Mellon ("BNYM" or "Defendant") acted as the depositary sponsored by an issuer that is identified in the Appendix to this Notice (the "Settlement Class").

A Federal Court authorized this Notice. This is not a solicitation from a lawyer.

This notice ("Notice") is issued pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") and an Order of the United States District Court for the Southern District of New York ("Court"). The purpose of this Notice is to advise you of the pendency of the above-captioned class action ("Action") and the proposed settlement ("Settlement") of the Action for $72,500,000 on the terms and provisions contained in the Stipulation and Agreement of Settlement filed in the Action and dated January 15, 2019 ("Stipulation").[1] The Honorable J. Paul Oetken is presiding over the Action. Judge Oetken has found that the prerequisites for class action certification under Rule 23 are likely to be to be satisfied with respect to the Settlement Class (defined in ¶ 3 below) for purposes of settlement only, has approved this Notice to potential members of the Settlement Class and has scheduled a final settlement hearing for _____, 2019, at __:__ _.m. ("Final Approval Hearing"). The Final Approval Hearing will be held in Courtroom 706 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY 10007.

[1] The Stipulation can be viewed at www.bnymadrfxsettlement.com. Any capitalized terms used in this Notice that are not otherwise defined herein shall have the meanings ascribed to them in the Stipulation.

The Settlement resolves claims by David Feige, International Union of Operating Engineers Local 138 Annuity Fund[2], and Annie L. Normand (collectively, "Named Plaintiffs") and Diana Carofano and Chester County Employees Retirement Fund ("Intervenor Plaintiffs" and, together with Named Plaintiffs, "Lead Plaintiffs"), that have been asserted on behalf of the Settlement Class against BNYM. Lead Plaintiffs alleged that, during the relevant time period, BNYM, as depositary for the ADRs listed in the Appendix hereto, systematically deducted impermissible fees for conducting foreign exchange ("FX") from cash distributions issued by foreign companies, and owed to ADR holders. BNYM denies these allegations. A more detailed description of the claims asserted by Lead Plaintiffs in the Action, as well as the history of the Action, is set forth in ¶¶ 11-23 below.

As more fully described in ¶¶ 28-37 below, the Settlement provides for $72.5 million ("Settlement Amount") to be paid by or on behalf of Defendant for the benefit of eligible Settlement Class Members, which amount has been deposited into an interest-bearing escrow account. The Net Settlement Fund (*i.e.*, the Settlement Amount plus any and all interest earned thereon (the "Settlement Fund") less any (i) Taxes and Tax Expenses; (ii) Notice and Administration Costs; and (iii) attorneys' fees and Litigation Expenses awarded by the Court) will be distributed to eligible Settlement Class Members (*i.e.*, "Authorized Recipients") according to a Court-approved plan of allocation. The proposed Plan of Allocation is set forth in Exhibit 1 hereto.

IMPORTANT - PLEASE NOTE: If you receive/have received a Post-Card Notice in the mail in connection with this Settlement, you are a Registered Holder Settlement Class Member (*i.e.*, you hold (or held) the ADRs covered by this Action directly through BNYM, are listed in the records of BNYM's transfer agent with respect to such holdings, and your contact, holding, and distribution information was provided to the Claims Administrator by BNYM's transfer agent) and you ***do not*** have to take any action in order to be eligible to receive a payment from the Settlement. You should, however, review the information provided by BNYM's transfer agent with respect to your holdings and distributions to confirm that the information is accurate and complete. *See* ¶ 39 below. If you do not receive/have not received a Post-Card Notice in the mail in connection with the Settlement, you are a Non-Registered Holder Settlement Class Members and you must complete and submit a valid Claim Form in order to be eligible to receive a payment from the Settlement.

Any questions regarding this Notice, the Action, the Settlement or your eligibility to participate in the Settlement should be directed to Lead Plaintiffs' Counsel: Sharan Nirmul, Esq., Kessler Topaz Meltzer & Check, LLP, 280 King of Prussia Road, Radnor, Pennsylvania 19087, (610) 667-7706, www.ktmc.com, and Daniel P. Chiplock, Esq., Lieff Cabraser Heimann & Bernstein, LLP, 250 Hudson Street, 8th Floor, New York, NY 10013-1413, (212) 355-9500, www.lieffcabraser.com. Further information may be obtained by contacting the Court-appointed Claims Administrator, Kurtzman Carson Consultants LLC ("KCC"), at *Bank of New York Mellon ADR FX Settlement*, c/o KCC Class Action Services, P.O. Box 505030, Louisville, KY 40233-5030, (866) 447-6210, info@bnymadrfxsettlement.com. **Please DO NOT contact the Court, the Clerk's office,**

[2] The operative complaint in the Action named International Union of Operating Engineers Local 138 Pension Trust Fund rather than International Union of Operating Engineers Local 138 Annuity Fund. The proper Named Plaintiff is International Union of Operating Engineers Local 138 Annuity Fund.

BNYM, or its counsel. All questions should be directed to either Lead Plaintiffs' Counsel or the Claims Administrator.

IF YOU ARE A SETTLEMENT CLASS MEMBER, PLEASE READ THIS NOTICE CAREFULLY. This Notice explains important rights you may have, including the possible receipt of cash from the Settlement. If you are a member of the Settlement Class, your legal rights will be affected whether or not you act.

A SUMMARY OF YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
SUBMIT A CLAIM FORM ONLINE OR POSTMARKED NO LATER THAN _____, 2019, *UNLESS YOU ARE A REGISTERED HOLDER SETTLEMENT CLASS MEMBER*.	If you are a Non-Registered Holder Settlement Class Member (as defined above), this is the <u>only</u> way for you to be eligible to receive a payment from the Settlement. If you are a Registered Holder Settlement Class Member (as defined above), you do not need to take any further action (*i.e.*, submit a Claim Form) to be eligible to receive a payment from the Settlement, but if the information regarding your holdings and cash distribution as set forth on the website is incorrect or incomplete, you must notify the Claims Administrator immediately.
EXCLUDE YOURSELF FROM THE SETTLEMENT CLASS BY SUBMITTING A WRITTEN REQUEST FOR EXCLUSION SO THAT IT IS *RECEIVED* NO LATER THAN _____, 2019.	If you are a member of the Settlement Class and choose to exclude yourself from the Settlement Class, you will not be eligible to receive any payment from the Settlement. This is the only option that allows you ever to be part of any *other* lawsuit against the Defendant or any of the other Releasees concerning the Released Claims. *See* ¶¶ 47-52 below for details.
OBJECT TO THE SETTLEMENT BY SUBMITTING A WRITTEN OBJECTION SO THAT IT IS *RECEIVED* NO LATER THAN _____, 2019.	If you object to the proposed Settlement, the proposed Plan of Allocation, and/or Lead Plaintiffs' Counsel's request for attorneys' fees and reimbursement of Litigation Expenses, you may write to the Court and explain why you object to them. You can only object to the Settlement, the Plan of Allocation or the fee and expense request if you are a Settlement Class Member and you do not exclude yourself from the Settlement Class. *See* ¶¶ 57-63 below for details.
FILE A NOTICE OF INTENTION TO APPEAR SO THAT IT IS *RECEIVED* NO LATER THAN _____, 2019, AND GO TO THE FINAL APPROVAL HEARING ON _____, 2019.	Filing a written objection and notice of intention to appear by _____, 2019 allows you to speak in Court, at the discretion of the Court, about the fairness of the proposed Settlement, the proposed Plan of Allocation, and/or Lead Plaintiffs' Counsel's request for attorneys' fees and reimbursement of Litigation Expenses. If you submit a written objection, you may (but you do not have to) attend the hearing and, at the discretion of the Court, speak to the Court about your objection.

DO NOTHING.	You will remain a member of the Settlement Class, which means that you give up your right to sue the Defendant or any of the other Releasees about the claims that are resolved by the Settlement and you will be bound by any judgments or orders entered by the Court in the Action. **Please Note: If you are a Non-Registered Holder Settlement Class Member and do nothing, you will not be eligible to receive a payment from the Settlement.**

WHAT THIS NOTICE CONTAINS

SUMMARY OF THE SETTLEMENT

1. As described in more detailed below (and in the operative complaint filed in the Action), Lead Plaintiffs allege that during the relevant time period, Defendant, BNYM, as depositary for certain ADRs, systematically deducted impermissible fees for conducting FX from cash distributions issued by foreign companies, and owed to ADR holders. A copy of the operative complaint in the Action – the Consolidated Amended Class Action Complaint dated October 26, 2016 ("Consolidated Complaint"), is available on the website for the Settlement, www.bnymadrfxsettlement.com.

2. An Escrow Account has been established to hold the Settlement Fund prior to being distributed to Authorized Recipients pursuant to the Court-approved plan of allocation. After the Settlement becomes Final and pursuant to Order of the Court, the Net Settlement Fund will be distributed to Authorized Recipients. Lead Plaintiffs estimate, with the aid of a damages expert, that the amount of the Settlement represents approximately 23 percent of the total overcharges to the Settlement Class from the alleged ADR FX practices for the relevant ADRs. **This is only an estimate.** BNYM does not concede the accuracy of Lead Plaintiffs' damages expert's calculation, or that there were any damages. A Settlement Class Member's Recognized Claim, as explained in the Plan of Allocation, reflects Lead Plaintiffs' view of the purported margin(s) retained by BNYM for FX conversions of ADR cash distributions. A Settlement Class Member's actual recovery will be based upon the Net Settlement Fund, which will consist of the Settlement Fund, less certain amounts to be deducted from the Settlement Fund as described in the Stipulation, including expenses associated with providing notice to the Settlement Class, Court-awarded attorneys' fees and Litigation Expenses (including any Service Awards to Lead Plaintiffs for the effort and time spent by them in connection with the prosecution of the Action), Taxes and Tax Expenses, and other costs related to the administration of the Settlement Fund and implementation of the Plan of Allocation, and will be allocated in accordance with the plan of allocation approved by the Court. (*See* ¶¶ 42-45 below and the proposed Plan of Allocation attached as Exhibit 1).

3. The Settlement Class is defined as follows:

> **All entities and individuals who at any time during the period January 1, 1997 through _____, 2019 held (directly or indirectly, registered or beneficially), or otherwise claim any entitlement to any payment (whether a dividend, rights offering, interest on capital, sale of shares, or other distribution) in connection with, any ADR for which BNYM acted as the depositary sponsored by an issuer that is identified in the Appendix hereto. For avoidance of doubt, Settlement Class Members include all entities, organizations, and associations regardless of form, including investment funds and pension funds of any kind.**

Please Note: There are exceptions to being included in the Settlement Class. A description of those persons and entities excluded by definition from the Settlement Class is provided below in ¶ 27.

4. As with any litigation, the Parties would face an uncertain outcome if this Action were to continue. Absent the Settlement, orders and appeals on class certification, summary

judgment and a trial could result in a judgment or verdict greater or less than the recovery obtained by the Settlement, or no recovery at all. This Action has been hotly contested from the outset. Throughout this Action, Lead Plaintiffs and BNYM have disagreed on both liability and damages. BNYM, among other things: (1) has denied, and continues to deny, the material allegations of the Consolidated Complaint; (2) has denied, and continues to deny, any wrongdoing or liability whatsoever; (3) contests the propriety of class certification; (4) believes that its actions were a proper exercise of its judgment and were in good faith and in its best judgment, and complied with all applicable laws, rules, regulations, codes, market practices, and standards; (5) would assert certain other defenses if this Settlement is not consummated; and (6) is entering into the Settlement solely to avoid the cost, disruption, and uncertainty of continued litigation. The Parties have taken into account the uncertainty and risks inherent in this Action, particularly its complex nature, and have concluded that it is desirable that this Action be fully and finally settled on the terms and conditions set forth in the Stipulation.

5. Over the course of this Action, the Parties briefed a motion to dismiss and engaged in extensive discovery efforts, which included Defendant's production of over 2.7 million pages of documents and over 136,000 Excel documents, Lead Plaintiffs' production of over 23,000 pages of documents, and the Parties taking 16 fact depositions and four expert depositions and exchanging several rounds of expert reports. The Parties' discovery efforts were coming to a close when they began discussing the possibility of resolving the Action. In addition, the Parties fully briefed Defendant's motion for partial summary judgment and Lead Plaintiffs' motion for class certification, both of which remained pending when the Settlement was reached.

6. Lead Plaintiffs' Counsel in this Action, on behalf of all plaintiffs' counsel, will apply to the Court for an award of attorneys' fees in an amount not to exceed 30% of the Settlement Amount and reimbursement of Litigation Expenses in an amount not to exceed $1,750,000, plus interest earned on these amounts. Lead Plaintiffs will share in the allocation of the money paid to members of the Settlement Class on the same basis and to the same extent as all other members of the Settlement Class, except that, in addition thereto, Lead Plaintiffs may apply to the Court for Service Awards of up to $40,000 in the aggregate. Any Service Awards granted to Lead Plaintiffs by the Court will be payable from the Settlement Fund, and will compensate Lead Plaintiffs for their effort and time spent in connection with the prosecution of the Action, as supported by adequate written documentation of such effort and time. The aggregate amount of Service Awards (*i.e.*, $40,000) is reflected in the maximum amount of Litigation Expenses set forth above.

BASIC INFORMATION

What Is The Purpose Of This Notice?

7. The Court has directed the issuance of this Notice to inform potential members of the Settlement Class regarding the proposed Settlement with BNYM before the Court decides whether to approve the Settlement. If the Court approves the Settlement, and any related objections and appeals are favorably resolved, the Settlement Fund, net of the costs, fees and expenses described herein, will be allocated among eligible Settlement Class Members according to a Court-approved plan of allocation, and the Releasees and Releasors will be released from all Released Claims and Released Defendant Claims, respectively, as set forth in the Stipulation.

8. This Notice explains the Action, the Settlement, your legal rights (if you are a Settlement Class Member), what benefits are available, who is eligible for them, and how you will receive your portion of the benefits. The Notice also informs you of the Final Approval Hearing to be held by the Court to consider the fairness, reasonableness and adequacy of the Settlement and to consider Lead Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses from the Settlement Fund, which may include Service Awards to Lead Plaintiffs.

9. The Final Approval Hearing will be on _____ __, 2019 at __:__ _.m., before the Honorable J. Paul Oetken in the United States District Court for the Southern District of New York, Courtroom 706 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY 10007, to determine:

- whether the Settlement should be approved as fair, reasonable and adequate;
- whether the Consolidated Complaint should be dismissed with prejudice pursuant to the terms of the Settlement;
- whether the Settlement Class should be certified for settlement purposes;
- whether notice and the means of dissemination thereof pursuant to the Settlement: (i) were appropriate and reasonable and constituted due, adequate, and sufficient notice to all persons and entities entitled to such notice; and (ii) met all applicable requirements of the Federal Rules of Civil Procedure, and any other applicable law; and
- whether Lead Plaintiffs' Counsel's application for attorneys' fees and reimbursement of Litigation Expenses, including Service Awards to Lead Plaintiffs, should be approved.

10. The issuance of this Notice is not an expression of the Court's opinion on the merits of any claim in this Action, and the Court still has to decide whether to approve the Settlement. If the Court approves the Settlement, payment to Authorized Recipients will be made after all related appeals, if any, are favorably resolved. It is always uncertain whether such appeals can be favorably resolved, and resolving them can take time, perhaps more than a year. Please be patient.

What Is This Action About? What Has Happened So Far?

11. On January 11, 2016, the initial complaint (*i.e.*, the "Class Action Complaint") was filed in the Action. The Class Action Complaint asserted claims for breach of contract, breach of implied covenant of good faith and fair dealing and conversion.

12. On February 26, 2016, BNYM moved to dismiss the Class Action Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Plaintiffs opposed BNYM's motion on March 18, 2016, and BNYM filed a reply in support of its motion on March 28, 2016.

13. By Order dated April 12, 2016, the Court designated Lieff Cabraser Heimann & Bernstein, LLP and Kessler Topaz Meltzer & Check, LLP as Interim Co-Lead Counsel for the putative class.

14. On April 15, 2016, the action titled *International Union of Operating Engineers Local 138 Pension* Trust *Fund v. The Bank of New York Mellon*, Case No. 16-cv-02834-JPO (the "Local 138 Action"), filed in the Eastern District of New York on February 19, 2016, was transferred to this Court. By Stipulation and Order Consolidating Cases and Setting Deadline for Response to Complaint in Local 138 Action, the Local 138 Action was consolidated with the Action for all purposes pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, under the caption *In re: The Bank of New York Mellon ADR FX Litigation*, File No. 1:16-CV-00212-JPO.

15. By Opinion and Order dated September 29, 2016, the Court granted in part and denied in part BNYM's motion to dismiss the Class Action Complaint. Specifically, the Court: (i) denied BNYM's motion as to plaintiffs' breach of contract claims; (ii) granted BNYM's motion as to plaintiffs' claims for breach of the implied duty of good faith and fair dealing and conversion; (iii) denied BNYM's motion as to plaintiffs' breach of contract claims under SLUSA; (iv) denied BNYM's motion as to plaintiffs' claims on the ground that plaintiffs lacked contractual standing; and (v) denied BNYM's motion as to claims asserted for the period prior to 2012 (for the California plaintiffs) and 2011 (for the Virginia plaintiffs) without prejudice to renewal, either on summary judgment after discovery, or at trial. The Court also found BNYM's argument that plaintiffs lacked class standing to represent all holders of the ADRs for which BNYM was depository to be premature.

16. On October 19, 2016, the Court entered an order that, among other things, permitted plaintiffs to file a consolidated complaint by October 28, 2016. In accordance with that Order, Lead Plaintiffs filed the operative complaint in the Action, the Consolidated Amended Class Action Complaint (*i.e.*, the Consolidated Complaint), on October 26, 2016. BNYM answered the Consolidated Complaint on November 23, 2016.

17. Thereafter, the Parties commenced discovery, which included BNYM producing over 2.7 million pages of documents and over 136,000 Excel documents, Lead Plaintiffs producing over 23,000 pages of documents, and the Parties taking 16 fact depositions and four expert depositions and exchanging several rounds of expert reports.

18. On February 12, 2018, BNYM moved for partial summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the applicability of the statutes of limitations and plaintiffs' standing. Lead Plaintiffs opposed BNYM's motion by memoranda filed on March 7, 2018 and March 22, 2018. BNYM filed a reply in support of its motion on March 19, 2018.

19. On April 27, 2018, Lead Plaintiffs moved to add Chester County Employees Retirement Fund as a named plaintiff, which BNYM opposed on May 11, 2018. Lead Plaintiffs filed their reply on May 18, 2018.

20. On May 15, 2018, Lead Plaintiffs moved for class certification. BNYM opposed Lead Plaintiffs' motion on June 5, 2018, and Lead Plaintiffs filed a reply in support of their motion on June 19, 2018.

21. As the Parties' discovery efforts were coming to a close and while the Parties' respective motions for partial summary judgment and class certification were pending, counsel for the Parties began discussing the possibility of resolving the Action. Following hard-fought, arm's-length negotiations spanning the course of several months, including formal mediation, on August 10, 2018, the Parties accepted a mediator's proposal on the Settlement Amount, and on October 16, 2018, the Parties entered into a term sheet setting forth the material terms of their agreement. On the same day, the Parties notified the Court of their tentative settlement.

22. Over the next two months, the Parties negotiated and documented the specific terms and conditions of the Settlement, which are embodied in the Stipulation entered on January 15, 2019. The Stipulation can be viewed at www.bnymadrfxsettlement.com.

23. Thereafter, on _____, 2019, the Court entered the Notice Order, approving the proposed notice plan to potential Settlement Class Members and scheduling the Final Approval Hearing to consider whether to grant final approval of the Settlement, among other things.

Why Is This Action A Class Action?

24. In a class action, one or more individuals or entities, referred to as "plaintiffs," sue on behalf of individuals and entities who have similar claims. All of the persons and entities on whose behalf Lead Plaintiffs in this Action are suing are members of a "class" referred to in this Notice as Settlement Class Members or members of the Settlement Class. Because Lead Plaintiffs believe that the wrongful conduct alleged in this case affected all holders of the BNYM-sponsored ADRs at issue in the Action (reflected in the Appendix hereto) in the same way, Lead Plaintiffs filed their case as putative class action. With respect to the Settlement Class, the Court has found that the prerequisite for class action certification under Rule 23 are likely to be found to be satisfied for purposes of effectuating the Settlement.

Why Is There A Settlement?

25. The Court has not expressed any opinions or reached any decisions on the ultimate merits of Lead Plaintiffs' claims against BNYM. Instead, Lead Plaintiffs and BNYM have agreed to a Settlement to resolve the Action. In reaching the Settlement, the Parties have avoided the cost and time of further litigation, including the costs and expenses involved in taking this Action to trial, post-trial briefing and potential appeals. As with any litigation, Lead Plaintiffs would face an uncertain outcome if this case proceeded. Pursuing the Action against BNYM could result in a verdict offering relief greater than this Settlement, a verdict for less money than Lead Plaintiffs have obtained through this Settlement, or no recovery at all. Based on these risks and an evaluation of other unique risks presented by this case, Lead Plaintiffs and Lead Plaintiffs' Counsel believe the Settlement is in the best interests of all members of the Settlement Class. Additional

information concerning the Settlement and these factors is available on the website, www.bnymadrfxsettlement.com.

26. As stated above, the Settlement is the product of hard-fought, arm's-length negotiations between Lead Plaintiffs' Counsel and Defendant's Counsel, both of which are very experienced with respect to complex litigation of this type. Lead Plaintiffs' Counsel believe the proposed Settlement is fair, reasonable and adequate and in the best interest of the Settlement Class.

How Do I Know If I Am Part Of The Settlement Class?

27. The Settlement Class is defined as follows:

> **All entities and individuals who at any time during the period from January 1, 1997 through _____, 2019 held (directly or indirectly, registered or beneficially), or otherwise claim any entitlement to any payment (whether a dividend, rights offering, interest on capital, sale of shares, or other distribution) in connection with, any ADR for which BNYM acted as the depositary sponsored by an issuer that is identified in the attached Appendix. For avoidance of doubt, Settlement Class Members include all entities, organizations, and associations regardless of form, including investment funds and pension funds of any kind.**

BNYM and its officers, directors, legal representatives, heirs, successors, corporate parents, subsidiaries, and/or assigns, other than Investment Vehicles[3] (which are not excluded), are excluded from the Settlement Class only to the extent that such persons or entities had a proprietary (*i.e.*, for their own account) interest in any such ADR and not to the extent that they hold or held such ADR in a fiduciary capacity or otherwise on behalf of any third-party client, account, fund, trust, or employee benefit plan that otherwise falls within the definition of the Settlement Class. Also excluded from the Settlement Class are any persons and entities who or which exclude themselves from the Settlement Class by submitting a request for exclusion that is accepted by the Court.

[3] "Investment Vehicle" means any investment company or pooled investment fund, including but not limited to mutual fund families, exchange-traded funds, funds of funds, private equity funds, real estate funds, and hedge funds, in which BNYM has or may have a direct or indirect interest, or as to which its affiliates may act as an investment advisor, general partner, managing member, or any other similar capacity.

PLEASE READ THIS NOTICE CAREFULLY TO DETERMINE WHETHER YOU ARE A SETTLEMENT CLASS MEMBER AND WHETHER YOU ARE ENTITLED TO RECEIVE PROCEEDS FROM THE SETTLEMENT.

IF YOU ARE A NON-REGISTERED HOLDER SETTLEMENT CLASS MEMBER AND YOU WISH TO BE ELIGIBLE TO RECEIVE A PAYMENT FROM THE SETTLEMENT, YOU ARE REQUIRED TO SUBMIT THE CLAIM FORM AND THE REQUIRED SUPPORTING DOCUMENTATION AS SET FORTH THEREIN POSTMARKED (OR RECEIVED) NO LATER THAN _____, 2019. YOU CAN OBTAIN A COPY OF THE CLAIM FORM, OR SUBMIT A CLAIM ONLINE, AT WWW.BNYMADRFXSETTLEMENT.COM.

PLEASE NOTE: If you are an ERISA Entity[4], you may also have received notice concerning a proposed settlement in another action entitled *Carver, et al. v. Bank of New York Mellon, et al.*, No. 15-CV-10180 (JPO)(JLC) (S.D.N.Y.) (the "*ERISA Settlement*"). Detailed information regarding the *ERISA Settlement* can be found on the website www.BNYMADRERISASettlement.com. **The Settlement described in this Notice is separate from and in addition to the *ERISA Settlement* insofar as ERISA Entities are concerned. ERISA Entities eligible to participate in the *ERISA Settlement* can and should also consider submitting a claim to receive a distribution in connection with this Settlement.**

What Does The Settlement Provide?

28. The Settlement provides for $72,500,000 to be paid by or on behalf of Defendant to settle the Action. The $72,500,000, plus interest that accrues on this amount, will be distributed to the Settlement Class after costs, expenses and fees are deducted as described below. Lead Plaintiffs estimate, with the aid of their damages expert, that the amount of the Settlement represents approximately 23 percent of the total overcharges to the Settlement Class from the alleged ADR FX practices for the relevant ADRs. **This is only an estimate.** BNYM does not concede the accuracy of Lead Plaintiffs' damages expert's calculation, or that there were any damages. A Settlement Class Member's Recognized Claim, as explained in the Plan of Allocation, reflects Lead Plaintiffs' view of the purported margin(s) retained by BNYM for FX conversions of ADR cash distributions. A Settlement Class Member's actual recovery will depend upon the net amount in the Settlement Fund (after the deduction of certain amounts as described herein and in the Stipulation, including Notice and Administration Costs, Court-approved attorneys' fees and Litigation Expenses, including any Service Awards to Lead Plaintiffs, and Taxes and Tax Expenses), which will be allocated and paid to eligible Settlement Class Members according to the plan of allocation approved by the Court.

[4] An "ERISA Entity" means an ERISA plan and any trust, pooled account, collective investment vehicle, or group insurance arrangement that files a Form 5500 annual return/report as a Direct Filing Entity ("DFE") in accordance with the DFE Filing Requirements, such as a group trust, master trust investment account (MTIA), common/collective trust (CCT), pooled separate account (PSA), 103-12 investment entity (102-12 IE), group insurance arrangement (GSA), or collective investment vehicle that held plan assets as defined by the U.S. Department of Labor "Instructions for Form 5500, Annual Return/Report of Employee Benefit Plan."

29. The Settlement will provide for cash payments to Settlement Class Members who do not exclude themselves from the Settlement Class pursuant to ¶¶ 47-52 below. Registered Holder Settlement Class Members do not need to submit a Claim Form in order to be eligible for a payment from the Settlement. Non-Registered Holder Settlement Class Members must submit a valid Claim Form in order to be eligible to receive a payment from the Settlement.

30. If the Settlement is approved, the Court will enter a judgment ("Order and Final Judgment"). The Order and Final Judgment will dismiss with prejudice the claims alleged in the Action against Defendant, and pursuant to the Order and Final Judgment, without further action by anyone, upon the Effective Date of the Settlement, Lead Plaintiffs and each member of the Settlement Class, on behalf of themselves and each of their respective heirs, executors, administrators, predecessors, successors, and assigns in their capacities as such, shall be deemed to have, and by operation of law and of the Order and Final Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged each and every Released Claim (as defined below) against any of the Releasees (as defined below), and shall forever be barred and enjoined from prosecuting any or all of the Released Claims against any of the Releasees.

31. "Released Claims" means any and all claims and causes of action of every nature and description, whether known or unknown (*i.e.*, "Unknown Claims" as defined below), asserted or unasserted, whether arising under federal, state, common, or foreign law, whether in connection with the applicable deposit agreements or otherwise, whether class, derivative, or individual in nature, that (a) were or could have been asserted in the Action, or in any other forum, that arise out of, are based upon, or relate in any way to the allegations set forth in any complaint or other pleading filed in the Action or (b) arise from, are based upon, or relate in any way to the conversion of foreign currency (including but not limited to any sale, receipt, price, charges, expenses, costs, margins, markup, spread, fee, profit, exchange, adjustment, deduction, or disclosure) in connection with the deposit agreements, depositary receipts, common share agreements and/or transfer agency, registrar, and dividend disbursing agreements, including but not limited to in connection with any payment, transfer, disbursement, or distribution (whether associated with a dividend, rights offering, interest on capital, sale of shares, stamp or other taxes, tax withholding or relief therefrom, or otherwise), in connection with any and all ADRs for which BNYM acted as the depositary at any time during the Settlement Class Period, *provided, however*, that the Released Claims shall not include claims under 29 U.S.C. § 1132(a) by participants, beneficiaries, trustees, or named fiduciaries of employee retirement plans for alleged breach of 29 U.S.C. §§ 1104, 1106 arising under the Employee Retirement Income Security Act of 1974, as amended. This release incorporates a waiver by Releasors of any limitation on the scope of the release that would otherwise exist under California Civil Law § 1542. "Released Claims" do not include claims arising out of, based upon, relating to, concerning, or in connection with the interpretation or enforcement of the terms of the Settlement.

32. "Releasees" means (a) BNYM, its predecessors, successors and assigns, its direct and indirect parents, subsidiaries, and affiliates, and their respective current and former officers, directors, employees, managers, members, partners, agents (in their capacity as agents of BNYM), shareholders (in their capacity as shareholders of BNYM), attorneys, and legal representatives,

and the predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing; (b) any custodians or subcustodians appointed by BNYM in its capacity as depositary with respect to any of the ADRs subject to this Settlement, solely in their capacity as such, and only with respect to the period that BNYM served as depositary, transfer agent, registrar, or dividend disbursing agent in connection with such ADRs; (c) any issuer of any foreign security deposited with BNYM in relation to any ADR subject to this Settlement, solely in its capacity as such, solely in relation to the conduct alleged in the Consolidated Complaint, and only with respect to the period that BNYM served as depositary, transfer agent, registrar, or dividend disbursing agent in connection with such ADR; and (d) any person or entity that converted currency on BNYM's behalf for distribution to ADR holders during the Settlement Class Period in relation to any of the ADRs subject to this Settlement, solely with respect to such currency conversion. As used in this provision, "affiliates" means entities controlling, controlled by, or under common control with a Releasee.

33. "Unknown Claims" means any and all claims that any Lead Plaintiff or any other Settlement Class Member does not know or suspect to exist in his, her or its favor at the time of the release of the Released Claims, and any and all claims that Defendant does not know or suspect to exist in its favor at the time of the release of the Released Defendant Claims, which if known to him, her or it might have affected his, her or its decision(s) with respect to the Settlement, including, but not limited to, his, her or its decision to object or not to object to the Settlement or not to exclude himself, herself or itself from the Settlement Class. With respect to any and all Released Claims and Released Defendant Claims, the Parties stipulate and agree that, upon the Effective Date, each of the Lead Plaintiffs and Defendant shall expressly waive, and each of the other Settlement Class Members shall be deemed to have, and by operation of the Order and Final Judgment shall have, expressly waived and relinquished any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States or any other jurisdiction, or principle of common law that is similar, comparable, or equivalent to California Civil Code § 1542, which provides:

> A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

Lead Plaintiffs and Defendant acknowledge, and each of the Settlement Class Members shall be deemed by operation of law to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement.

34. In addition, if the Settlement is approved, pursuant to the Order and Final Judgment, without further action by anyone, upon the Effective Date of the Settlement, Defendant shall be deemed to have, and by operation of law and of the Order and Final Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged each and every Released Defendant Claim (as defined below) against the Releasors (as defined below), and shall forever be barred and enjoined from prosecuting any or all of the Released Defendant Claims against any of the Releasors.

35. "Released Defendant Claims" means any and all claims and causes of action of every nature and description, whether known or unknown (*i.e.*, "Unknown Claims" as defined above), asserted or unasserted, whether arising under federal, state, common, or foreign law, whether in connection with the applicable deposit agreements or otherwise, whether class, derivative, or individual in nature, that arise out of or relate in any way to the institution, prosecution, or settlement of the claims asserted in the Action against Defendant. "Released Defendant Claims" do not include claims arising out of, based upon, relating to, concerning, or in connection with the interpretation or enforcement of the terms of the Settlement.

36. "Releasors" means Lead Plaintiffs and each and every Settlement Class Member on their own behalf and on behalf of their respective predecessors, successors, beneficiaries, and assigns, direct and indirect parents, subsidiaries and affiliates, their current and former officers, directors, employees, agents, and legal representatives, and the predecessors, successors, heirs, executors, administrators, beneficiaries, and assigns of each of the foregoing, in their capacities as such. With respect to any Settlement Class Member that is a government entity, Releasors include any Settlement Class Member as to which the government entity has the legal right to release such claims. As used in this provision, "affiliates" means entities controlling, controlled by, or under common control with a Releasor.

37. **Please Note: The complete terms of the Settlement are set forth in the Stipulation which may be viewed on the website www.bnymadrfxsettlement.com.**

How Do I Participate In The Settlement? What Do I Need To Do?

38. If you do not receive/have not received a Post-Card Notice in the mail, you are a Non-Registered Holder Settlement Class Member. Non-Registered Holder Settlement Class Members are Settlement Class Members who are not listed in the records of BNYM's transfer agent or whose contact, holding, and distribution information has not been provided by BNYM's transfer agent, including those Settlement Class Members who hold (or held) their eligible securities through a bank, broker or other nominee rather than directly. If you are a Non-Registered Holder Settlement Class Member and you wish to be eligible to receive a payment from the proceeds of the Settlement, you must timely complete and return the Claim Form with adequate supporting documentation ***postmarked, or submitted online, no later than _____, 2019***. You can go to www.bnymadrfxsettlement.com to submit a Claim. You can also obtain a copy of the Claim Form on the website, or you may request that a Claim Form be mailed to you by calling the Claims Administrator toll free at 1-866-447-6210 or by sending an email to the Claims Administrator at info@bnymadrfxsettlement.com. Please retain all records of your holdings in the eligible ADRs, as they may be needed to document your claim. **If you are a Non-Registered Holder Settlement Class Member and do not submit a timely and valid Claim Form, you will not be eligible to share in the Net Settlement Fund, but will still be bound by all the terms in the Stipulation and Settlement, including the terms of any orders by the Court and the Releases provided for therein and described above.**

39. If you receive/have received a Post-Card Notice in the mail in connection with this Settlement, you are a Registered Holder Settlement Class Member (*i.e.*, you hold (or held) the ADRs covered by this Action directly through BNYM, are listed in the records of BNYM's transfer

agent with respect to such holdings, and your contact, holding, and distribution information was provided to the Claims Administrator by BNYM's transfer agent) and you ***do not*** have to take any further action in order to participate in the Settlement and be potentially eligible to receive a payment from the proceeds of the Settlement. The Post-Card Notice you received contains a unique Claim Number and PIN. You can use your Claim Number and PIN to assess information regarding the eligible ADRs you held and the cash distributions you received in connection with such holdings that was obtained from BNYM's transfer agent on the website www.bnymadrfxsettlement.com. **Please Note: If you are a Registered Holder Settlement Class Member, your Recognized Claim and payment amount will be calculated pursuant to the information provided by BNYM's transfer agent. It is important that you review the holding and distribution information set forth on the website to confirm that it is accurate and complete. If the information regarding your holdings and cash distribution is incorrect or incomplete, you must notify the Claims Administrator (as set forth in ¶ 73 herein) immediately. If the Claims Administrator does not hear from you, it will assume the information set forth on the website is correct and complete, and will use this information to calculate your Claim.**

40. Settlement Class Members who exclude themselves from the Settlement Class pursuant to ¶¶ 57-72 below, will not receive a payment from the Net Settlement Fund.

41. **PLEASE NOTE:** As mentioned above, if you are an ERISA Entity, you may also have received notice concerning a proposed settlement in another action entitled *Carver, et al. v. Bank of New York Mellon, et al.*, No. 15-CV-10180 (JPO)(JLC) (S.D.N.Y.) (the "*ERISA Settlement*"). Detailed information regarding the *ERISA Settlement* can be found on the website www.BNYMADRERISASettlement.com. **The Settlement described in this Notice is separate from and in addition to the *ERISA Settlement* insofar as ERISA Entities are concerned. ERISA Entities eligible to participate in the *ERISA Settlement* can and should also consider submitting a claim to receive a distribution in connection with this Settlement.**

What Will Be My Share Of The Settlement Fund?

42. At this time, it is not possible to make a precise determination as to the amount of any payment that any individual Settlement Class Member may receive from the Settlement.

43. Exhibit 1 to this Notice sets forth the Plan of Allocation for allocating the Net Settlement Fund among Authorized Recipients, as proposed by Lead Plaintiffs and Lead Plaintiffs' Counsel. At the Final Approval Hearing, Lead Plaintiffs' Counsel will request that the Court approve the Plan of Allocation. The Court may modify the Plan of Allocation, or approve a different plan of allocation, without further notice to the Settlement Class.

44. The Plan of Allocation describes the manner by which the Net Settlement Fund will be distributed to eligible Settlement Class Members. In general, the Net Settlement Fund will be allocated to (i) Registered Holder Settlement Class Members and (ii) Non-Registered Holder Settlement Class Members who submit valid Claim Forms. The amount paid to each Authorized Recipient will depend on each Authorized Recipient's calculated Recognized Claim, as defined in the Plan of Allocation below, relative to the Recognized Claims of other Authorized Recipients.

Because the Net Settlement Fund most likely will be less than the total losses alleged to have been suffered in the Action, an Authorized Recipient's proportionate recovery most likely will be less than their alleged loss.

45. The tax treatment of any distribution varies based upon the recipient's tax status and treatment of its investments. The tax treatment of any distribution from the Net Settlement Fund is the responsibility of each recipient. You should consult your tax advisor to determine the tax consequences, if any, of any distribution to you.

When Will I Receive My Payment?

46. Payment is conditioned on several matters, including the Court's approval of the Settlement and that approval becoming Final and no longer subject to any appeals. If the Court approves the Settlement and a plan of allocation, then payments to Authorized Recipients will be made after any appeals are resolved and after the completion of all Claims processing. Please be patient, as this process can take some time to complete.

Can I Exclude Myself From The Settlement Class?

47. Yes. You may request to be excluded (also referred to as "opting-out") from the Settlement Class. If you request exclusion, (a) you will *not* participate in any distribution of the Net Settlement Fund and will not receive any part of the Settlement Amount; (b) you will not be bound by the terms of the Settlement, including the Releases, and you will retain any right to file your own lawsuit concerning the Released Claims; and (c) you will not be able to object to the Settlement.

48. In the event you wish to exclude yourself from the Settlement Class, you must submit a written Request for Exclusion, which must be ***received no later than _____, 2019***, to:

Bank of New York Mellon ADR FX Settlement
c/o KCC Class Action Services
EXCLUSIONS
P.O. Box 505030
Louisville, KY 40233-5030

49. In order to be valid, your Request for Exclusion must set forth: (i) your name; (ii) your address; (iii) your telephone number; (iv) the identity of the ADRs listed on the attached Appendix that you held and the cash payments you received per eligible ADR during the relevant time period; and (v) a statement that you wish to be excluded from the Settlement Class in the Action.

50. **To be effective, your Request for Exclusion must be received no later than _____, 2019.** Unless otherwise ordered by the Court, any Settlement Class Member who does not submit a timely and valid Request for Exclusion as provided herein shall be bound by the Settlement. Do not request exclusion if you wish to participate in the Settlement.

51. You cannot exclude yourself on the Settlement website, by telephone or by email. If you do not follow these procedures – including meeting the deadline for requesting exclusion set forth above – you will not be excluded from the Settlement Class, and you will be bound by all of the orders and judgments entered by the Court regarding the Settlement, including the release of claims.

52. **Please Note:** If you decide to exclude yourself from the Settlement Class, there is a risk that any lawsuit you may file to pursue claims alleged in the Action may be dismissed, including because the suit is not filed within the applicable time periods required for filing suit. BNYM will have the right to assert any and all defenses it may have to any claims you seek to assert. Also, BNYM may terminate the Settlement if potential Settlement Class Members who meet certain criteria exclude themselves from the Settlement Class.

THE LAWYERS REPRESENTING YOU

Do I Have A Lawyer In This Case?

53. Kessler Topaz Meltzer & Check, LLP and Lieff Cabraser Heimann & Bernstein, LLP are Lead Plaintiffs' Counsel for Lead Plaintiffs and the Settlement Class in the Action. You will not be charged directly by Lead Plaintiffs' Counsel or any other firms representing Lead Plaintiffs in this case. If you want to be represented by your own lawyer, you may hire one at your own expense.

How Will The Lawyers Be Paid?

54. Lead Plaintiffs' Counsel, on behalf of all plaintiffs' counsel, will apply to the Court for an award of attorneys' fees and reimbursement of Litigation Expenses. Lead Plaintiffs' Counsel's application for attorneys' fees will not exceed 30% of the Settlement Fund plus reimbursement of Litigation Expenses not to exceed $1,750,000 incurred in connection with the prosecution and resolution of this Action. Lead Plaintiffs' Counsel's application for attorneys' fees and Litigation Expenses, which may include requests for Service Awards to Lead Plaintiffs up to an aggregate amount of $40,000, will be filed by _____, 2019, and the Court will consider this application at the Final Approval Hearing. Once filed, a copy of Lead Plaintiffs' Counsel's application for fees and expenses will be available for review at www.bnymadrfxsettlement.com. Any award of attorneys' fees and reimbursement of Litigation Expenses, including any Service Awards to Lead Plaintiffs, will be paid from the Settlement Fund prior to allocation and payment to Authorized Recipients. ***Settlement Class Members are not personally liable for any such attorneys' fees or expenses.***

55. To date, neither Lead Plaintiffs' Counsel nor any other firms representing Lead Plaintiffs, have received any payment for their services in prosecuting this Action on behalf of the Settlement Class, nor have any counsel been reimbursed for their out-of-pocket expenses incurred in connection with litigating this Action. The attorneys' fees requested by Lead Plaintiffs' Counsel will compensate counsel for their efforts in achieving the Settlement for the benefit of the

Settlement Class and for their risk in undertaking this representation on a contingency basis. The Court will determine the actual amount of the award.

56. By following the procedures described in ¶¶ 57-63 below, you can tell the Court that you do not agree with the attorneys' fees and expenses Lead Plaintiffs' Counsel intend to seek and ask the Court to deny their motion or limit the award.

OBJECTIONS

How Do I Tell The Court If I Do Not Like The Settlement?

57. Any Settlement Class Member may appear at the Final Approval Hearing and explain why it thinks the Settlement of the Action as embodied in the Stipulation should not be approved as fair, reasonable and adequate and why a judgment should not be entered thereon, why the attorneys' fees and expenses of Lead Plaintiffs' Counsel should not be awarded, in whole or in part, or why Lead Plaintiffs should not be awarded any Service Awards, in whole or in part. However, no Settlement Class Member shall be heard or entitled to contest these matters unless such Settlement Class Member has filed a written objection with the Court.

58. To object, you must send a letter or other written statement saying that you object to the Settlement, the Plan of Allocation, and/or Lead Plaintiffs' Counsel's request for attorneys' fees and Litigation Expenses (including Service Awards) in *In re: The Bank of New York Mellon*, No. 16-CV-00212-JPO-JLC. You must (i) include your name, address, telephone number, and signature, (ii) indicate whether the objection applies only to the objector, to a specific subset of the Settlement Class or to the entire Settlement Class, and (iii) provide a full explanation of all reasons why you object to the Settlement and state with specificity the grounds for the objection, including any legal and evidentiary support you wish to bring to the Court's attention. You must also include documents sufficient to prove your membership in the Settlement Class, including any of the ADRs listed on the attached Appendix that you held and the cash distributions you received in connection with such holdings during the relevant time period.

59. **Your written objection must be filed with the Court, and served by mail upon the counsel listed below *by no later than _____, 2019*:**

CLERK'S OFFICE	LEAD PLAINTIFFS' COUNSEL	DEFENDANT'S COUNSEL
United States District Court Southern District of New York Clerk of the Court Thurgood Marshall United States Courthouse 40 Foley Square New York, NY 10007	Sharan Nirmul, Esq. **Kessler Topaz Meltzer & Check, LLP** 280 King of Prussia Road Radnor, PA 19087 Daniel P. Chiplock, Esq. **Lieff Cabraser Heimann & Bernstein, LLP** 250 Hudson Street	Elizabeth M. Sacksteder, Esq. **Paul, Weiss, Rifkind, Wharton & Garrison LLP** 1285 Avenue of the Americas New York, NY 10019-6064

	8th Floor New York, NY 10013-1413	

60. You may file a written objection without having to appear at the Final Approval Hearing. You may not, however, appear at the Final Approval Hearing to present your objection unless you first file and serve a written objection in accordance with the procedures described above, unless the Court orders otherwise.

61. If you wish to be heard orally at the Final Approval Hearing, and if you file and serve a timely written objection as described above, you must also file a notice of appearance with the Clerk's Office and serve it on Lead Plaintiffs' Counsel and Defendant's Counsel at the addresses set forth above so that it is ***received*** **on or before _____, 2019**. Persons who intend to object and desire to present evidence at the Final Approval Hearing must include in their written objection or notice of appearance the identity of any witnesses they may call to testify and exhibits they intend to introduce into evidence at the hearing. Such Persons may be heard orally at the discretion of the Court.

62. You are not required to hire an attorney to represent you in making written objections to any aspect of the Settlement or in appearing at the Final Approval Hearing. However, if you decide to hire an attorney, it will be at your own expense, and that attorney must file a notice of appearance with the Court and serve it on Lead Plaintiffs' Counsel and Defendant's Counsel at the addresses set forth above so that the notice is ***received*** **on or before _____, 2019**.

63. **UNLESS OTHERWISE ORDERED BY THE COURT, ANY SETTLEMENT CLASS MEMBER WHO DOES NOT OBJECT IN THE MANNER DESCRIBED HEREIN WILL BE DEEMED TO HAVE WAIVED ANY OBJECTION AND SHALL BE FOREVER FORECLOSED FROM MAKING ANY OBJECTION TO THE PROPOSED SETTLEMENT, THE PLAN OF ALLOCATION AND/OR THE REQUESTS FOR ATTORNEYS' FEES AND LITIGATION EXPENSES, INCLUDING ANY SERVICE AWARDS.**

THE COURT'S FINAL APPROVAL HEARING

When And Where Will The Court Decide Whether To Approve The Settlement?

64. The Court will hold a Final Approval Hearing at **__:__ _.m. on _____, 2019**, before the Honorable J. Paul Oetken in Courtroom 706 of the United States District Court for the Southern District of New York, Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY 10007.

65. **IF YOU DO NOT WISH TO OBJECT TO THE SETTLEMENT, PLAN OF ALLOCATION OR THE REQUESTS FOR ATTORNEYS' FEES AND LITIGATION EXPENSES (INCLUDING ANY SERVICE AWARDS), YOU NEED NOT ATTEND THE FINAL APPROVAL HEARING.**

66. At the Final Approval Hearing, the Court will consider whether the proposed Settlement is fair, reasonable and adequate. If there are objections, the Court will consider them. At or after the hearing, the Court will decide whether to approve the Settlement. The Court will also consider any motions for attorneys' fees, expenses of plaintiffs' counsel, and Service Awards for Lead Plaintiffs, as well as the proposed Plan of Allocation. We do not know how long these decisions will take.

Do I Have To Come To The Hearing?

67. No. Lead Plaintiffs' Counsel will answer any questions that the Court may have about the Settlement at the Final Approval Hearing. You are not required to attend the Final Approval Hearing but are welcome to come at your own expense. If you send an objection, you do not have to come to Court to discuss it. As long as you filed your written objection on time, it will be before the Court when the Court considers whether to approve the Settlement as fair, reasonable and adequate. You may also have your own lawyer attend the Final Approval Hearing at your expense, but such attendance is not mandatory. *See* ¶¶ 57-63 above.

68. **The Final Approval Hearing may be rescheduled by the Court without further notice to the Settlement Class. If you wish to attend the Final Approval Hearing, you should confirm the date and time with Lead Plaintiffs' Counsel.**

May I Speak At The Hearing?

69. If you are a Settlement Class Member and you have filed a timely objection, and if you wish to speak, present evidence or present testimony at the Final Approval Hearing, you must state in your objection your intention to do so, and must identify any witnesses you intend to call or evidence you intend to present. *See* ¶ 61 above.

IF YOU DO NOTHING

What Happens If I Do Nothing At All?

70. If you are a member of the Settlement Class and do nothing and the Settlement is approved, you will be bound by the terms of the Settlement and you will be deemed to have released all Released Claims against all of the Releasees.

71. If you are a Registered Holder Settlement Class Member and do nothing, you will receive your *pro rata* payment from the Settlement as described in the Plan of Allocation attached hereto as Exhibit 1, or according to such other plan of allocation the Court approves. The Claims Administrator will calculate your Recognized Claim using the information regarding your cash distributions provided by BNYM's transfer agent. However, if you are a Non-Registered Holder Settlement Class Member and do nothing, you will not be eligible to receive a payment from the Settlement. **If you are a Non-Registered Holder Settlement Class Member you must submit a valid Claim Form to be eligible to receive a payment from the Settlement.**

EXHIBIT A-1

GETTING MORE INFORMATION

How Do I Get More Information?

72. This Notice contains only a summary of the terms of the proposed Settlement. For more detailed information about the matters involved in this Action, you are referred to the papers on file in the Action, including the Stipulation, which may be inspected during regular office hours at the Office of the Clerk, United States District Court for the Southern District of New York, Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY 10007. Additionally, copies of the Stipulation, this Notice, the Claim Form, the proposed Order and Final Judgment, and any related orders entered by the Court will be posted on the website maintained by the Claims Administrator, www.bnymadrfxsettlement.com.

73. All inquiries concerning this Notice and the Claim Form, or requests for additional information, should be directed to:

Bank of New York Mellon ADR FX Settlement
c/o KCC Class Action Services
P.O. Box 505030
Louisville, KY 40233-5030
1-866-447-6210
info@bnymadrfxsettlement.com

Court-Approved Claims Administrator

and/or

Sharan Nirmul, Esq.
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
info@ktmc.com

Daniel P. Chiplock, Esq.
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street
8th Floor
New York, NY 10013-1413
info@lieffcabraser.com

Lead Plaintiffs' Counsel for the Settlement Class

DO NOT CALL OR WRITE THE COURT, THE OFFICE OF THE CLERK OF THE COURT, DEFENDANT OR ITS COUNSEL REGARDING THIS NOTICE.

Dated:

By Order of the Court
United States District Court
Southern District of New York

EXHIBIT A-1

APPENDIX

ISSUER	CUSIPs
ABI SAB GROUP HOLDING LTD	78572M105 836216309 836220103
ACCOR SA	00435F101 00435F309
ADIDAS AG	00687A107
ADMINISTRADORA DE FONDOS DE PE	00709P108
AES TIETE ENERGIA SA	00809V203 00808P207 00808P108
AIXTRON SE	009606104
ALCATEL-LUCENT SA	013904305
ALLIED IRISH BANKS PLC	019228402 019228303
ALSTOM SA	021244108
ALTANA AG	02143N103
ALUMINA LTD	022205108
AMBEV SA	20441W203 02319V103
ANGLO AMERICAN PLC	03485P102 03485P300
ANGLO PLATINUM	035078104
ANGLOGOLD ASHANTI LTD	035128206 043743103 043743202
ANHEUSER-BUSCH INBEV SA/NV	03524A108 157123209 40051F100 74838Y207
ARKEMA SA	041232109
ARM HOLDINGS PLC	042068106
ASSICURAZIONI GENERALI SPA	465234102
ASTRA AB	046298105 046298204

EXHIBIT A-1

ISSUER	CUSIPs
AUSTRALIA & NEW ZEALAND BANKIN	052528304
AV GOLD	035134303
AXA SA	054536107 149188104 866791106
B.A.	060587508 060593100
BANCO BILBAO VIZCAYA ARGENTARI	059458208 059456202 059456301 059456103 058925108 05946K101 059594408 059594507 07329Q507 07329Q200 07329Q309
BANCO COMERCIAL PORTUGUES SA	059479303 059479709
BANCO DO BRASIL SA	059578104
BANCO POPOLARE SC	059471102 059633107
BANCO SANTANDER BRASIL SA	05964H105 05967A107
BANCO SANTANDER CHILE	05965F108 05965X109
BANK OF IRELAND	46267Q103
BANK OF TOKYO-MITSUBISHI FJ L	065379109
BARCLAYS AFRICA GROUP LTD	06738E204 06742G302 06739H776 06739H511 06739H362 06739F390
BASF SE	055262505 019097104
BASS PLC	069904209

EXHIBIT A-1

ISSUER	CUSIPs
BAT INDUSTRIES PLC	055270508
BAYER AG	072730302
BBVA BANCO FRANCES SA	059591107 07329M100
BG GROUP LTD	055434203 052578408 055434104 780259206 780259107
BIDVEST GROUP LTD/THE	088836101 088836200 088836309
BILLABONG INTERNATIONAL	090055104
BLUE CIRCLE INDUSTRIES	095342408 095342507
BNP PARIBAS SA	05565A202 05565A103 066747106
BOEHLER-UDDEHOLM AG	097356307
BRASIL TELECOM PARTICIPACOES S	10553M101 10553M200 105530109 670851104 670851203
BRASILAGRO - CO BRASILEIRA DE	10554B104
BRASKEM SA	105532105 217252105 86959M101
BRF SA	10552T107 71361V204 71361V303 71361V105
BRITISH AMERICAN TOBACCO PLC	110448107
BRITISH STEEL	111015301
BUNZL PLC	120738406 120738307
BURMAH CASTROL PLC	122169303
CENCOSUD SA	15132H101

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ISSUER	CUSIPs
	802233106
CENTRICA PLC	15639K102 15639K201 15639K300
CHILCOTT UK LTD	363240102 93443W109
CHINA AGRI-INDUSTRIES HOLDINGS	16940R109
CHORUS LTD	17040V107
CHUNGHWA TELECOM CO., LTD.	17133Q205
CIA BRASILEIRA DE DISTRIBUICAO	20440T201 20440T102
CIA CERVEJARIA BRAHMA	20440X103 20440X202
CIA DE BEBIDAS DAS AMERICAS-AM	20441W104
CIA DE SANEAMENTO BASICO DO ES	20441A102
CIA DE TRANSMISSAO DE ENERGIA	20441Q107 20441Q206
CIA ENERGETICA DE SAO PAULO	20440P209 20440P407
CIA PARANAENSE DE ENERGIA	20441B308 20441B407
CIE FINANCIERE RICHEMONT SA	204318109
COCA COLA HELLENIC BOTTLING CO	1912EP104
COCA-COLA AMATIL LTD	191085208
COCA-COLA FEMSA SAB DE CV	191241108
COFLEXIP SA	192384105
COMMERZBANK AG	202597308 202597605
COMMONWEALTH BANK OF AUSTRALIA	202712303 202712600
COMP. DE GERACAO DE ENERGIA EL	20441P109 20441P208 20441R204 20441R105 264398108 264398207
COMPASS GROUP PLC	20449X104 20449X203

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ISSUER	CUSIPs
	20449X302
CONTINENTAL AG	210771200
CONVERIUM	21248N107
CORUS GROUP LTD	22087M101
COSCO SHIPPING INTERNATIONAL S	22112Y203
CRANEWARE PLC	224465104
CRAYFISH CO. LTD.	225226208
CREDIT SUISSE GROUP AG	225401108
CRH PLC	12626K203
CRUCELL NV	228769105
DAI NIPPON PRINTING CO LTD	233806306
DANKA BUSINESS SYSTEMS PLC	236277109
DBS GROUP HOLDINGS LTD	23304Y100
DELHAIZE GROUP SCA	29759W101
DEUTSCHE BANK AG	251525309
DEUTSCHE LUFTHANSA AG	251561304 549836500
DEUTSCHE POST AG	25157Y202
DIAGEO PLC	25243Q205 25243Q106 402033302
DOLLAR PREF RESTRICTED 4-2 B E	6162*1019 6162*1017
DOMINION MINING LTD	257457309
DRDGOLD LTD	26152H103 26152H301 266597301
DRESDNER BANK AG	261561302 261561401
DUCATI MOTOR HOLDING SPA	264066101
ELETROPAULO METROPOLITANA ELET	286203302
ELF AQUITAINE SA	286269105
EMBOTELLADORA ANDINA SA	29081P204 29081P303

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ISSUER	CUSIPs
EMBRATEL PARTICIPACOES SA	29081N100 29081N209
EMPRESAS ICA SAB DE CV	292448107
ENGIE BRASIL ENERGIA SA	892360108 29286U107 892360306
ENI LASMO PLC	501730204
ENI SPA	26874R108
ENIIM 10 PERP	501730303
ERSTE GROUP BANK AG	296036304
EVRAZ HIGHVELD STEEL & VANADIU	30050A301
FERGUSON PLC	97786P100
FIBRIA CELULOSE SA	92906P106
FILA HOLDING S.P.A	316850106
FOMENTO ECONOMICO MEXICANO SAB	344419106
FOSTER'S GROUP PTY LTD	350258307
FRESENIUS MEDICAL CARE AG & CO	358029106 358029205
GALLAHER GROUP LTD	363595109
GATES WORLDWIDE LTD	890030208
GAZPROM NEFT PJSC	36829G107
GAZPROM PJSC	47973C305 753317304 753317205 753317106
GENESYS	37185M209
GERDAU SA	373737105
GETLINK SE	39944Q109
GLAXOSMITHKLINE PLC	37733W105
GOL LINHAS AEREAS INTELIGENT	38045R107
GOLD FIELDS LTD	262026503 38059R100 38059T106 380596205

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ISSUER	CUSIPs
	957654304
GRUPO AEROPORTUARIO DEL CENTRO	400501102
GRUPO AEROPORTUARIO DEL PACIFI	400506101
GRUPO AEROPORTUARIO DEL SUREST	40051E202
GRUPO CASA SABA SAB DE CV	40048P104
GRUPO ELEKTRA, S.A. DE C.V.	40050A102
GRUPO FINANCIERO BANORTE SAB D	400486106 059456400 059456509 40051M105 40052P107 400486304 40051M204
GRUPO MEX DESARROLLO	40048G104 40048G203
GRUPO TELEVISA SAB	40049J206
HANNOVER RUECK SE	410693105
HARMONY GOLD MINING CO LTD	413216300
HBOS PLC	42205M106
HELLENIC TELECOMMUNICATIONS OR	423325307
HENKEL AG & CO KGAA	42550U109 42550U208
HILLSDOWN HOLDINGS PLC	432586204
HMS HYDRAULIC MACHINES & SYSTE	40425X100
HOECHST GMBH	434390308
HOT TELECOMMUNICATION SYSTEM L	576561104
HYDROMET CORP LTD	449003102
IGATE COMPUTER SYSTEMS LTD	703248203
IMPERIAL HOLDINGS LTD	452833106 452833205
INCITEC PIVOT LTD	45326Y206
INDOSAT TBK PT	744383100
INDUSIND BANK LTD	45579Q108

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ISSUER	CUSIPs
INDUSTRIAS BACHOCO SAB DE CV	456463108
INDUSTRIE NATUZZI S.P.A.	456478106
INFORMA PLC	093529204 45672B206 45672B305 90265U203 90969M101
INTERCONTINENTAL HOTELS GROUP	45857P103 458573102 458573201
INTERNATIONAL POWER LTD	46018M104
INTESA SANPAOLO SPA	05944F104 46115H107
INVENSYS LTD	461204109
INVERSIONES AGUAS METROPOLITAN	46128Q201
ITAU UNIBANCO HOLDING SA	059602102 465562106 059602201 90458E107
J SAINSBURY PLC	466249208
JOHNSON MATTHEY PLC	479142309 479142408 479142507
JULIUS BAER GROUP LTD	481369106
KIDDE PLC	493793103
KINGFISHER PLC	495724403 495724205 495724304
KINGSGATE CONSOLIDATED LTD	496362104
KLABIN SA	45647P108 49834M100
KOMATSU LTD	500458401
KOMERCNI BANKA AS	500459409
KONINKLIJKE AHOLD N.V.	500467303 500467402 500467AA3

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ISSUER	CUSIPs
KOOR INDUSTRIES LTD	500507108
KROTON EDUCACIONAL SA	50106A402
KUMBA IRON ORE LTD	50125N104
LADBROKE GROUP INC	505727305 505730101
LAGARDERE SCA	507069102
LAN AIRLINES S.A.	501723100
LEGAL & GENERAL GROUP PLC	52463H103
LENDLEASE GROUP	526023205
LHR AIRPORTS LTD	05518L206
LIBERTY GROUP LTD	140487109 530616101 53055R103 53055R202 530706100 530706209
LIHIR GOLD LTD	532349206 532349107
LLOYDS BANKING GROUP PLC	539439109
LONMIN PLC	54336Q104 54336Q203 543374409
LUKOIL PJSC	69343P105 677862104 677862807 677862302 677862203
LUXOTTICA GROUP SPA	55068R202
LVMH MOET HENNESSY LOUIS VUITT	502441207
MACQUARIE GROUP LTD	55607P105 55607P204
MADECO, S.A.	556304103 556304202
MAHANAGAR TELEPHONE NIGAM LTD	559778402
MAKITA CORP	560877300
MANNESMANN A.G.	563775303

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ISSUER	CUSIPs
MASISA SA	574799102 574800108
MASSMART HOLDINGS LTD	576290100
METSO OYJ	592671101 754183101 920232303
MIZUHO FINANCIAL GROUP INC	359558103 60687Y109
MMC NORILSK NICKEL PJSC	46626D108 55315J102
MMI HOLDINGS LTD/SOUTH AFRICA	55314H107
MOBILE TELESYSTEMS PJSC	61946A106
MOL HUNGARIAN OIL & GAS PLC	831595202
MOSENERGO PJSC	037376100 037376308
MTN GROUP LTD	62474M108
NATIONAL AUSTRALIA BANK LTD	632525408
NATIONAL BANK OF GREECE SA	633643507 633643408
NATIONAL GRID	636274102 636274300 636274409
NATIONAL POWER PLC	637194408
NATUZZI SPA	63905A101
NEC CORP	629050204 81661W109
NEDBANK GROUP LTD	63975P103 63975K104 63975P202
NET SERVICOS DE COMUNICACAO SA	37957X102
NEWCREST MINING LTD	651191108
NEWMONT AUSTRALIA PTY LTD	390290104 656190105 656190204
NIPPON YUSEN KK	654633304

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ISSUER	CUSIPs
NOMURA HOLDINGS INC	65535H208
NTT DOCOMO INC	62942M201 62942M102 629424201 62942M300 629424102 629424508 629424409
ORANGE POLSKA SA	87943D108
ORANGE SA	35177Q105 35177Q204 35177QAB1
ORKLA ASA	686331109
PARTNER COMMUNICATIONS CO LTD	70211M109
PEARSON PLC	705015105
PERNOD RICARD SA	019121102 714264108
PETROCHINA CO LTD	71646E100
PETROLEO BRASILEIRO SA	71654V101 71654V408
PFLLN 1.35	74050U206
PHAROL SGPS SA	737273102
POLSKI KONCERN NAFTOWY ORLEN S	731613402
POLYUS PJSC	678129107 73181P102
POWERGEN LTD	738905405
PREMIER FARNELL LTD	74050U107
PROVIDENT FINANCIAL PLC	74387B103
PUBLICIS GROUPE SA	74463M106 F76080112 785144205
QANTAS AIRWAYS LTD	74726M406 74726M505
QBE INSURANCE GROUP LTD	74728G605
RACAL ELECTRONICS PLC	749815403

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ISSUER	CUSIPs
RANDSTAD UK HOLDING LTD	81617E203
RBS 11.2 PERP	780097309
RBS 6.35 PERP	780097770
RBS 8 1/2 PERP	780097804 780097853
RBS 8.1 PERP	780097705
RBS 8.2125 PERP	780097606
RBS 9 1/2 PERP	780097408
REED ELSEVIER NV	758204101 758205108 758204200 758205207
RENTOKIL INITIAL PLC	760125104
REPSOL SA	76026T205
REXAM LTD	761655406 761655505 761655604
RHODIA SA	762397107 762397206
RIO TINTO FRANCE SAS	705151207
RIO TINTO PLC	767202104 767204100 045074101 126170505 74974K706
ROCHE HOLDING AG	771195104 771195401
ROLLS-ROYCE HOLDINGS PLC	775781206
ROYAL BANK OF SCOTLAND/ABN	780097721 780097739
RUSHYDRO PJSC	466294105 782183123 782183131 782183404 466294204
RWE AG	74975E303 74975E402
RWE GENERATION UK HOLDINGS PLC	45769A103

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ISSUER	CUSIPs
RYANAIR HOLDINGS PLC	783513104
SADIA SA	786326108
SANOFI	80105N105 762426AC8 762426401 80105N204
SANTANDER UK PLC	002920106 002920700
SANUK 8 3/4 PERP	002920205
SAP SE	803054204 803054303
SAPPI LTD	803069103 803069202 108510041
SASOL LTD	803866300
SBERBANK OF RUSSIA PJSC	80585Y308
SCOR SE	80917Q106
SCOTTISH POWER PLC	81013T408 81013T705
SEGA SAMMY HOLDINGS INC	815794102
SEKISUI HOUSE LTD	816078307
SERONO	81752M101
SEVERSKY TUBE WORKS PJSC	818146102
SHELL TRANSPORT & TRADING CO L	822703609
SHISEIDO CO LTD	824841407
SHOPRITE HOLDINGS LTD	82510E209
SIBANYE GOLD LTD	03840M109 825724206
SIGNET JEWELERS LTD	82668L872
SIMS METAL MANAGEMENT LTD	829160100
SIX CONTINENTS LTD	830018107
SKY PLC	111013108
SMITHKLINE BEECHAM LTD	832378301

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ISSUER	CUSIPs
SOCIEDAD QUIMICA Y MINERA DE C	833636103
SOCIEDAD QUMICA Y MINERA DE CHILE	833635105
SOCIETE GENERALE SA	784320103 784320202 83364L109
SODEXO SA	833792104
SOFTBANK GROUP CORP	471104109
SOUTHERN ELECTRIC PLC 144A	842809709 842809402
SPARK NEW ZEALAND LTD	84652A102 879278307 879278208
SSE PLC	810133405 810133702 81012K309
STANDARD BANK GROUP LTD	853118206
STATOIL ASA	85771P102
SUBMARINO S.A. - REG S	86431P300 86431P508
SUMITOMO MITSUI FINANCIAL GROU	865622104
SUNCORP GROUP LTD	867232100
SURGUTNEFTEGAS OJSC	46625F104 868861204 868861105
SVENSKA CELLULOSA AB SCA	869587402
SWEDISH MATCH AB	870309507
SWIRE PACIFIC LTD	870794302 870794401 870797404
SWISSCOM AG	871013108
SYNGENTA AG	87160A100
TABCORP HOLDINGS LTD	873306203
TATA COMMUNICATIONS LTD	876564105 92659G402 92659G600 92659G303

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ISSUER	CUSIPs
TATE & LYLE PLC	876570607
TATNEFT PJSC	03737P207 03737P108 65486P100 876629205
TDC A/S	87236N102
TELE CELULAR SUL PART S.A.	879238103
TELE CENTRO OESTE CELULAR PART	87923P105
TELE NORDESTE CELULAR PARTICIP	87924W109
TELE NORTE LESTE PARTICIPACOES	87924Y105 879246106
TELE SUDESTE CELULAR PARTICIPA	87943B102 879252104
TELE2 AB	87952P109 87952P208
TELECOMUNICACOES BRASILEIRAS S	879287209
TELEKOM AUSTRIA AG	87943Q109
TELEKOMUNIKASI INDONESIA PERSE	715684106
TELEMIG CELULAR PARTICIPACOES	87944E105
TELESP PARTICIPACOES S.A.	87952L108 87952K100
TELKOM SA SOC LTD	879603108
TELSTRA CORP LTD	87969N204 87969N303 87969N105
TERNIUM MEXICO SA DE CV	880890108
TESCO PLC	881575302 098561202
TEVA PHARMACEUTICAL INDUSTRIES	881624209 16361E108 50540H104
TIGER BRANDS LTD	88673M102 88673M201 886911106

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ISSUER	CUSIPs
TMK PJSC	87260R300
TOTAL SA	89151E109 716485206
TRANSCOM WORLDWIDE SA	893234104 893545103 893545202 894116102
TREND MICRO INC/JAPAN	89486M206
TURKIYE GARANTI BANKASI AS	900148305 900148701 900151101
TV AZTECA SAB DE CV	901145102
UBS AG	90261R105
ULTRAPAR PARTICIPACOES SA	90400P101
UNIBAIL-RODAMCO SE	960224103
UNIFIED ENERGY SYSTEM OAO	904688108 904688405
UNION ANDINA DE CEMENTOS SAA	904845104
UNITED OVERSEAS BANK LTD	911271302 910903301
USINAS SIDERURGICAS DE MINAS G	917302408
VAN DER MOOLEN HOLDING NV	921020103
VEOLIA ENVIRONNEMENT SA	92334N103
VIMPEL-COMMUNICATIONS PJSC	92719A106 92719A304
VINA CONCHA Y TORO SA	927191106
VIVENDI SA	137041208 204390108 419312202 92851S105 92851S204
VODAFONE AIRTOUCH PLC	92857T107
VODAFONE GROUP PLC	92857W308 698113107 87926R108 92857W209 92857W100

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ISSUER	CUSIPs
	92858M101
WACOAL HOLDINGS CORP	930004205
WAL-MART DE MEXICO SAB DE CV	93114W107
WAVECOM SA	943531103
WESTPAC BANKING CORPORATION	789547106 961214301
WIND HELLAS TELECOMMUNICATIONS	859823106 88706Q104
WMC LIMITED	928947100 92928R106
WOODSIDE PETROLEUM LTD	980228308
WOOLWORTHS HOLDINGS LTD/SOUTH	480209402 98088R109 98088R505
ZURICH INSURANCE GROUP AG	01959Q101 98982M107 989825104

EXHIBIT 1

PLAN OF ALLOCATION OF NET SETTLEMENT FUND

The plan of allocation set forth below ("Plan of Allocation" or "Plan") is the plan for allocating the Net Settlement Fund to Authorized Recipients that is being proposed by Lead Plaintiffs and Lead Plaintiffs' Counsel. In accordance with the Settlement, the Net Settlement Fund will be allocated to (i) Registered Holder Settlement Class Members and (ii) Non-Registered Holder Settlement Class Members who submit valid Claim Forms. The Court may approve the below Plan, or modify it, without additional notice to the Settlement Class. Any order modifying the Plan will be posted on the website for the Settlement, www.bnymadrfxsettlement.com.

The objective of the Plan is to equitably distribute the Net Settlement Fund among as many Settlement Class Members as possible. The Plan is based on Lead Plaintiffs' view of the average margin per ADR that BNYM retained on FX conversions of ADR dividends and cash distributions as determined by Lead Plaintiffs' damages expert. BNYM produced data concerning the amount (if any) it retained for cash distributions issued for the ADRs listed in the Appendix hereto between January 1, 1997 and December 31, 2017, inclusive. Utilizing this data, Lead Plaintiffs' damages expert calculated the average margin per ADR across the Settlement Class Period. BNYM does not concede the accuracy of Lead Plaintiffs' damages expert's calculation, or that there were any damages. The Plan is intended to be generally consistent with an assessment of, among other things, the damages that Lead Plaintiffs and Lead Plaintiffs' Counsel believe could have been recovered for the claims asserted in the Action, and reflect Lead Plaintiffs' allegations that over the course of the relevant time period, BNYM, as depositary for certain ADRs, systematically deducted impermissible fees for conducting FX from dividends and/or cash distributions issued by foreign companies, and owed to ADR holders.

To the extent there are sufficient funds in the Net Settlement Fund, each Authorized Recipient will receive an amount equal to that Settlement Class Member's "Recognized Claim," as described below. If, however, as expected, the amount in the Net Settlement Fund is not sufficient to permit payment of the total Recognized Claim of each Authorized Recipient, then each Authorized Recipient shall be paid the percentage of the Net Settlement Fund that each Authorized Recipient's Recognized Claim bears in relation to the total of the Recognized Claims of all Authorized Recipients – *i.e.*, the Authorized Recipient's *pro rata* share of the Net Settlement Fund.

A. Calculation of Recognized Claims

Individuals and entities are potentially eligible to participate in the Settlement and the distribution of the Net Settlement Fund if they at any time during the Settlement Class Period (*i.e.*, January 1, 1997 through _____, 2019, inclusive) held (directly or indirectly, registered or beneficially), or otherwise claim any entitlement to any payment (whether a dividend, rights offering, interest on capital, sale of shares, or other distribution) in connection with, any ADR for which BNYM acted as the depositary sponsored by an issuer that is identified in the Appendix to the Notice.

A "Recognized Loss Amount Per ADR" will be calculated according to the formula set forth below for each eligible ADR a Settlement Class Member held during the relevant time period and for which they received a cash distribution. A Settlement Class Member's "Recognized Claim" shall be the sum of his, her or its Recognized Loss Amounts Per ADR.

The formula for calculating a Settlement Class Member's Recognized Loss Amount Per ADR shall be as follows:

Gross Amount of Cash Distributions Received by the Settlement Class Member for that ADR	***X***	***Calculated Average Margin for ADR ("Margin") set forth in Table 1 below***

B. Distribution to Authorized Recipients

Prior to the Effective Date, the Settlement Fund shall remain in an interest-bearing escrow account, except as otherwise provided in the Stipulation. After the Court enters the Order and Final Judgment and the Settlement becomes Final, the Claims Administrator shall distribute the Net Settlement Fund, which shall be done as promptly as possible pursuant to the Distribution Order. The Distribution Order shall not authorize payments to Authorized Recipients prior to the Effective Date.

C. Additional Provisions

As noted above, the Net Settlement Fund will be distributed to Authorized Recipients on a *pro rata* basis based on the relative size of their Recognized Claims. Specifically, a "Distribution Amount" will be calculated for each Authorized Recipient, which shall be the Authorized Recipient's Recognized Claim divided by the total Recognized Claims of all Authorized Recipients, multiplied by the total amount in the Net Settlement Fund. If an Authorized Recipient's Distribution Amount calculates to less than $1.00, it will not be included in the calculation and no distribution will be made to such Authorized Recipient.

After the initial distribution of the Net Settlement Fund, the Claims Administrator shall make reasonable and diligent efforts to have Authorized Recipients cash their distribution checks. To the extent any monies remain in the fund nine (9) months after the initial distribution, if Lead Plaintiffs' Counsel, in consultation with the Claims Administrator, determine that it is cost-effective to do so, the Claims Administrator shall conduct a re-distribution of the funds remaining after payment of any unpaid fees and expenses incurred in administering the Settlement, including for such re-distribution, to Authorized Recipients who have cashed their initial distributions and who would receive at least $1.00 from such re-distribution. Additional re-distributions to Authorized Recipients who have cashed their prior checks and who would receive at least $1.00 on such additional re-distributions may occur thereafter if Lead Plaintiffs' Counsel, in consultation with the Claims Administrator, determine that additional re-distributions, after the deduction of any additional fees and expenses incurred in administering the Settlement, including for such re-distributions, would be cost-effective. At such time as it is determined that the re-distribution of funds remaining in the Net Settlement Fund is not cost-effective, Lead Plaintiffs' Counsel shall seek an order from the Court: (i) approving the recommendation that any further re-distribution is

not cost effective or efficient; and (ii) ordering the contribution of the Net Settlement Fund to a nonsectarian charitable organization selected by the Court upon application by Lead Plaintiffs.

Payment pursuant to the Plan of Allocation, or such other plan of allocation as may be approved by the Court, shall be conclusive against all Authorized Recipients. No Person shall have any claim against Lead Plaintiffs, Lead Plaintiffs' Counsel, plaintiffs' counsel, Lead Plaintiffs' damages expert, Defendant, Defendant's Counsel, or any of the other Released Parties, the Claims Administrator, the Publication Notice Plan Administrator or other agent designated by Lead Plaintiffs' Counsel arising from distributions made substantially in accordance with the Stipulation, the plan of allocation approved by the Court, or further Orders of the Court. Lead Plaintiffs, Defendant, and their respective counsel, and all other Releasees, shall have no responsibility or liability whatsoever for the investment or distribution of the Settlement Fund or the Net Settlement Fund; the plan of allocation; the determination, administration, calculation, or payment of any Claim or nonperformance of the Claims Administrator or the Publication Notice Plan Administrator; the payment or withholding of Taxes and Tax Expenses; or any losses incurred in connection therewith.

TABLE 1
Average Margin Across Settlement Class Period

ISSUER	CUSIPs	MARGIN
ABI SAB GROUP HOLDING LTD	78572M105 836216309 836220103	0.34%
ACCOR SA	00435F101 00435F309	0.62%
ADIDAS AG	00687A107	0.43%
ADMINISTRADORA DE FONDOS DE PE	00709P108	0.28%
AES TIETE ENERGIA SA	00809V203 00808P207 00808P108	0.43%
AIXTRON SE	009606104	0.28%
ALCATEL-LUCENT SA	013904305	0.24%
ALLIED IRISH BANKS PLC	019228402 019228303	0.22%
ALSTOM SA	021244108	0.31%
ALTANA AG	02143N103	0.42%
ALUMINA LTD	022205108	1.03%
AMBEV SA	20441W203 02319V103	0.94%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
ANGLO AMERICAN PLC	03485P102 03485P300	0.50%
ANGLO PLATINUM	035078104	0.30%
ANGLOGOLD ASHANTI LTD	035128206 043743103 043743202	0.36%
ANHEUSER-BUSCH INBEV SA/NV	03524A108 157123209 40051F100 74838Y207	0.42%
ARKEMA SA	041232109	0.26%
ARM HOLDINGS PLC	042068106	0.30%
ASSICURAZIONI GENERALI SPA	465234102	0.86%
ASTRA AB	046298105 046298204	0.17%
AUSTRALIA & NEW ZEALAND BANKIN	052528304	0.47%
AV GOLD	035134303	0.97%
AXA SA	054536107 149188104 866791106	0.37%
B.A.	060587508 060593100	0.64%
BANCO BILBAO VIZCAYA ARGENTARI	059458208 059456202 059456301 059456103 058925108 05946K101 059594408 059594507 07329Q507 07329Q200 07329Q309	0.36%
BANCO COMERCIAL PORTUGUES SA	059479303 059479709	0.46%
BANCO DO BRASIL SA	059578104	0.46%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
BANCO POPOLARE SC	059471102 059633107	0.31%
BANCO SANTANDER BRASIL SA	05964H105 05967A107	0.37%
BANCO SANTANDER CHILE	05965F108 05965X109	1.14%
BANK OF IRELAND	46267Q103	0.22%
BANK OF TOKYO-MITSUBISHI FJ L	065379109	0.20%
BARCLAYS AFRICA GROUP LTD	06738E204 06742G302 06739H776 06739H511 06739H362 06739F390	0.25%
BASF SE	055262505 019097104	0.41%
BASS PLC	069904209	0.20%
BAT INDUSTRIES PLC	055270508	0.31%
BAYER AG	072730302	0.25%
BBVA BANCO FRANCES SA	059591107 07329M100	0.39%
BG GROUP LTD	055434203 052578408 055434104 780259206 780259107	0.25%
BIDVEST GROUP LTD/THE	088836101 088836200 088836309	0.36%
BILLABONG INTERNATIONAL	090055104	0.69%
BLUE CIRCLE INDUSTRIES	095342408 095342507	0.30%
BNP PARIBAS SA	05565A202 05565A103 066747106	0.43%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
BOEHLER-UDDEHOLM AG	097356307	0.66%
BRASIL TELECOM PARTICIPACOES S	10553M101 10553M200 105530109 670851104 670851203	0.34%
BRASILAGRO - CO BRASILEIRA DE	10554B104	0.48%
BRASKEM SA	105532105 217252105 86959M101	0.61%
BRF SA	10552T107 71361V204 71361V303 71361V105	0.40%
BRITISH AMERICAN TOBACCO PLC	110448107	0.32%
BRITISH STEEL	111015301	0.48%
BUNZL PLC	120738406 120738307	0.21%
BURMAH CASTROL PLC	122169303	0.25%
CENCOSUD SA	15132H101 802233106	0.28%
CENTRICA PLC	15639K102 15639K201 15639K300	0.13%
CHILCOTT UK LTD	363240102 93443W109	0.41%
CHINA AGRI-INDUSTRIES HOLDINGS	16940R109	0.01%
CHORUS LTD	17040V107	0.38%
CHUNGHWA TELECOM CO., LTD.	17133Q205	0.15%
CIA BRASILEIRA DE DISTRIBUICAO	20440T201 20440T102	0.47%
CIA CERVEJARIA BRAHMA	20440X103 20440X202	0.31%
CIA DE BEBIDAS DAS AMERICAS-AM	20441W104	0.73%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
CIA DE SANEAMENTO BASICO DO ES	20441A102	0.47%
CIA DE TRANSMISSAO DE ENERGIA	20441Q107 20441Q206	0.54%
CIA ENERGETICA DE SAO PAULO	20440P209 20440P407	0.38%
CIA PARANAENSE DE ENERGIA	20441B308 20441B407	0.62%
CIE FINANCIERE RICHEMONT SA	204318109	0.30%
COCA COLA HELLENIC BOTTLING CO	1912EP104	0.24%
COCA-COLA AMATIL LTD	191085208	0.33%
COCA-COLA FEMSA SAB DE CV	191241108	0.35%
COFLEXIP SA	192384105	0.36%
COMMERZBANK AG	202597308 202597605	0.13%
COMMONWEALTH BANK OF AUSTRALIA	202712303 202712600	0.29%
COMP. DE GERACAO DE ENERGIA EL	20441P109 20441P208 20441R204 20441R105 264398108 264398207	0.33%
COMPASS GROUP PLC	20449X104 20449X203 20449X302	0.12%
CONTINENTAL AG	210771200	0.47%
CONVERIUM	21248N107	0.62%
CORUS GROUP LTD	22087M101	0.31%
COSCO SHIPPING INTERNATIONAL S	22112Y203	0.49%
CRANEWARE PLC	224465104	0.35%
CRAYFISH CO. LTD.	225226208	0.64%
CREDIT SUISSE GROUP AG	225401108	0.04%
CRH PLC	12626K203	0.36%

TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
CRUCELL NV	228769105	0.18%
DAI NIPPON PRINTING CO LTD	233806306	0.49%
DANKA BUSINESS SYSTEMS PLC	236277109	0.25%
DBS GROUP HOLDINGS LTD	23304Y100	0.18%
DELHAIZE GROUP SCA	29759W101	0.29%
DEUTSCHE BANK AG	251525309	0.32%
DEUTSCHE LUFTHANSA AG	251561304 549836500	0.24%
DEUTSCHE POST AG	25157Y202	0.24%
DIAGEO PLC	25243Q205 25243Q106 402033302	0.28%
DOLLAR PREF RESTRICTED 4-2 B E	6162*1019 6162*1017	0.25%
DOMINION MINING LTD	257457309	2.66%
DRDGOLD LTD	26152H103 26152H301 266597301	0.48%
DRESDNER BANK AG	261561302 261561401	0.17%
DUCATI MOTOR HOLDING SPA	264066101	0.90%
ELETROPAULO METROPOLITANA ELET	286203302	0.67%
ELF AQUITAINE SA	286269105	0.44%
EMBOTELLADORA ANDINA SA	29081P204 29081P303	0.30%
EMBRATEL PARTICIPACOES SA	29081N100 29081N209	0.44%
EMPRESAS ICA SAB DE CV	292448107	0.34%
ENGIE BRASIL ENERGIA SA	892360108 29286U107 892360306	0.64%
ENI LASMO PLC	501730204	0.26%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
ENI SPA	26874R108	0.37%
ENIIM 10 PERP	501730303	0.25%
ERSTE GROUP BANK AG	296036304	0.41%
EVRAZ HIGHVELD STEEL & VANADIU	30050A301	0.42%
FERGUSON PLC	97786P100	0.30%
FIBRIA CELULOSE SA	92906P106	0.65%
FILA HOLDING S.P.A	316850106	0.27%
FOMENTO ECONOMICO MEXICANO SAB	344419106	0.48%
FOSTER'S GROUP PTY LTD	350258307	0.54%
FRESENIUS MEDICAL CARE AG & CO	358029106 358029205	0.44%
GALLAHER GROUP LTD	363595109	0.12%
GATES WORLDWIDE LTD	890030208	0.26%
GAZPROM NEFT PJSC	36829G107	0.29%
GAZPROM PJSC	47973C305 753317304 753317205 753317106	0.23%
GENESYS	37185M209	0.21%
GERDAU SA	373737105	0.66%
GETLINK SE	39944Q109	0.85%
GLAXOSMITHKLINE PLC	37733W105	0.36%
GOL LINHAS AEREAS INTELIGENT	38045R107	0.85%
GOLD FIELDS LTD	262026503 38059R100 38059T106 380596205 957654304	0.53%
GRUPO AEROPORTUARIO DEL CENTRO	400501102	0.33%
GRUPO AEROPORTUARIO DEL PACIFI	400506101	0.29%
GRUPO AEROPORTUARIO DEL SUREST	40051E202	0.40%
GRUPO CASA SABA SAB DE CV	40048P104	0.34%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
GRUPO ELEKTRA, S.A. DE C.V.	40050A102	0.33%
GRUPO FINANCIERO BANORTE SAB D	400486106 059456400 059456509 40051M105 40052P107 400486304 40051M204	0.27%
GRUPO MEX DESARROLLO	40048G104 40048G203	0.30%
GRUPO TELEVISA SAB	40049J206	0.30%
HANNOVER RUECK SE	410693105	0.30%
HARMONY GOLD MINING CO LTD	413216300	0.74%
HBOS PLC	42205M106	0.14%
HELLENIC TELECOMMUNICATIONS OR	423325307	0.32%
HENKEL AG & CO KGAA	42550U109 42550U208	0.40%
HILLSDOWN HOLDINGS PLC	432586204	0.25%
HMS HYDRAULIC MACHINES & SYSTE	40425X100	0.95%
HOECHST GMBH	434390308	0.17%
HOT TELECOMMUNICATION SYSTEM L	576561104	0.26%
HYDROMET CORP LTD	449003102	0.33%
IGATE COMPUTER SYSTEMS LTD	703248203	0.21%
IMPERIAL HOLDINGS LTD	452833106 452833205	0.14%
INCITEC PIVOT LTD	45326Y206	0.35%
INDOSAT TBK PT	744383100	0.29%
INDUSIND BANK LTD	45579Q108	0.41%
INDUSTRIAS BACHOCO SAB DE CV	456463108	0.34%
INDUSTRIE NATUZZI S.P.A.	456478106	0.85%
INFORMA PLC	093529204 45672B206 45672B305 90265U203 90969M101	0.18%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
INTERCONTINENTAL HOTELS GROUP	45857P103 458573102 458573201	0.32%
INTERNATIONAL POWER LTD	46018M104	0.64%
INTESA SANPAOLO SPA	05944F104 46115H107	0.38%
INVENSYS LTD	461204109	0.71%
INVERSIONES AGUAS METROPOLITAN	46128Q201	0.13%
ITAU UNIBANCO HOLDING SA	059602102 465562106 059602201 90458E107	0.49%
J SAINSBURY PLC	466249208	0.34%
JOHNSON MATTHEY PLC	479142309 479142408 479142507	0.41%
JULIUS BAER GROUP LTD	481369106	0.38%
KIDDE PLC	493793103	0.60%
KINGFISHER PLC	495724403 495724205 495724304	0.32%
KINGSGATE CONSOLIDATED LTD	496362104	0.58%
KLABIN SA	45647P108 49834M100	0.71%
KOMATSU LTD	500458401	0.19%
KOMERCNI BANKA AS	500459409	0.24%
KONINKLIJKE AHOLD N.V.	500467303 500467402 500467AA3	0.11%
KOOR INDUSTRIES LTD	500507108	0.38%
KROTON EDUCACIONAL SA	50106A402	0.14%
KUMBA IRON ORE LTD	50125N104	0.32%
LADBROKE GROUP INC	505727305 505730101	0.18%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
LAGARDERE SCA	507069102	0.45%
LAN AIRLINES S.A.	501723100	0.46%
LEGAL & GENERAL GROUP PLC	52463H103	0.17%
LENDLEASE GROUP	526023205	0.63%
LHR AIRPORTS LTD	05518L206	0.37%
LIBERTY GROUP LTD	140487109 530616101 53055R103 53055R202 530706100 530706209	0.59%
LIHIR GOLD LTD	532349206 532349107	0.67%
LLOYDS BANKING GROUP PLC	539439109	0.26%
LONMIN PLC	54336Q104 54336Q203 543374409	0.24%
LUKOIL PJSC	69343P105 677862104 677862807 677862302 677862203	0.30%
LUXOTTICA GROUP SPA	55068R202	0.52%
LVMH MOET HENNESSY LOUIS VUITT	502441207	0.63%
MACQUARIE GROUP LTD	55607P105 55607P204	0.42%
MADECO, S.A.	556304103 556304202	0.51%
MAHANAGAR TELEPHONE NIGAM LTD	559778402	0.18%
MAKITA CORP	560877300	0.31%
MANNESMANN A.G.	563775303	0.28%
MASISA SA	574799102 574800108	0.22%
MASSMART HOLDINGS LTD	576290100	0.69%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
METSO OYJ	592671101 754183101 920232303	0.39%
MIZUHO FINANCIAL GROUP INC	359558103 60687Y109	0.29%
MMC NORILSK NICKEL PJSC	46626D108 55315J102	0.45%
MMI HOLDINGS LTD/SOUTH AFRICA	55314H107	0.30%
MOBILE TELESYSTEMS PJSC	61946A106	0.10%
MOL HUNGARIAN OIL & GAS PLC	831595202	0.57%
MOSENERGO PJSC	037376100 037376308	0.14%
MTN GROUP LTD	62474M108	0.24%
NATIONAL AUSTRALIA BANK LTD	632525408	0.41%
NATIONAL BANK OF GREECE SA	633643507 633643408	0.38%
NATIONAL GRID	636274102 636274300 636274409	0.26%
NATIONAL POWER PLC	637194408	0.30%
NATUZZI SPA	63905A101	0.49%
NEC CORP	629050204 81661W109	0.71%
NEDBANK GROUP LTD	63975P103 63975K104 63975P202	0.38%
NET SERVICOS DE COMUNICACAO SA	37957X102	0.29%
NEWCREST MINING LTD	651191108	0.48%
NEWMONT AUSTRALIA PTY LTD	390290104 656190105 656190204	0.38%
NIPPON YUSEN KK	654633304	0.70%
NOMURA HOLDINGS INC	65535H208	0.34%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
NTT DOCOMO INC	62942M201 62942M102 629424201 62942M300 629424102 629424508 629424409	0.30%
ORANGE POLSKA SA	87943D108	0.36%
ORANGE SA	35177Q105 35177Q204 35177QAB1	0.39%
ORKLA ASA	686331109	0.49%
PARTNER COMMUNICATIONS CO LTD	70211M109	0.41%
PEARSON PLC	705015105	0.22%
PERNOD RICARD SA	019121102 714264108	0.19%
PETROCHINA CO LTD	71646E100	0.01%
PETROLEO BRASILEIRO SA	71654V101 71654V408	0.49%
PFLLN 1.35	74050U206	0.25%
PHAROL SGPS SA	737273102	0.31%
POLSKI KONCERN NAFTOWY ORLEN S	731613402	0.53%
POLYUS PJSC	678129107 73181P102	0.38%
POWERGEN LTD	738905405	0.37%
PREMIER FARNELL LTD	74050U107	0.27%
PROVIDENT FINANCIAL PLC	74387B103	0.25%
PUBLICIS GROUPE SA	74463M106 F76080112 785144205	0.21%
QANTAS AIRWAYS LTD	74726M406 74726M505	0.42%
QBE INSURANCE GROUP LTD	74728G605	0.23%
RACAL ELECTRONICS PLC	749815403	0.36%

TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
RANDSTAD UK HOLDING LTD	81617E203	0.95%
RBS 11.2 PERP	780097309	0.25%
RBS 6.35 PERP	780097770	0.10%
RBS 8 1/2 PERP	780097804 780097853	0.25%
RBS 8.1 PERP	780097705	0.25%
RBS 8.2125 PERP	780097606	0.25%
RBS 9 1/2 PERP	780097408	0.25%
REED ELSEVIER NV	758204101 758205108 758204200 758205207	0.34%
RENTOKIL INITIAL PLC	760125104	0.22%
REPSOL SA	76026T205	0.45%
REXAM LTD	761655406 761655505 761655604	0.11%
RHODIA SA	762397107 762397206	0.21%
RIO TINTO FRANCE SAS	705151207	0.72%
RIO TINTO PLC	767202104 767204100 045074101 126170505 74974K706	0.25%
ROCHE HOLDING AG	771195104 771195401	0.44%
ROLLS-ROYCE HOLDINGS PLC	775781206	0.21%
ROYAL BANK OF SCOTLAND/ABN	780097721 780097739	0.15%
RUSHYDRO PJSC	466294105 782183123 782183131 782183404 466294204	0.41%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
RWE AG	74975E303 74975E402	0.30%
RWE GENERATION UK HOLDINGS PLC	45769A103	0.31%
RYANAIR HOLDINGS PLC	783513104	0.26%
SADIA SA	786326108	0.64%
SANOFI	80105N105 762426AC8 762426401 80105N204	0.27%
SANTANDER UK PLC	002920106 002920700	0.26%
SANUK 8 3/4 PERP	002920205	0.25%
SAP SE	803054204 803054303	0.40%
SAPPI LTD	803069103 803069202 108510041	0.62%
SASOL LTD	803866300	0.58%
SBERBANK OF RUSSIA PJSC	80585Y308	0.35%
SCOR SE	80917Q106	0.33%
SCOTTISH POWER PLC	81013T408 81013T705	0.23%
SEGA SAMMY HOLDINGS INC	815794102	0.32%
SEKISUI HOUSE LTD	816078307	0.33%
SERONO	81752M101	0.39%
SEVERSKY TUBE WORKS PJSC	818146102	0.20%
SHELL TRANSPORT & TRADING CO L	822703609	0.25%
SHISEIDO CO LTD	824841407	0.29%
SHOPRITE HOLDINGS LTD	82510E209	0.80%
SIBANYE GOLD LTD	03840M109 825724206	0.19%
SIGNET JEWELERS LTD	82668L872	0.22%

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TABLE 1
Average Margin Across Settlement Class Period

ISSUER	CUSIPs	MARGIN
SIMS METAL MANAGEMENT LTD	829160100	1.67%
SIX CONTINENTS LTD	830018107	0.20%
SKY PLC	111013108	0.21%
SMITHKLINE BEECHAM LTD	832378301	0.25%
SOCIEDAD QUIMICA Y MINERA DE C	833636103	0.16%
SOCIEDAD QUMICA Y MINERA DE CHILE	833635105	0.72%
SOCIETE GENERALE SA	784320103 784320202 83364L109	0.38%
SODEXO SA	833792104	0.42%
SOFTBANK GROUP CORP	471104109	0.49%
SOUTHERN ELECTRIC PLC 144A	842809709 842809402	0.27%
SPARK NEW ZEALAND LTD	84652A102 879278307 879278208	0.46%
SSE PLC	810133405 810133702 81012K309	0.25%
STANDARD BANK GROUP LTD	853118206	0.86%
STATOIL ASA	85771P102	0.49%
SUBMARINO S.A. - REG S	86431P300 86431P508	0.33%
SUMITOMO MITSUI FINANCIAL GROU	865622104	0.72%
SUNCORP GROUP LTD	867232100	0.58%
SURGUTNEFTEGAS OJSC	46625F104 868861204 868861105	0.26%
SVENSKA CELLULOSA AB SCA	869587402	0.25%
SWEDISH MATCH AB	870309507	0.38%
SWIRE PACIFIC LTD	870794302 870794401 870797404	0.03%

TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
SWISSCOM AG	871013108	0.49%
SYNGENTA AG	87160A100	0.40%
TABCORP HOLDINGS LTD	873306203	0.42%
TATA COMMUNICATIONS LTD	876564105 92659G402 92659G600 92659G303	0.11%
TATE & LYLE PLC	876570607	0.27%
TATNEFT PJSC	03737P207 03737P108 65486P100 876629205	0.25%
TDC A/S	87236N102	0.36%
TELE CELULAR SUL PART S.A.	879238103	0.66%
TELE CENTRO OESTE CELULAR PART	87923P105	0.52%
TELE NORDESTE CELULAR PARTICIP	87924W109	0.74%
TELE NORTE LESTE PARTICIPACOES	87924Y105 879246106	0.56%
TELE SUDESTE CELULAR PARTICIPA	87943B102 879252104	0.23%
TELE2 AB	87952P109 87952P208	0.55%
TELECOMUNICACOES BRASILEIRAS S	879287209	0.48%
TELEKOM AUSTRIA AG	87943Q109	0.71%
TELEKOMUNIKASI INDONESIA PERSE	715684106	0.15%
TELEMIG CELULAR PARTICIPACOES	87944E105	0.55%
TELESP PARTICIPACOES S.A.	87952L108 87952K100	0.14%
TELKOM SA SOC LTD	879603108	0.42%
TELSTRA CORP LTD	87969N204 87969N303 87969N105	0.35%
TERNIUM MEXICO SA DE CV	880890108	0.29%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
TESCO PLC	881575302 098561202	0.32%
TEVA PHARMACEUTICAL INDUSTRIES	881624209 16361E108 50540H104	0.36%
TIGER BRANDS LTD	88673M102 88673M201 886911106	0.31%
TMK PJSC	87260R300	0.37%
TOTAL SA	89151E109 716485206	0.39%
TRANSCOM WORLDWIDE SA	893234104 893545103 893545202 894116102	0.22%
TREND MICRO INC/JAPAN	89486M206	0.29%
TURKIYE GARANTI BANKASI AS	900148305 900148701 900151101	0.30%
TV AZTECA SAB DE CV	901145102	0.32%
UBS AG	90261R105	0.29%
ULTRAPAR PARTICIPACOES SA	90400P101	0.55%
UNIBAIL-RODAMCO SE	960224103	1.00%
UNIFIED ENERGY SYSTEM OAO	904688108 904688405	0.17%
UNION ANDINA DE CEMENTOS SAA	904845104	0.33%
UNITED OVERSEAS BANK LTD	911271302 910903301	0.22%
USINAS SIDERURGICAS DE MINAS G	917302408	0.52%
VAN DER MOOLEN HOLDING NV	921020103	0.38%
VEOLIA ENVIRONNEMENT SA	92334N103	0.34%
VIMPEL-COMMUNICATIONS PJSC	92719A106 92719A304	0.21%

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TABLE 1 Average Margin Across Settlement Class Period		
ISSUER	**CUSIPs**	**MARGIN**
VINA CONCHA Y TORO SA	927191106	0.32%
VIVENDI SA	137041208 204390108 419312202 92851S105 92851S204	0.25%
VODAFONE AIRTOUCH PLC	92857T107	0.25%
VODAFONE GROUP PLC	92857W308 698113107 87926R108 92857W209 92857W100 92858M101	0.39%
WACOAL HOLDINGS CORP	930004205	0.30%
WAL-MART DE MEXICO SAB DE CV	93114W107	0.36%
WAVECOM SA	943531103	0.52%
WESTPAC BANKING CORPORATION	789547106 961214301	0.18%
WIND HELLAS TELECOMMUNICATIONS	859823106 88706Q104	0.18%
WMC LIMITED	928947100 92928R106	0.27%
WOODSIDE PETROLEUM LTD	980228308	0.41%
WOOLWORTHS HOLDINGS LTD/SOUTH	480209402 98088R109 98088R505	0.38%
ZURICH INSURANCE GROUP AG	01959Q101 98982M107 989825104	0.33%

In re: The Bank of New York Mellon ADR FX Litigation
No. 16-CV-00212-JPO-JLC
(S.D.N.Y.)

THIS NOTICE ONLY PROVIDES LIMITED INFORMATION ABOUT THIS CLASS ACTION LAWSUIT AND SETTLEMENT.

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CI2

Bank of New York Mellon ADR FX Settlement
c/o KCC Class Action Services
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<<CLAIMID>>

<<ClaimID>>

IMPORTANT - PLEASE READ: You are receiving this notice because records identified in the Southern District of New York Action 7 (BNYM's transfer agent as a holder of one or more of the American Depositary Receipts ("ADRs") covered by this class action. Information regarding your holdings and the cash distributions you received during the relevant time period in connection with your holdings has been provided by BNYM's transfer agent and can be reviewed at www.bnymadrfxsettlement.com using the Claim Number and PIN provided below. The Claims Administrator will use this information to calculate your Claim in accordance with the Plan of Allocation found in the full notice ("Notice"), or other plan approved by the Court, **so it is important that you review the information to confirm it is accurate and complete. If the information is not accurate or complete, you must notify the Claims Administrator immediately. Otherwise, the Claims Administrator will assume the information is accurate and complete.**

CLAIM NUMBER: «AccountID» / PIN: «PinNo»

Pursuant to Federal Rule of Civil Procedure 23 and Court Order, the Court has directed the issuance of notice of the proposed $72.5 million settlement of the action to potential members of the Settlement Class. If approved, the settlement will resolve all claims in the case. **This notice provides basic information. You should review the Notice found on the website www.bnymadrfxsettlement.com for additional information.**

What Is the Action About: Lead Plaintiffs allege that, during the relevant time period, BNYM systematically deducted impermissible fees for conducting foreign exchange from cash distributions issued by foreign companies, and owed to ADR holders. BNYM has denied, and continues to deny, any wrongdoing or liability whatsoever.

Who Is a Settlement Class Member: All entities and individuals who at any time from January 1, 1997 through _____, 2019 held (directly or indirectly, registered or beneficially), or otherwise claim any entitlement to any payment (whether a dividend, rights offering, interest on capital, sale of shares, or other distribution) in connection with, any ADR for which BNYM acted as the depositary sponsored by an issuer that is identified in the Appendix to the Notice (the "Settlement Class"). Certain entities and individuals are excluded from the definition of the Settlement Class as set forth in detail in the Notice.

What Are the Benefits: If the Court approves the settlement, the settlement proceeds, after deduction of Court-approved notice and administration costs, attorneys' fees and expenses, and any applicable taxes will be distributed to eligible Settlement Class Members pursuant to the Plan of Allocation attached as Exhibit 1 to the Notice, or other plan approved by the Court.

What Are My Rights: As a Registered Holder Settlement Class Member, you *do not* have to take any action in order to be eligible to receive a settlement payment. Your Claim will be calculated using the information provided by BNYM's transfer agent, which can be accessed on the website using the Claim Number and PIN provided above. You should review this information to confirm it is accurate and complete. If you do not want to remain in the Settlement Class, you can request exclusion by _____ __, **2019**, in accordance with the Notice. If you properly exclude yourself from the Settlement Class, you will not be bound by any judgments or orders entered by the Court in the action and you will not be eligible to share in the net settlement proceeds. Objections to the settlement, Plan of Allocation, and/or request for attorneys' fees and expenses must be received by _____ __, **2019**, in accordance with the Notice.

When Is the Final Approval Hearing: A hearing will be held on _____ __, **2019 at __:__ _.m.** before the Honorable J. Paul Oetken, at the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY 10007, to determine if the settlement, Plan of Allocation, and request for attorneys' fees and expenses should be approved. Supporting papers will be posted on the website once filed.

For more information visit www.bnymadrfxsettlement.com, email info@bnymadrfxsettlement.com or call 866-447-6210.

Place Stamp Here

Bank of New York Mellon ADR FX Settlement
c/o KCC Class Action Services
P.O. Box 505030
Louisville, KY 40233-5030

CI2

IF YOU ARE OR WERE A HOLDER OF OR OTHERWISE CLAIM ANY ENTITLEMENT TO ANY PAYMENT IN CONNECTION WITH ANY AMERICAN DEPOSITARY SHARE (SOMETIMES KNOWN AS AN AMERICAN DEPOSITARY RECEIPT) ("ADR") FOR WHICH THE BANK OF NEW YORK MELLON ("BNYM") ACTED AS DEPOSITARY, YOUR RIGHTS MAY BE AFFECTED.

Pursuant to Federal Rule of Civil Procedure 23 and Court Order, the Court has directed notice of the $72.5 million settlement proposed in *In re: The Bank of New York Mellon ADR FX Litigation*, No. 16-CV-00212-JPO-JLC (S.D.N.Y.) to the Settlement Class. If approved, the settlement will resolve all claims in the litigation. **This notice provides basic information. It is important that you review the detailed notice ("Notice") found at the website below.**

What is this lawsuit about:

Lead Plaintiffs allege that, during the relevant time period, BNYM systematically deducted impermissible fees for conducting foreign exchange from dividends and/or cash distributions issued by foreign companies, and owed to ADR holders. BNYM has denied, and continues to deny, any wrongdoing or liability whatsoever.

Who is a Settlement Class Member:

All entities and individuals who at any time from January 1, 1997 through _____ __, 2019 held (directly or indirectly, registered or beneficially), or otherwise claim any entitlement to any payment (whether a dividend, rights offering, interest on capital, sale of shares, or other distribution) in connection with, any ADR for which BNYM acted as the depositary sponsored by an issuer that is identified in the Appendix to the Notice. Certain entities and individuals are excluded from the definition of Settlement Class as set forth in detail in the Notice.

What are the benefits:

If the Court approves the settlement, the proceeds, after deduction of Court-approved notice and administration costs, attorneys' fees and expenses, and any applicable taxes, will be distributed pursuant to the Plan of Allocation set forth in the Notice, or other plan approved by the Court.

What are my rights:

If you receive/have received a Post-Card Notice in the mail, you are a Registered Holder (i.e., you hold (or held) your eligible ADRs directly and your relevant information was provided by BNYM's transfer agent), and you *do not* have to take any action to be eligible for a settlement payment. If you do not receive/have not received a Post-Card Notice in the mail, you are a Non-Registered Holder and you *must submit* a Claim Form, ***postmarked (if mailed), or online, by _____ __, 2019***, to be eligible for a settlement payment. Non-Registered Holder Settlement Class Members who do nothing will not receive a payment, but will be bound by all Court decisions.

If you are a Settlement Class Member and do not want to remain in the Settlement Class, you may exclude yourself by request, ***received by _____ __, 2019***, in accordance with the Notice. If you exclude yourself, you will *not* be bound by any Court decisions in this litigation and you will *not receive a payment*, but you will retain any right you may have to pursue your own litigation at your own expense concerning the settled claims. Objections to the settlement, Plan of Allocation, or request for attorneys' fees and expenses must be ***received by _____ __, 2019***, in accordance with the Notice.

A hearing will be held on **_____, 2019 at __:__ _.m.**, before the Honorable J. Paul Oetken, at the Thurgood Marshall U.S. Courthouse, 40 Foley Square, NY, NY 10007, to determine if the settlement, Plan of Allocation, and/or request for fees and expenses should be approved. Supporting papers will be posted on the website once filed.

For more information visit www.bnymadrfxsettlement.com,
email info@bnymadrfxsettlement.com or call 866-447-6210.

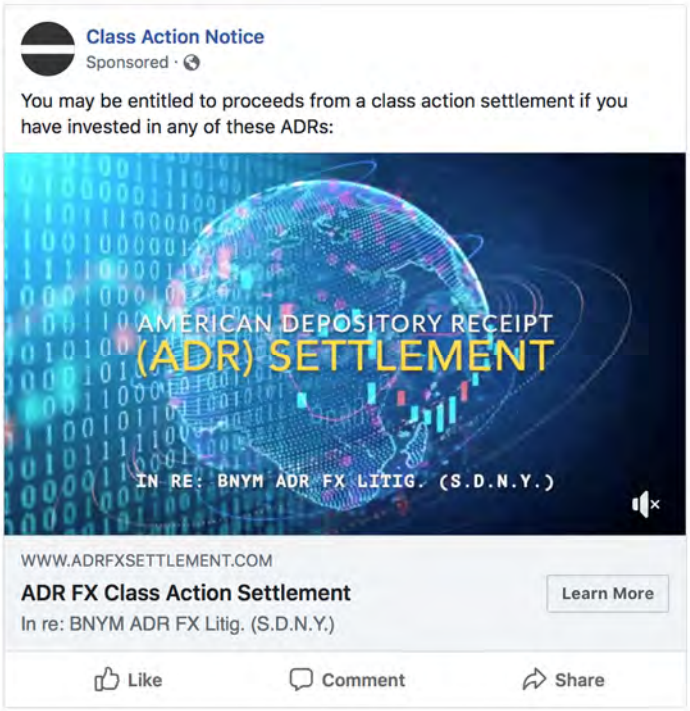
ADR Settlement Online Display Example Ad Sizes:

Text scrolls like stock ticker to show example ADRS

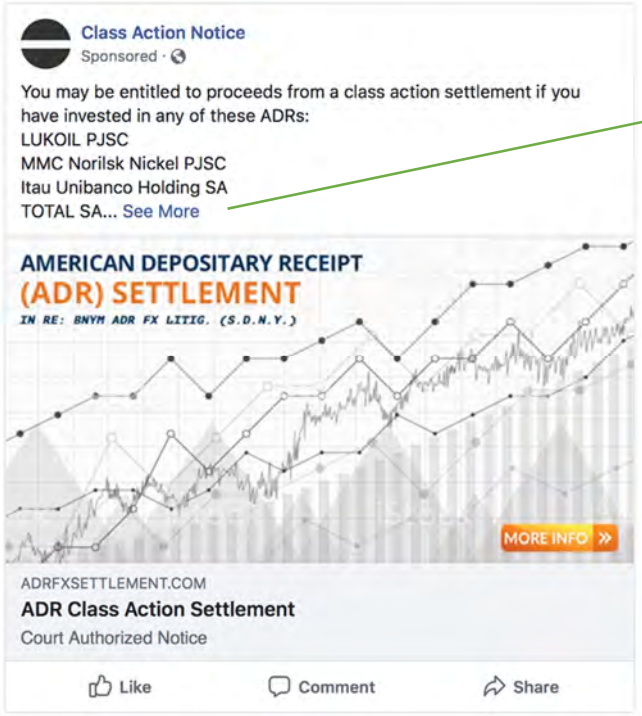
Text scrolls like stock ticker to show example ADRS

ADR Settlement Facebook Ads:

Facebook Video Preview: https://fb.com/l/1FLyxB0POoLVYBp



Facebook Image Ad: https://fb.com/l/1FLyxB0POoLVYBp

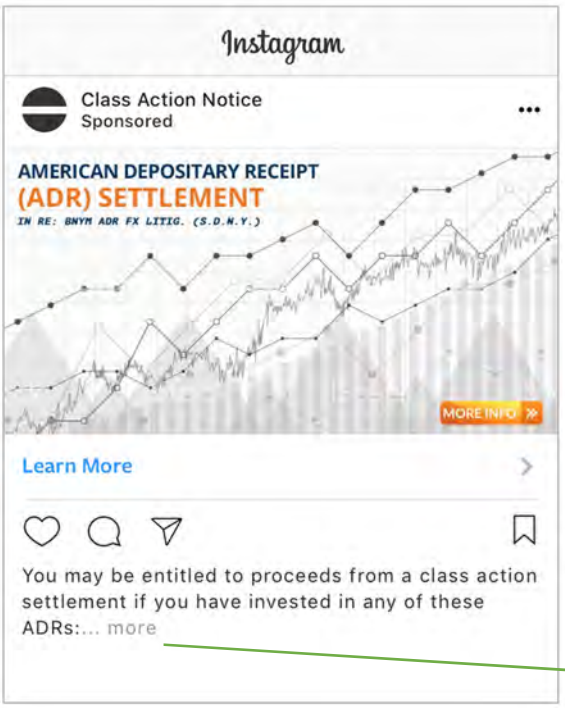


Opens to reveal longer list of ADRs and "See website for full list of ADRs" at the end.

ADR Settlement Instagram Ads:

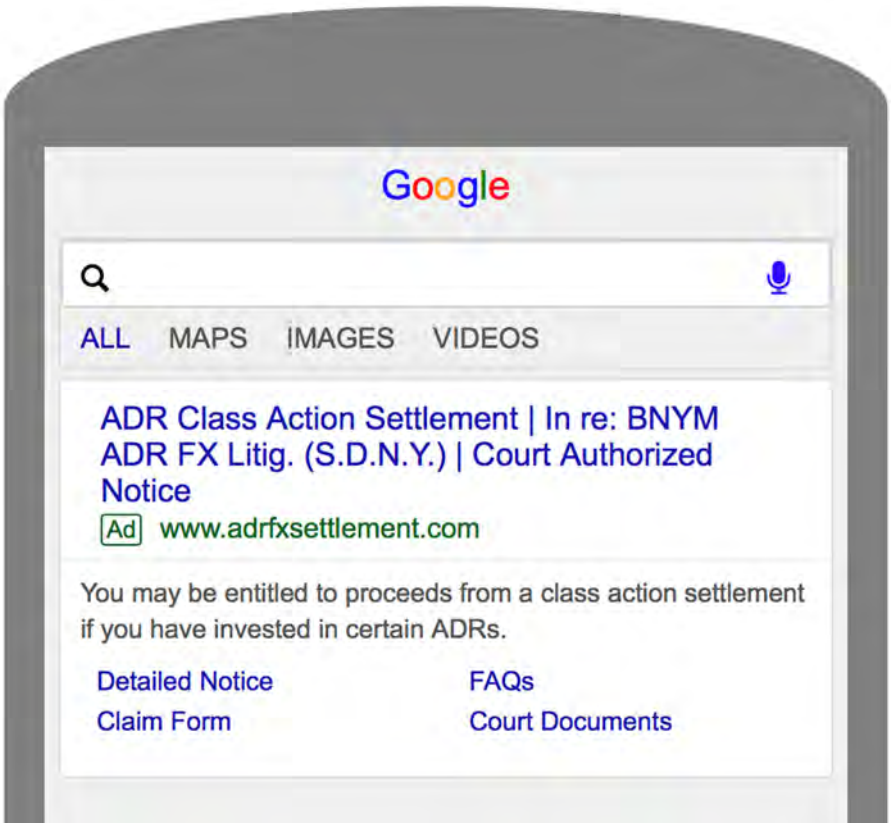
Instagram Video Preview: https://fb.com/l/1HIlj4LQIEvdzbz

Instagram Image Preview: https://fb.com/l/27hpqYARLTkOWyp



Opens to reveal longer list of ADRs and "See website for full list of ADRs" at the end.

Google Search Ads:



LinkedIn Ads:

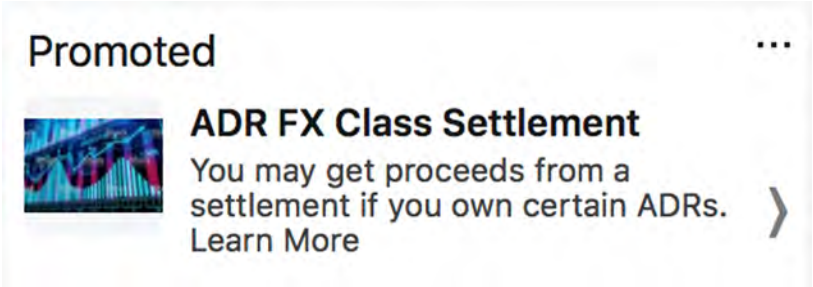


EXHIBIT A-5

Bank of New York Mellon ADR FX Settlement
c/o KCC Class Action Services
P.O. Box 505030
Louisville, KY 40233-5030
1-866-447-6210
info@bnymadrfxsettlement.com

PROOF OF CLAIM AND RELEASE FORM

IMPORTANT – If you receive/have received a Post-Card Notice in the mail in connection with this Settlement, you are a Registered Holder Settlement Class Member (i.e., you hold (or held) the American Depositary Receipts ("ADRs") covered by this Action directly through The Bank of New York Mellon ("BNYM" or "Defendant"), are listed in the records of BNYM's transfer agent with respect to such holdings, and your contact, holding, and distribution information was provided to the Claims Administrator by BNYM's transfer agent), and you DO NOT need to complete and submit this Proof of Claim and Release Form ("Claim Form") to be eligible to receive a share of the Net Settlement Fund in connection with the Settlement. The Post-Card Notice mailed to you contains a Claim Number and PIN to access your holdings and distribution information on the website www.bnymadrfxsettlement.com. Please refer to paragraph 2 of the General Instructions in this Claim Form and the full Notice available on the website for more information. If you did NOT receive a Post-Card Notice containing a Claim Number and PIN, please follow the instructions below to submit a Claim Form.

IF YOU DO NOT RECEIVE/HAVE NOT RECEIVED A POST-CARD NOTICE IN THE MAIL IN CONNECTION WITH THIS SETTLEMENT, YOU ARE A NON-REGISTERED HOLDER SETTLEMENT CLASS MEMBER AND YOU MUST COMPLETE AND SIGN THIS CLAIM FORM AND MAIL IT BY PREPAID, FIRST-CLASS MAIL TO THE ABOVE ADDRESS, OR SUBMIT IT ONLINE AT WWW.BNYMADRFXSETTLEMENT.COM, **POSTMARKED (OR RECEIVED) NO LATER THAN _____, 2019** IN ORDER TO BE ELIGIBLE TO RECEIVE A SHARE OF THE NET SETTLEMENT FUND IN CONNECTION WITH THE SETTLEMENT.

IF YOU ARE A NON-REGISTERED HOLDER SETTLEMENT CLASS MEMBER, FAILURE TO SUBMIT YOUR CLAIM FORM BY THE DATE SPECIFIED ABOVE WILL SUBJECT YOUR CLAIM TO REJECTION AND MAY PRECLUDE YOU FROM BEING ELIGIBLE TO RECEIVE ANY MONEY IN CONNECTION WITH THE SETTLEMENT.

DO NOT MAIL OR DELIVER YOUR CLAIM FORM TO THE COURT, THE PARTIES, OR THEIR COUNSEL. SUBMIT YOUR CLAIM FORM ONLY TO THE CLAIMS ADMINISTRATOR AT THE ADDRESS SET FORTH ABOVE, OR ONLINE AT WWW.BNYMADRFXSETTLEMENT.COM.

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PART I – CLAIMANT INFORMATION

The Claims Administrator will use this information for all communications regarding this Claim Form. If this information changes, you MUST notify the Claims Administrator in writing at the address above.

Claimant Names(s) (as the name(s) should appear on check, if eligible for payment; if the ADRs are jointly owned, the names of all beneficial owners must be provided):

Name of Person the Claims Administrator Should Contact Regarding this Claim Form (Must Be Provided):

Mailing Address – Line 1: Street Address/P.O. Box:

Mailing Address – Line 2 (If Applicable): Apartment/Suite/Floor Number:

City:

State/Province: Zip Code: Country:

Last 4 digits of Claimant Social Security/Taxpayer Identification Number:[1]

Daytime Telephone Number: Evening Telephone Number:

Email Address:

[1] The last four digits of the taxpayer identification number ("TIN"), consisting of a valid Social Security Number ("SSN") for individuals or Employer Identification Number ("EIN") for business entities, trusts, estates, etc., and telephone number of the beneficial owner(s) may be used in verifying this claim.

PART II – GENERAL INSTRUCTIONS

1. It is important that you completely read and understand the Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Final Approval Hearing; and (III) Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Notice") available at www.bnymadrfxsettlement.com, including the proposed Plan of Allocation of Net Settlement Fund attached as Exhibit 1 to the Notice. The Notice describes the proposed Settlement, how Settlement Class Members are affected by the Settlement, and the manner in which the Net Settlement Fund will be distributed if the Settlement and Plan of Allocation are approved by the Court. The Notice also contains the definitions of many of the defined terms (which are indicated by initial capital letters) used in this Claim Form. By signing and submitting this Claim Form, you will be certifying that you have read and understand the Notice, including the terms of the Releases described therein and provided for herein.

2. **Important - Please Note**: Only Non-Registered Holder Settlement Class Members, including those Settlement Class Members who hold (or held) their eligible ADRs through a bank, broker or other nominee rather than directly, must submit a Claim Form in order to be eligible to receive a payment from the Settlement. Those Settlement Class Members who receive/have received a Post-Card Notice in the mail (*i.e.*, Registered Holder Settlement Class Members) do not need to submit a Claim Form in order to be eligible to receive a payment from the Settlement. The Post-Card Notice mailed to Registered Holder Settlement Class Members contains a unique Claim Number and PIN to access, on the website www.bnymadrfxsettlement.com, information regarding the ADRs they held and the cash distributions they received during the relevant period in connection with their holdings as provided by BNYM's transfer agent, which information will be used to calculate their Claims. If you received a Post-Card Notice, please review the information regarding your holdings and cash distribution as set forth on the website to confirm it is accurate and complete. If the information regarding your holdings and cash distributions is incorrect or incomplete, you must notify the Claims Administrator immediately. Otherwise, the Claims Administrator will assume the information is correct and complete, and will use such information to calculate your Claim. **If you are unsure whether you are a Non-Registered Holder Settlement Class Member or a Registered Holder Settlement Class Member, please contact the Claims Administrator.**

3. By submitting this Claim Form, you will be making a request to share in the proceeds of the Settlement described in the Notice. IF YOU ARE NOT A SETTLEMENT CLASS MEMBER (*see* definition of Settlement Class on page __ of the Notice, which sets forth who is included in and who is excluded from the Settlement Class), OR IF YOU, OR SOMEONE ACTING ON YOUR BEHALF, SUBMITTED A REQUEST FOR EXCLUSION FROM THE SETTLEMENT CLASS, DO NOT SUBMIT A CLAIM FORM. **YOU MAY NOT, DIRECTLY OR INDIRECTLY, PARTICIPATE IN THE SETTLEMENT IF YOU ARE NOT A SETTLEMENT CLASS MEMBER.** THUS, IF YOU ARE EXCLUDED FROM THE SETTLEMENT CLASS, ANY CLAIM FORM THAT YOU SUBMIT, OR THAT MAY BE SUBMITTED ON YOUR BEHALF, WILL NOT BE ACCEPTED.

4. **Submission of this Claim Form does not guarantee that you will share in the proceeds of the Settlement. The distribution of the Net Settlement Fund will be governed by the Plan of Allocation set forth in the Notice, if it is approved by the Court, or by such other plan of allocation as the Court approves.**

5. Use the Schedule of Cash Distributions Per Eligible ADR in Part III of this Claim Form to supply all required information regarding the cash distributions you received as a result of your holdings in the

ADRs covered by the Action. Please provide all of the requested information.

6. You are required to submit genuine and sufficient documentation for all of the cash distributions set forth in the Schedule of Cash Distributions Per Eligible ADR in Part III of this Claim Form. Documentation may consist of copies of your end of year account statements, or an authorized statement from your broker containing the information regarding your cash distributions that would be found in a year-end account statement. **Please Note**: If you are a Non-Registered Holder Settlement Class Member, the Parties and the Claims Administrator do not independently have information about your holdings in the ADRs covered by the Action or the cash distributions you may have received as a result of such holdings. IF SUCH DOCUMENTS ARE NOT IN YOUR POSSESSION, PLEASE OBTAIN COPIES OR EQUIVALENT DOCUMENTS FROM YOUR BROKER. FAILURE TO SUPPLY THIS DOCUMENTATION MAY RESULT IN THE REJECTION OF YOUR CLAIM. DO NOT SEND ORIGINAL DOCUMENTS. **Please keep a copy of all documents that you send to the Claims Administrator. Also, please do not highlight any portion of the Claim Form or any supporting documents.**

7. Separate Claim Forms should be submitted for each separate legal entity.

8. All joint beneficial owners must each sign this Claim Form and their names must appear as "Claimants" in Part I of this Claim Form.

9. Agents, executors, administrators, guardians, and trustees must complete and sign the Claim Form on behalf of persons represented by them, and they must:

(a) expressly state the capacity in which they are acting;

(b) identify the name, account number, last four digits of the SSN (or TIN), address and telephone number of the beneficial owner of (or other person or entity on whose behalf they are acting with respect to) the eligible ADRs; and

(c) furnish herewith evidence of their authority to bind to the Claim Form the person or entity on whose behalf they are acting. (Authority to complete and sign a Claim Form cannot be established by stockbrokers demonstrating only that they have discretionary authority to trade securities in another person's accounts.)

10. By submitting a signed Claim Form, you will be swearing that you:

(a) received the cash distributions you have listed in the Claim Form; or

(b) are expressly authorized to act on behalf of the owner of the ADRs that received such cash distributions.

11. By submitting a signed Claim Form, you will be swearing to the truth of the statements contained therein and the genuineness of the documents attached thereto, subject to penalties of perjury under the laws of the United States of America. The making of false statements, or the submission of forged or fraudulent documentation, will result in the rejection of your Claim and may subject you to civil liability or criminal prosecution.

12. If the Court approves the Settlement, payments to eligible Authorized Recipients pursuant to the Plan of Allocation (or such other plan of allocation as the Court approves) will be made after any appeals are resolved, and after the completion of all Claims processing. The Claims process could take substantial time to

complete fully and fairly. Please be patient.

13. **PLEASE NOTE:** As set forth in the Plan of Allocation, each Authorized Recipient shall receive his, her or its *pro rata* share of the Net Settlement Fund. If the prorated payment to any Authorized Recipient calculates to less than $1.00, it will not be included in the calculation and no distribution will be made to that Authorized Recipient.

14. If you have questions concerning the Claim Form, or need additional copies of the Claim Form or the Notice, you may contact the Claims Administrator, KCC Class Action Services, at the above address, by toll-free phone at (866) 447-6210, or by e-mail at info@bnymadrfxsettlement.com, or you may download the documents from the website for the Settlement, www.bnymadrfxsettlement.com.

15. NOTICE REGARDING ELECTRONIC FILES: Certain Claimants may request, or may be requested, to submit information regarding their transactions in electronic files. To obtain the mandatory electronic filing requirements and file layout, you may visit the Settlement website at www.bnymadrfxsettlement.com or you may email the Claims Administrator's electronic filing department at Nominees@bnymadrfxsettlement.com. Any file not in accordance with the required electronic filing format will be subject to rejection. No electronic files will be considered to have been properly submitted unless the Claims Administrator issues an email after processing your file with your claim numbers and respective account information. **Do not assume that your file has been received or processed until you receive this email. If you do not receive such an email within 10 days of your submission, you should contact the electronic filing department at Nominees@bnymadrfxsettlement.com to inquire about your file and confirm it was received and acceptable.**

IMPORTANT: PLEASE NOTE

YOUR CLAIM IS NOT DEEMED FILED UNTIL YOU RECEIVE AN ACKNOWLEDGEMENT POSTCARD. THE CLAIMS ADMINISTRATOR WILL ACKNOWLEDGE RECEIPT OF YOUR CLAIM FORM BY MAIL, WITHIN 60 DAYS. IF YOU DO NOT RECEIVE AN ACKNOWLEDGEMENT POSTCARD WITHIN 60 DAYS, PLEASE CALL THE CLAIMS ADMINISTRATOR TOLL FREE AT (866) 447-6210.

PART III – SCHEDULE OF CASH DISTRIBUTIONS PER ELIGIBLE ADR

Please be sure to include proper documentation with your Claim Form as described in detail in Part II – General Instructions, paragraph 6, above.

A. Please fill in the total cash distributions you received from January 1, 1997 through _____, 2019 for each of the ADRs set forth in the list attached hereto as Exhibit 1.

ADR CODE	Total Cash Distributions Received from January 1, 1997 though _____, 2019	Confirm Proof Enclosed
	$_____	• Yes • No
	$_____	• Yes • No
	$_____	• Yes • No
	$_____	• Yes • No
	$_____	• Yes • No
	$_____	• Yes • No

PART IV - RELEASE OF CLAIMS AND SIGNATURE

YOU MUST ALSO READ THE RELEASE AND CERTIFICATION BELOW AND SIGN ON PAGE _ OF THIS CLAIM FORM.

I (we) hereby acknowledge that, pursuant to the terms set forth in the Stipulation, without further action by anyone, upon the Effective Date of the Settlement, I (we), on behalf of myself (ourselves) and my (our) respective heirs, executors, administrators, predecessors, successors, and assigns in their capacities as such, shall be deemed to have, and by operation of law and of the judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged each and every Released Claim against any of the Releasees, and shall forever be barred and enjoined from prosecuting any or all of the Released Claims against any of the Releasees.

CERTIFICATION

By signing and submitting this Claim Form, the Claimant(s) or the person(s) who represent(s) the Claimant(s) certifies (certify), as follows:

1. that I (we) have read and understand the contents of the Notice and this Claim Form, including the Releases provided for in the Settlement and the terms of the Plan of Allocation;

2. that the Claimant(s) is a (are) Settlement Class Member(s), as defined in the Notice, and is (are) not excluded by definition from the Settlement Class as set forth in the Notice;

3. that the Claimant has **not** submitted a request for exclusion from the Settlement Class;

4. that I (we) received the cash distributions identified in the Claim Form and have not assigned the claim against the Defendant or any of the other Releasees to another, or that, in signing and submitting this Claim Form, I (we) have the authority to act on behalf of the owner(s) thereof;

5. that the Claimant(s) has (have) not submitted any other claim covering the same cash distributions identified in the Claim Form and knows (know) of no other person having done so on the Claimant's (Claimants') behalf;

6. that the Claimant(s) submit(s) to the jurisdiction of the Court with respect to Claimant's (Claimants') claim and for purposes of enforcing the Releases set forth herein;

7. that I (we) agree to furnish such additional information with respect to this Claim Form as Lead Plaintiffs' Counsel, the Claims Administrator or the Court may require;

8. that the Claimant(s) waive(s) the right to trial by jury, to the extent it exists, and agree(s) to the Court's summary disposition of the determination of the validity or amount of the claim made by this Claim Form;

9. that I (we) acknowledge that the Claimant(s) will be bound by and subject to the terms of any judgment(s) that may be entered in the Action; and

10. that the Claimant(s) is (are) NOT subject to backup withholding under the provisions of Section 3406(a)(1)(C) of the Internal Revenue Code because (a) the Claimant(s) is (are) exempt from backup withholding or (b) the Claimant(s) has (have) not been notified by the IRS that he/she/it is subject to backup withholding as a result of a failure to report all interest or dividends or (c) the IRS has notified the Claimant(s) that he/she/it is no longer subject to backup withholding. **If the IRS has notified the Claimant(s) that he/she/it is subject to backup withholding, please strike out the language in the preceding sentence indicating that the claim is not subject to backup withholding in the certification above.**

UNDER THE PENALTIES OF PERJURY, I (WE) CERTIFY THAT ALL OF THE INFORMATION PROVIDED BY ME (US) ON THIS CLAIM FORM IS TRUE, CORRECT, AND COMPLETE, AND THAT THE DOCUMENTS SUBMITTED HEREWITH ARE TRUE AND CORRECT COPIES OF WHAT THEY PURPORT TO BE.

Signature of Claimant Date

Print your name here

Signature of joint Claimant, if any Date

Print your name here

If the Claimant is other than an individual, or is not the person completing this form, the following also must be provided:

Signature of person signing on behalf of Claimant Date

Print your name here

Capacity of person signing on behalf of Claimant, if other than an individual, *e.g.*, executor, president, trustee, custodian, etc. (Must provide evidence of authority to act on behalf of Claimant – *see* paragraph 9 on page _ of this Claim Form.)

REMINDER CHECKLIST

1. Please sign the above release and certification. If this Claim Form is being made on behalf of joint Claimants, then both must sign.

2. Remember to attach only **copies** of acceptable supporting documentation as these documents will not be returned to you.

3. Please do not highlight any portion of the Claim Form or any supporting documents.

4. Keep copies of the completed Claim Form and documentation for your own records.

5. The Claims Administrator will acknowledge receipt of your Claim Form by mail within 60 days. Your claim is not deemed filed until you receive an acknowledgement postcard. **IF YOU DO NOT RECEIVE AN ACKNOWLEDGEMENT POSTCARD WITHIN 60 DAYS, PLEASE CALL THE CLAIMS ADMINISTRATOR TOLL FREE AT 1-866-447-6210.**

6. If your address changes in the future, or if this Claim Form was sent to an old or incorrect address, please send the Claims Administrator written notification of your new address. If you change your name, please inform the Claims Administrator.

7. If you have any questions or concerns regarding your claim, please contact the Claims Administrator at the above address or toll-free at 1-866-447-6210, or visit www.bnymadrfxsettlement.com. Please DO NOT call BNYM or its counsel with questions regarding your claim.

THIS CLAIM FORM MUST BE MAILED TO THE CLAIMS ADMINISTRATOR BY PREPAID, FIRST-CLASS MAIL, OR SUBMITTED ONLINE AT WWW.BNYMADRFXSETTLEMENT.COM, **POSTMARKED (OR RECEIVED) NO LATER THAN _____, 2019**. IF MAILED, THE CLAIM FORM SHOULD BE ADDRESSED AS FOLLOWS:

Bank of New York Mellon ADR FX Settlement
c/o KCC Class Action Services
P.O. Box 505030
Louisville, KY 40233-5030

If mailed, a Claim Form received by the Claims Administrator shall be deemed to have been submitted when posted, if a postmark date on or before _____, 2019 is indicated on the envelope and it is mailed First Class, and addressed in accordance with the above instructions. In all other cases, a Claim Form shall be deemed to have been submitted when actually received by the Claims Administrator.

You should be aware that it will take a significant amount of time to fully process all of the Claim Forms. Please be patient and notify the Claims Administrator of any change of address.

EXHIBIT 1

ADR/CUSIPs	Code (To be entered in PART III above)	ADR/CUSIPs	Code (To be entered in PART III above)
ABI Sab Group Holding Ltd (CUSIPs: 78572M105 / 836216309 /836220103)	**ABIS**	**Legal & General Group Plc** (CUSIP: 52463H103)	**LEGA**
Accor SA (CUSIPs: 00435F101 /00435F309)	**ACCO**	**Lendlease Group** (CUSIP: 526023205)	**LEND**
Adidas AG (CUSIP: 00687A107)	**ADID**	**LHR Airports Ltd** (CUSIP: 05518L206)	**LHRA**
Administradora de Fondos de Pe 00709P108	**ADMI**	**Liberty Group Ltd** (CUSIPs: 140487109 / 530616101 / 53055R103 / 53055R202 / 530706100 / 530706209)	**LIBE**
AES Tiete Energia SA (CUSIPs: 00809V203 / 00808P207 / 00808P108	**AEST**	**Lihir Gold Ltd** (CUSIPs: 532349206 / 532349107)	**LIHI**
Aixtron SE (CUSIP: 009606104)	**AIXT**	**Lloyds Banking Group Plc** (CUSIP: 539439109)	**LLOY**
Alcatel-Lucent SA (CUSIP: 013904305)	**ALCA**	**Lonmin Plc** (CUSIPs: 54336Q104 / 54336Q203 / 543374409)	**LONM**
Allied Irish Banks PLC (CUSIPs: 019228402 / 019228303)	**ALLI**	**Lukoil Pjsc** (CUSIPs: 69343P105 / 677862104 / 677862807 / 677862302 / 677862203)	**LUKO**
Alstom SA (CUSIP: 021244108)	**ALST**	**Luxottica Group Spa** (CUSIP: 55068R202)	**LUXO**
Altana AG (CUSIP: 02143N103)	**ALTA**	**Lvmh Moet Hennessy Louis Vuitt** (CUSIP: 502441207)	**LYMH**
Alumina Ltd. (CUSIP: 022205108)	**ALUM**	**Macquarie Group Ltd** (CUSIPs: 55607P105 / 55607P204)	**MACQ**
Ambev SA (CUSIPs: 20441W203 / 02319V103)	**AMBE**	**Madeco, S.A.** (CUSIPs: 556304103 / 556304202)	**MADE**
Anglo American Plc. (CUSIPs: 03485P102 / 03485P300)	**ANGA**	**Mahanagar Telephone Nigam Ltd** (CUSIP: 559778402)	**MAHA**
Anglo Platinum (CUSIP: 035078104)	**ANGP**	**Makita Corp** (CUSIP: 560877300)	**MAKI**
Anglogold Ashanti Ltd. (CUSIPs: 035128206 / 043743103 / 043743202)	**ANGL**	**Mannesmann A.G.** (CUSIP: 563775303)	**MANN**
Anheuser-Busch Inbev SA/NV (CUSIPs: 03524A108 / 157123209 / 40051F100 / 74838Y207)	**ANHB**	**Masisa SA** (CUSIPs: 574799102 / 574800108)	**MASI**
Arkema SA (CUSIP: 041232109)	**ARKE**	**Massmart Holdings Ltd** (CUSIP: 576290100)	**MASS**
Arm Holdings Plc. (CUSIP: 042068106)	**ARMH**	**Metso Oyj** (CUSIPs: 592671101 / 754183101 / 920232303)	**METS**
Assicurazioni Generali Spa (CUSIP: 465234102)	**ASSI**	**Mizuho Financial Group Inc** (CUSIPs: 359558103 / 60687Y109)	**MIZU**

ADR/CUSIPs	Code (To be entered in PART III above)	ADR/CUSIPs	Code (To be entered in PART III above)
Astra AB (CUSIPs: 046298105 / 046298204)	**ASTR**	**Mmc Norilsk Nickel Pjsc** (CUSIPs: 46626D108 / 55315J102)	**MMCN**
Australia & New Zealand Banking (CUSIP: 052528304)	**AUST**	**MMI Holdings Ltd/South Africa** (CUSIP: 55314H107)	**MMIH**
AV Gold (CUSIP: 035134303)	**AVGO**	**Mobile Telesystems Pjsc** (CUSIP: 61946A106)	**MOBI**
AXA SA (CUSIPs: 054536107 / 149188104 / 866791106)	**AXAS**	**Mol Hungarian Oil & Gas Plc** (CUSIP: 831595202)	**MOLH**
B.A. (CUSIPs: 060587508/ 060593100)	**BBAA**	**Mosenergo Pjsc** (CUSIPs: 037376100 / 037376308)	**MOSE**
Banco Bilbao Vizcaya Argentari (CUSIPs: 059458208 / 059456202 / 059456301 / 059456103 / 058925108 / 05946K101 / 059594408 / 059594507 / 07329Q507 / 07329Q200 / 07329Q309)	**BBVA**	**MTN Group Ltd** (CUSIP: 62474M108)	**MTNG**
Banco Comercial Portugues SA (CUSIPs: 059479303 / 059479709)	**BACP**	**National Australia Bank Ltd** (CUSIP: 632525408)	**NAAB**
Banco Do Brasil SA (CUSIP: 059578104)	**BADB**	**National Bank of Greece SA** (CUSIPs: 633643507 / 633643408)	**NABG**
Banco Popolare SC (CUSIPs: 059471102 /059633107)	**BAPO**	**National Grid** (CUSIPs: 636274102 / 636274300 / 636274409)	**NATG**
Banco Santander Brasil SA (CUSIPs: 05964H105 / 05967A107)	**BASB**	**National Power Plc** (CUSIP: 637194408)	**NATP**
Banco Santander Chile (CUSIPs: 05965F108 / 05965X109)	**BASC**	**Natuzzi Spa** (CUSIP: 63905A101)	**NATU**
Bank of Ireland (CUSIP: 46267Q103)	**BAOI**	**NEC Corp** (CUSIPs: 629050204 / 81661W109)	**NECC**
Bank of Tokyo – Mitsubishi FJ L (CUSIP: 065379109)	**BOTM**	**Nedbank Group Ltd** (CUSIPs: 63975P103 / 63975K104 / 63975P202)	**NEDB**
Barclays Africa Group Ltd. (CUSIPs: 06738E204 / 06742G302 / 06739H776 / 06739H511 / 06739H362 / 06739F390	**BAAG**	**Net Servicos de Comunicacao SA** (CUSIP: 37957X102)	**NETS**
BASF SE (CUSIPs: 055262505 / 019097104)	**BASF**	**Newcrest Mining Ltd** (CUSIP: 651191108)	**NEWC**
Bass Plc. (CUSIP: 069904209)	**BASS**	**Newmont Australia Pty Ltd** (CUSIPs: 390290104 / 656190105 / 656190204)	**NEWM**
BAT Industries Plc. (CUSIP: 055270508)	**BATI**	**Nippon Yusen KK** (CUSIP: 654633304)	**NIPP**

ADR/CUSIPs	Code (To be entered in PART III above)	ADR/CUSIPs	Code (To be entered in PART III above)
Bayer AG (CUSIP: 072730302)	**BAYE**	**Nomura Holdings Inc** (CUSIP: 65535H208)	**NOMU**
BBVA Banco Frances SA (CUSIPs: 059591107 / 07329M100)	**BBVA**	**NTT Docomo Inc** (CUSIPs: 62942M201 / 62942M102 / 629424201 / 62942M300 / 629424102 / 629424508 / 629424409)	**NTTD**
BG Group Ltd. (CUSIPs: 055434203 / 052578408 / 055434104 / 780259206 / 780259107)	**BGGR**	**Orange Polska SA** (CUSIP: 87943D108)	**ORAN**
Bidvest Group LTD/THE (CUSIPs: 088836101 / 088836200 / 088836309)	**BIDV**	**Orange SA** (CUSIPs: 35177Q105 / 35177Q204 / 35177QAB1)	**ORNG**
Billabong International (CUSIP: 090055104)	**BILL**	**Orkla Asa** (CUSIP: 686331109)	**ORKL**
Blue Circle Industries (CUSIPs: 095342408 / 095342507)	**BLUE**	**Partner Communications Co Ltd** (CUSIP: 70211M109)	**PART**
BNP Paribas SA (CUSIPs: 05565A202 / 05565A103 / 066747106)	**BNPP**	**Pearson Plc** (CUSIP: 705015105)	**PEAR**
Boehler-Uddeholm AG (CUSIP: 097356307)	**BOEH**	**Pernod Ricard SA** (CUSIPs: 019121102 / 714264108)	**PERN**
Brasil Telecom Participacoes S (CUSIPs: 10553M101 / 10553M200 / 105530109 / 670851104 / 670851203)	**BRTP**	**Petrochina Co Ltd** (CUSIP: 71646E100)	**PETR**
Brasilagro – Co Brasileira De (CUSIP: 10554B104)	**BRCB**	**Petroleo Brasileiro SA** (CUSIPs: 71654V101 / 71654V408)	**PEBR**
Braksem SA (CUSIPs: 105532105 / 217252105 / 86959M101)	**BRAS**	**Pflln 1.35** (CUSIP: 74050U206)	**PFLL**
BRF SA (CUSIPs: 10552T107 / 71361V204 /71361V303 / 71361V105)	**BRFS**	**Pharol Sgps SA** (CUSIP: 737273102)	**PHAR**
British American Tobacco Plc. (CUSIP: 110448107)	**BRIT**	**Polski Koncern Naftowy Orlen S** (CUSIP: 731613402)	**POLS**
British Steel (CUSIP: 111015301)	**BRST**	**Polyus Pjsc** (CUSIPs: 678129107 / 73181P102)	**POLY**
Bunzl Plc. (CUSIPs: 120738406 / 120738307)	**BUNZ**	**Powergen Ltd** (CUSIP: 738905405)	**POWE**
Burmah Castrol Plc. (CUSIP: 122169303)	**BURM**	**Premier Farnell ltd** (CUSIP: 74050U107)	**PREM**
Cencosud SA (CUSIPs: 15132H101 / 802233106)	**CENC**	**Provident Financial Plc** (CUSIP: 74387B103)	**PROV**
Centrica Plc. (CUSIPs: 15639K102 / 15639K201 15639K300)	**CENT**	**Publicis Groupe SA** (CUSIPs: 74463M106 / F76080112 / 785144205)	**PUBL**
Chilcott UK Ltd. (CUSIPs: 363240102 / 93443W109)	**CHIL**	**Qantas Airways Ltd** (CUSIPs: 74726M406 / 74726M505)	**QANT**
China Agri-Industries Holdings (CUSIP: 16940R109)	**CHIN**	**QBE Insurance Group Ltd** (CUSIP: 74728G605)	**QBEI**

ADR/CUSIPs	Code (To be entered in PART III above)	ADR/CUSIPs	Code (To be entered in PART III above)
Chorus Ltd. (CUSIP: 17040V107)	**CHOR**	**Racal Electronics Plc** (CUSIP: 749815403)	**RACA**
Chunghwa Telecom Co., Ltd. (CUSIP: 17133Q205)	**CHUN**	**Randstad UK Holding Ltd** (CUSIP: 81617E203)	**RAND**
CIA Brasileira De Distribuicao (CUSIPs: 20440T201 / 20440T102)	**CBDD**	**Rbs 11.2 Perp** (CUSIP: 780097309)	**RBSA**
CIA Cervejaria Brahma (CUSIPs: 20440X103 / 20440X202)	**CCBR**	**Rbs 6.35 Perp** (CUSIP: 780097770)	**RBSB**
Cia DeBebidas Das Americas-AM (CUSIP: 20441W104)	**CBDA**	**Rbs 8 1/2 Perp** (CUSIP: 780097804 / 780097853)	**RBSC**
Cia De Saneamento Basico Do Es (CUSIP: 20441A102)	**CDSB**	**Rbs 8.1 Perp** (CUSIP: 780097705)	**RBSD**
Cia De Transmissao De Energia (CUSIPs: 20441Q107 / 20441Q206)	**CDTD**	**Rbs 8.2125 Perp** (CUSIP: 780097606)	**RBSE**
Cia Energetica De Sao Paulo (CUSIPs: 20440P209 / 20440P407)	**CESP**	**Rbs 9 1/2 Perp** (CUSIP: 780097408)	**RBSF**
Cia Paranaense De Energia (CUSIPs: 20441B308 / 20441B407)	**CIPE**	**Reed Elsevier NV** (CUSIPs: 758204101 / 758205108 / 758204200 / 758205207)	**REED**
Cie Financiere Richemont SA (CUSIP: 204318109)	**CIEF**	**Rentokil Initial Plc** (CUSIP: 760125104)	**RENT**
Coca Cola Hellenic Bottling Co. (CUSIP: 1912EP104)	**COCA**	**Repsol SA** (CUSIP: 76026T205)	**REPS**
Coca-Cola Amatil Ltd. (CUSIP: 191085208)	**COAM**	**Rexam Ltd** (CUSIPs: 761655406 / 761655505 / 761655604)	**REXA**
Coca-Cola Femsa Sab De CV (CUSIP: 191241108)	**COFE**	**Rhodia SA** (CUSIPs: 762397107 / 762397206)	**RHOD**
Coflexip SA (CUSIP: 192384105)	**COFL**	**Rio Tinto France Sas** (CUSIP: 705151207)	**RIOF**
Commerzbank AG (CUSIPs: 202597308 / 202597605)	**COMM**	**Rio Tinto Plc** (CUSIPs: 767202104 / 767204100 / 045074101 / 126170505 / 74974K706)	**RIOT**
Commonwealth Bank of Australia (CUSIPs: 202712303 / 202712600)	**CBOA**	**Roche Holding AG** (CUSIPs: 771195104 / 771195401)	**ROCH**
Comp. De Geracao De Energia El (CUSIPs: 20441P109 / 20441P208 / 20441R204 / 20441R105 / 264398108 / 264398207)	**CDGE**	**Rolls-Royce Holdings Plc** (CUSIP: 775781206)	**ROLL**
Compass Group Plc. (CUSIPs: 20449X104 / 20449X203 / 20449X302)	**COMP**	**Royal Bank of Scotland/ABN** (CUSIPs: 780097721 / 780097739)	**ROYA**
Continental AG (CUSIP: 210771200)	**CONT**	**Rushydro Pjsc** (CUSIPs: 466294105 / 782183123 / 782183131 / 782183404 / 466294204)	**RUSH**
Converium (CUSIP: 21248N107)	**CONV**	**RWE AG** (CUSIPs: 74975E303 / 74975E402)	**RWEA**
Corus Group Ltd. (CUSIP: 22087M101)	**CORU**	**RWE Generation UK Holdings** Plc (CUSIP: 45769A103)	**RWEG**
Cosco Shipping International S	**COSC**	**Ryanair Holdings Plc**	**RYAN**

ADR/CUSIPs	Code (To be entered in PART III above)	ADR/CUSIPs	Code (To be entered in PART III above)
(CUSIP: 22112Y203)		(CUSIP: 783513104)	
Craneware Plc. (CUSIP: 224465104)	**CRAN**	**Sadia SA** (CUSIP: 786326108)	**SADI**
Crayfish Co. Ltd. (CUSIP: 225226208)	**CRAY**	**Sanofi** (CUSIPs: 80105N105 / 762426AC8 / 762426401 / 80105N204)	**SANO**
Credit Suisse Group AG (CUSIP: 225401108)	**CRED**	**Santander UK Plc** (CUSIPs: 002920106 / 002920700)	**SANT**
CRH Plc. (CUSIP: 12626K203)	**CRHP**	**Sanuk 8 3/4 Perp** (CUSIP: 002920205)	**SANU**
Crucell NV (CUSIP: 228769105)	**CRUC**	**Sap SE** (CUSIPs: 803054204 / 803054303)	**SAPS**
Dai Nippon Printing Co Ltd (CUSIP: 233806306)	**DAIN**	**Sappi Ltd.** (CUSIPs: 803069103 / 803069202 / 108510041)	**SAPP**
Danka Business Systems Plc (CUSIP: 236277109)	**DABS**	**Sasol Ltd.** (CUSIP: 803866300)	**SASO**
DBS Group Holdings Ltd (CUSIP: 23304Y100)	**DBSG**	**Sberbank of Russia Pjsc** (CUSIP: 80585Y308)	**SBER**
Delhaize Group Sca (CUSIP: 29759W101)	**DELH**	**Scor SE** (CUSIP: 80917Q106)	**SCOR**
Deutsche Bank AG (CUSIP: 251525309)	**DEUT**	**Scottish Power Plc** (CUSIPs: 81013T408 / 81013T705)	**SCOT**
Deutsche Lufthansa AG (CUSIPs: 251561304 / 549836500)	**DEUL**	**Sega Sammy Holdings Inc** (CUSIP: 815794102)	**SEGA**
Deutsche Post AG (CUSIP: 25157Y202)	**DEUP**	**Sekisui House Ltd** (CUSIP: 816078307)	**SEKI**
Diageo Plc (CUSIPs: 25243Q205 / 25243Q106 / 402033302)	**DIAG**	**Serono** (CUSIP: 81752M101)	**SERO**
Dollar Pref Restricted 4-2 b e (CUSIPs: 6162*1019 / 6162*1017)	**DOLL**	**Seversky Tube Works Pjsc** (CUSIP: 818146102)	**SEVE**
Dominion Mining Ltd (CUSIP: 257457309)	**DOMN**	**Shell Transport & Trading Co l** (CUSIP: 822703609)	**SHEL**
Drdgold Ltd (CUSIPs: 26152H103 / 26152H301 / 266597301)	**DRDG**	**Shiseido Co Ltd** (CUSIP: 824841407)	**SHIS**
Dresdner Bank AG (CUSIPs: 261561302 / 261561401)	**DRES**	**Shoprite Holdings Ltd** (CUSIP: 82510E209)	**SHOP**
Ducati Motor Holding Spa (CUSIP: 264066101)	**DUCA**	**Sibanye Gold Ltd** (CUSIPs: 03840M109 / 825724206)	**SIBA**
Eletropaulo Metropolitana Elet (CUSIP: 286203302)	**ELET**	**Signet Jewelers Ltd** (CUSIP: 82668L872)	**SIGN**
Elf Aquitaine SA (CUSIP: 286269105)	**ELFA**	**Sims Metal Management Ltd** (CUSIP: 829160100)	**SIMS**
Embotelladora Andina SA (CUSIPs: 29081P204 / 29081P303)	**EMBO**	**Six Continents Ltd** (CUSIP: 830018107)	**SIXC**
Embratel Participacoes SA (CUSIPs: 29081N100 / 29081N209)	**EMBR**	**Sky Plc** (CUSIP: 111013108)	**SKYP**

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Empresas Ica Sab de CV (CUSIP: 292448107)	**EMPR**	**Smithkline Beecham Ltd** (CUSIP: 832378301)	**SMIT**
Engie Brasil Energia SA (CUSIPs: 892360108 / 29286U107 / 892360306)	**ENGI**	**Sociedad Quimica y Minera De C** (CUSIP: 833636103)	**SOCI**
Eni Lasmo Plc (CUSIP: 501730204)	**ENIL**	**Sociedad Qumica y Minera de Chile** (CUSIP: 833635105)	**SQMC**
Eni Spa (CUSIP: 26874R108)	**ENSP**	**Societe Generale SA** (CUSIPs: 784320103 / 784320202 / 83364L109)	**SOGE**
Eniim 10 Perp (CUSIP: 501730303)	**ENII**	**Sodexo SA** (CUSIP: 833792104)	**SODE**
Erste Group Bank AG (CUSIP: 296036304)	**ERST**	**Softbank Group Corp** (CUSIP: 471104109)	**SOFT**
Evraz Highveld Steel & Vanadiu (CUSIP: 30050A301)	**EVRA**	**Southern Electric Plc 144a** (CUSIPs: 842809709 / 842809402)	**SOUT**
Ferguson Plc (CUSIP: 97786P100)	**FERG**	**Spark New Zealand ltd** (CUSIPs: 84652A102 / 879278307 / 879278208)	**SPAR**
Fibria Celulose SA (CUSIP: 92906P106)	**FIBR**	**Sse Plc** (CUSIPs: 810133405 / 810133702 / 81012K309)	**SSEP**
Fila Holding S.P.A. (CUSIP: 316850106)	**FILA**	**Standard Bank Group Ltd** (CUSIP: 853118206)	**STAN**
Fomento Economico Mexicano Sab (CUSIP: 344419106)	**FOME**	**Statoil Asa** (CUSIP: 85771P102)	**STAT**
Foster's Group Pty Ltd (CUSIP: 350258307)	**FOST**	**Submarino S.A. - Reg s** (CUSIPs: 86431P300 / 86431P508)	**SUBM**
Fresenius Medical Care AG & Co (CUSIPs: 358029106 / 358029205)	**FRES**	**Sumitomo Mitsui Financial Group** (CUSIP: 865622104)	**SUMI**
Gallaher Group Ltd (CUSIP: 363595109)	**GALA**	**Suncorp Group Ltd** (CUSIP: 867232100)	**SUNC**
Gates Worldwide Ltd (CUSIP: 890030208)	**GATE**	**Surgutneftegas Ojsc** (CUSIPs: 46625F104 / 868861204 / 868861105)	**SURG**
Gazprom Neft Pjsc (CUSIP: 36829G107)	**GAZP**	**Svenska Cellulosa Ab Sca** (CUSIP: 869587402)	**SVEN**
Gazprom Pjsc (CUSIPs: 47973C305 / 753317304 / 753317205 / 753317106)	**GAPP**	**Swedish Match Ab** (CUSIP: 870309507)	**SWED**
Genesys (CUSIP: 37185M209)	**GENE**	**Swire Pacific Ltd** (CUSIPs: 870794302 / 870794401 / 870797404)	**SWIR**
Gerdau SA (CUSIP: 373737105)	**GERD**	**Swisscom AG** (CUSIP: 871013108)	**SWIS**
Getlink SE (CUSIP: 39944Q109)	**GETL**	**Syngenta AG** (CUSIP: 87160A100)	**SYNG**
Glaxosmithkline Plc (CUSIP: 37733W105)	**GLAX**	**Tabcorp Holdings Ltd** (CUSIP: 873306203)	**TABC**
Gol Linhas Aereas Inteligent (CUSIP: 38045R107)	**GOLL**	**Tata Communications Ltd** (CUSIPs: 876564105 / 92659G402 /	**TATA**

ADR/CUSIPs	Code (To be entered in PART III above)	ADR/CUSIPs	Code (To be entered in PART III above)
		92659G600 / 92659G303)	
Gold Fields Ltd (CUSIPs: 262026503 / 38059R100 / 38059T106 / 380596205 / 957654304)	**GOLD**	**Tate & Lyle Plc** (CUSIP: 876570607)	**TATE**
Grupo Aeroportuario del Centro (CUSIP: 400501102)	**GRUP**	**Tatneft Pjsc** (CUSIPs: 03737P207 / 03737P108 / 65486P100 / 876629205)	**TATN**
Grupo Aeroportuario del Pacifi (CUSIP: 400506101)	**GADP**	**TDC A/S** (CUSIP: 87236N102)	**TDCA**
Grupo Aeroportuario del Surest (CUSIP: 40051E202)	**GADS**	**Tele Celular Sul Part S.A.** (CUSIP: 879238103)	**TELC**
Grupo Casa Saba Sab de CV (CUSIP: 40048P104)	**GCSS**	**Tele Centro Oeste Celular Part** (CUSIP: 87923P105)	**TECE**
Grupo Elektra, S.A. De C.V. (CUSIP: 40050A102)	**GREL**	**Tele Nordeste Celular Particip** (CUSIP: 87924W109)	**TELN**
Grupo Financiero Banorte Sab D (CUSIPs: 400486106 / 059456400 / 059456509 / 40051M105 / 40052P107 / 400486304 / 40051M204)	**GRFI**	**Tele Norte Leste Participacoes** (CUSIPs: 87924Y105 / 879246106)	**TNLP**
Grupo Mex Desarrollo (CUSIPs: 40048G104 / 40048G203)	**GRMD**	**Tele Sudeste Celular Participa** (CUSIPs: 87943B102 / 879252104)	**TELS**
Grupo Televisa SAB (CUSIP: 40049J206)	**GRTS**	**Tele2 AB** (CUSIPs: 87952P109 / 87952P208)	**TELE**
Hannover Rueck SE (CUSIP: 410693105)	**HANN**	**Telecomunicacoes Brasileiras S** (CUSIP: 879287209)	**TECB**
Harmony Gold Mining Co Ltd (CUSIP: 413216300)	**HAGO**	**Telekom Austria AG** (CUSIP: 87943Q109)	**TELA**
Hbos Plc (CUSIP: 42205M106)	**HBOS**	**Telekomunikasi Indonesia Perse** (CUSIP: 715684106)	**TELI**
Hellenic Telecommunications OR (CUSIP: 423325307)	**HETE**	**Telemig Celular Participacoes** (CUSIP: 87944E105)	**TECP**
Henkel AG & Co KGAA (CUSIP: 42550U109 / 42550U208)	**HENK**	**Telesp Participacoes S.A.** (CUSIPs: 87952L108 / 87952K100)	**TESP**
Hillsdown Holdings Plc (CUSIP: 432586204)	**HILL**	**Telkom SA Soc Ltd** (CUSIP: 879603108)	**TELK**
HMS Hydraulic Machines & Syste (CUSIP: 40425X100)	**HMSH**	**Telstra Corp Ltd** (CUSIPs: 87969N204 / 87969N303 / 87969N105)	**TEST**
Hoechst Gmbh (CUSIP: 434390308)	**HOEC**	**Ternium Mexico SA De Cv** (CUSIP: 880890108)	**TERN**
Hot Telecommunication System I (CUSIP: 576561104)	**HOTT**	**Tesco Plc** (CUSIPs: 881575302 / 098561202)	**TESC**
Hydromet Corp Ltd (CUSIP: 449003102)	**HYDR**	**Teva Pharmaceutical Industries** (CUSIPs: 881624209 / 16361E108 / 50540H104)	**TEVA**
Igate Computer Systems Ltd (CUSIP: 703248203)	**IGAT**	**Tiger Brands Ltd** (CUSIPs: 88673M102 / 88673M201 / 886911106)	**TIGR**
Imperial Holdings Ltd (CUSIPs: 452833106 / 452833205)	**IMPE**	**TMK Pjsc** (CUSIP: 87260R300)	**TMKP**

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Incitec Pivot Ltd (CUSIP: 45326Y206)	**INCI**	**Total SA** (CUSIPs: 89151E109 / 716485206)	**TOTA**
Indosat Tbk Pt (CUSIP: 744383100)	**INDO**	**Transcom Worldwide SA** (CUSIPs: 893234104 / 893545103 / 893545202 / 894116102)	**TRAN**
Indusind Bank Ltd (CUSIP: 45579Q108)	**INDU**	**Trend Micro Inc/Japan** (CUSIP: 89486M206)	**TREN**
Industrias Bachoco Sab de CV (CUSIP: 456463108)	**INDB**	**Turkiye Garanti Bankasi AS** (CUSIPs: 900148305 / 900148701 / 900151101)	**TURK**
Industrie Natuzzi S.P.A. (CUSIP: 456478106)	**INDU**	**Tv Azteca Sab De Cv** (CUSIP: 901145102)	**TVAZ**
Informa Plc (CUSIPs: 093529204 / 45672B206 / 45672B305 / 90265U203 / 90969M101)	**INFO**	**UBS AG** (CUSIP: 90261R105)	**UBSA**
Intercontinental Hotels Group (CUSIPs: 45857P103 / 458573102 / 458573201)	**INTE**	**Ultrapar Participacoes SA** (CUSIP: 90400P101)	**ULTR**
International Power Ltd (CUSIP: 46018M104)	**INPO**	**Unibail-Rodamco SE** (CUSIP: 960224103)	**UNIB**
Intesa Sanpaolo Spa (CUSIPs: 05944F104 / 46115H107)	**INTS**	**Unified Energy System Oao** (CUSIPs: 904688108 / 904688405)	**UNIF**
Invensys Ltd (CUSIP: 461204109)	**INVE**	**Union Andina de Cementos SAA** (CUSIP: 904845104)	**UNIO**
Inversiones Aguas Metropolitan (CUSIP: 46128Q201)	**INAM**	**United Overseas Bank Ltd** (CUSIPs: 911271302/ 910903301)	**UNIT**
Itau Unibanco Holding SA (CUSIPs: 059602102 / 465562106 / 059602201 / 90458E107)	**ITAU**	**Usinas Siderurgicas de Minas G** (CUSIP: 917302408)	**USIN**
J Sainsbury Plc (CUSIP: 466249208)	**SAIN**	**Van Der Moolen Holding Nv** (CUSIP: 921020103)	**VAND**
Johnson Matthey Plc (CUSIPs: 479142309 / 479142408 / 479142507)	**JOHN**	**Veolia Environnement SA** (CUSIP: 92334N103)	**VEOL**
Julius Baer Group Ltd (CUSIP: 481369106)	**JULI**	**Vimpel-Communications Pjsc** (CUSIPs: 92719A106 / 92719A304)	**VIMP**
Kidde Plc (CUSIP: 493793103)	**KIDD**	**Vina Concha y Toro SA** (CUSIP: 927191106)	**VINA**
Kingfisher Plc (CUSIPs: 495724403 / 495724205 / 495724304)	**KING**	**Vivendi SA** (CUSIPs: 137041208 / 204390108 / 419312202 / 92851S105 / 92851S204)	**VIVE**
Kingsgate Consolidated Ltd (CUSIP: 496362104)	**KIGA**	**Vodafone Airtouch Plc** (CUSIP: 92857T107)	**VODA**
Klabin SA (CUSIPs: 45647P108 / 49834M100)	**KLAB**	**Vodafone Group Plc** (CUSIPs: 92857W308 / 698113107 / 87926R108 / 92857W209 / 92857W100 / 92858M101)	**VODG**
Komatsu Ltd (CUSIP: 500458401)	**KOMA**	**Wacoal Holdings Corp** (CUSIP: 930004205)	**WACO**
Komercni Banka AS (CUSIP: 500459409)	**KOME**	**Wal-mart de Mexico Sab De Cv** (CUSIP: 93114W107)	**WALM**

ADR/CUSIPs	Code (To be entered in PART III above)	ADR/CUSIPs	Code (To be entered in PART III above)
Koninklijke Ahold N.V. (CUSIPs: 500467303 / 500467402 / 500467AA3)	**KONI**	**Wavecom SA** (CUSIP: 943531103)	**WAVE**
Koor Industries Ltd (CUSIP: 500507108)	**KOOR**	**Westpac Banking Corporation** (CUSIPs: 789547106 / 961214301)	**WEST**
Kroton Educacional SA (CUSIP: 50106A402)	**KROT**	**Wind Hellas Telecommunications** (CUSIPs: 859823106 / 88706Q104)	**WIND**
Kumba Iron Ore Ltd (CUSIP: 50125N104)	**KUMB**	**WMC Limited** (CUSIPs: 928947100 / 92928R106)	**WMCL**
Ladbroke Group Inc (CUSIPs: 505727305 / 505730101)	**LADB**	**Woodside Petroleum Ltd** (CUSIP: 980228308)	**WOOD**
Lagardere Sca (CUSIP: 507069102)	**LAGA**	**Woolworths Holdings Ltd/South** (CUSIPs: 480209402 / 98088R109 / 98088R505)	**WOOL**
Lan airlines S.A. (CUSIP: 501723100)	**LANA**	**Zurich Insurance Group AG** (CUSIPs: 01959Q101 / 98982M107 / 989825104)	**ZURI**

RESOLVING MDLs

Judge Ann Montgomery
Aimee Wagstaff
Madeleine McDonough

Resolving MDLs

The following written materials may be accessed online at this link:

Fallon, Bellwether Trials in Multidistrict Litigation, 82 Tul. L. Rev. 2323 (2008) – https://www.jpml.uscourts.gov/articles

APPELLATE REVIEW OF MDLs

Judge Duane Benton
Gretchen Garrison
Sharon Nelles

CURRENT ISSUES IN MDLS AND CLASS ACTIONS

- APPELLATE ISSUES -

A. The JPML Is Not A Review Court.

See Multidistrict Litigation Manual § 3:10:

> "The Panel does not review the decisions of either the transferee court or the transferor court."

See *In re Data Gen. Corp. Antitrust Litig.*, 510 F. Supp. 1220, 1226 (J.P.M.L. 1979):

> "The Panel has neither the statutory authority nor the inclination to review decisions of district courts, whether they are transferor or transferee courts." *Id.* at 1266-67 (citing *In re Molinaro/Catanzaro Patent Litig.*, 402 F.Supp. 1404, 1406 (J.P.M.L. 1975); *In re Glenn W. Turner Enters. Litig.*, 368 F. Supp. 805, 806 (J.P.M.L. 1973)).

B. There Generally Is No Appeal From Panel Orders.

28 U.S.C. § 1407(e):

> "No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings."

1. Orders granting or denying a motion to transfer are not reviewable on appeal.

See Multidistrict Litigation Manual § 11:1:

> "Orders denying a motion to transfer are not reviewable by any court . . . Review of other decisions of the Panel is obtained only by extraordinary writ."

2. Mandamus is generally the exclusive route of review.

See In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180 (8th Cir. 1976):

"Orders of the Panel are reviewable only by extraordinary writ . . . Pfizer, of course, is free to request an order of remand from the Panel itself." *Id*. at 196 (citing J.P.M.L. R. 11(c) - (d) (1975)).

See In re Mortg. Elec. Registration Sys., Inc., 754 F.3d 772 (9th Cir. 2014):

"Mandamus is the exclusive mechanism for reviewing JPML orders . . . Appellants have not sought a writ of mandamus, and we dismiss for lack of jurisdiction their appeal of the JPML Order." *Id*. at 780.

3. Obtaining mandamus is tough but possible.

See In re Wilson, 451 F.3d 161 (3rd Cir. 2006):

Denying writ to compel JPML to dissolve the MDL proceedings and remand cases plaintiffs viewed as ready for remand.

See Illinois Cent. R. Co. v. Templar, 463 F.2d 972 (10th Cir. 1972):

Denying writ as to ruling on agency: "The agency issue is not one which may properly be raised or tested by mandamus . . . It is a typical legal question ruled on by the trial court. It is an important matter for the parties, but other remedies exist to provide an adequate review." *Id*. at 975-76.

***Compare** S. Ry. Co. v. Templar*, 463 F.2d 967 (10th Cir. 1972):

Reviewing order of MDL court imposing evidentiary sanction on all defendant carriers for failing to respond to discovery, including Southern Railway Co., which entered existing MDL upon transfer by JPML. Issued writ to correct abuse of discretion. *Id*. at 972.

"It is apparent that the transfer of these two cases to a single judge for "coordinated and consolidated pretrial proceedings" with many others does not mean that the parties in all the cases must all do the same thing, or all initiate discovery by deposition if they do not wish to do so. Each can make its own determinations in this regard . . . All the transferred cases cannot necessarily be squeezed into the same mold." *Id*. at 971.

C. Partial Remands Are Possible.

Note that the Panel "may separate any claim, cross-claim, counter-claim, or third-party claim at any time and remand it separately from the rest of the case." *Statutory structure—Termination and remand*, Guide to Multistate Litigation § 2:10 (citing 28 U.S.C.A. § 1407(a)).

D. Appeal From Transferee Or Transferor Decision?

1. General:

"When the transferee judge has made dispositive rulings on the common issues but that do not dispose completely of all of the cases, it is left to the discretion of the [JPML] in conjunction with the trial court judge to determine whether to issue partial final judgments under Fed. R. Civ. P. 54(b), which would require immediate appeal of the rulings in all the cases to the court of appeals for the transferee judge's circuit, or to remand the cases to their original courts for disposition of remaining claims, which would mean that the appeals of the dispositive rulings by the transferee judge would be to the transferor courts' circuits and thus determined by several different courts of appeals." *Statutory structure—Termination and remand*, Guide to Multistate Litigation § 2:10.

See Multidistrict Litigation, Federal Appellate Practice: Ninth Circuit § 6:4 (2018-2019 ed.): "Orders by the transferee district court should be appealed to the court of appeals for the regional circuit covering the transferee court, not the one covering the transferor court."

2. Example of analysis:

In re Food Lion, Inc., Fair Labor Standards Act "Effective Scheduling" Litig., 73 F.3d 528 (4th Cir. 1996):

> The MDL court dismissed claims of some plaintiffs on summary judgment. Upon the MDL court's suggestion of remand, the Panel remanded eight actions to respective transferor courts.
>
> One remanded case was completed and appeal was taken by a number of plaintiffs whose claims were dismissed in the MDL proceeding. Other plaintiffs asked their transferor courts for, and obtained, Rule 54(b) certifications for immediate appeal. These two appeals were consolidated with the first appeal.
>
> ***Held:*** "[W]e believe that permitting the transferor courts . . . to reconsider the transferee court's summary judgment orders will frustrate the aims of § 1407.9. The overriding purpose of the multidistrict procedure dictates that these claims be decided in the same appellate forum." *Id.* at 532.
>
> "The better practice in this case would have been for the dismissed parties to have requested, and for Judge Fox to have directed, the entry of Rule 54(b) final judgments prior to filing the suggestion of remand . . . Accordingly, transferee courts in this circuit *must*, at some point prior to filing a suggestion of remand, enter final judgment under Rule 54(b) with regard to any decision or order of that court that fully disposes of "fewer than all the claims or the rights and liabilities of fewer than all the parties." *Id*. at 533.

Issued writ of mandamus to the JPML directing re-transfer of the dismissed cases, and ordered the MDL court "to enter final judgment as to all such claims, pursuant to Fed.R.Civ.P. 54(b)" and that "any appeals taken pursuant to such certifications will be heard in the Court of Appeals for the Fourth Circuit." *Id.* at 533.

3. ***Compare*** *FedEx Ground Package Sys., Inc. v. U.S. Judicial Panel on Multidistrict Litig.,* 662 F.3d 887 (7th Cir. 2011):

In August, the MDL court granted a bellwether summary judgment to defendant on all state-law claims in the Kansas case.

In December, the court granted summary judgment to defendant on claims in most of the other pending cases, while granting summary judgment to plaintiffs on some claims in a other cases.

These decisions effectively concluded the coordinated proceedings. "It was time for appeal in the closed cases and remand in the cases that still had open claims that had not been resolved by the summary judgment motions." *Id.* at 889

Problem Identified**:** The summary judgment decisions resolved all claims in twenty-two of the still-pending MDL cases, but other claims remained in the other twelve pending MDL cases. Plaintiffs appealed from the decision in the twenty-two cases where the transferee court entered final judgments, all appeals going to the Seventh Circuit. "There is no final, appealable judgment in the remaining twelve cases, and there's the rub." *Id.* at 889.[1]

Options**:** (1) Ask MDL court to issue "partial final judgments" under Rule 54(b) and say plaintiffs must immediately appeal therefrom to the Seventh Circuit [which still chops up those persons' appeals]; (2) allow transfer of cases with remaining claims back to original transferor courts for further proceedings, including possible appeals after final judgment [which entails appeals to multiple circuits]. *Id.* at 890.

Held**:** Denied defendant's mandamus petition, holding that which route to follow was in the JPML's discretion. *See id.* at 891 ("The choice between these two methods of case management is an archetype for a discretionary judgment, and the transferee court and the JPML are in the best position to make that judgment.").

[1] *See Gelboim v. Bank of Am. Corp*., 135 S. Ct. 897 (2015), discussed *infra*.

E. Final Judgment Rule

28 U.S.C.A. § 1291:

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from *all final decisions* of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court . . . ." (emphasis added).

1. Cases in an MDL retain their identity; final judgment terminating one case in its entirety is appealable.

"Cases transferred and consolidated by the Judicial Panel on Multidistrict Litigation remain separate for appeal purposes because 28 U.S.C. § 1407 only authorizes consolidation for pretrial purposes." D. Knibb, Do you need a 54(b) certification in consolidated cases?, Fed. Ct. App. Manual § 3:3 (6th ed.) (citing *Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992)).

Generally, consolidation "does not 'meld [one] action and others in the MDL into a single unit.'" *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig*., 835 F.3d 1195, 1208 (10th Cir. 2016) (quoting *Gelboim v. Bank of Am. Corp*., 574 U.S. – –, 135 S.Ct. 897, 905 190 L.Ed.2d 789 (2015)).

See Hall v. Hall, 138 S. Ct. 1118, 1122 (2018):

> "Three Terms ago, we held that one of multiple cases consolidated for multidistrict litigation under 28 U.S.C. § 1407 is immediately appealable upon an order disposing of that case, regardless of whether any of the others remain pending." *Id*. at 1122 (citing *Gelboim*, 135 S.Ct. 897).

\ *See Gelboim v. Bank of Am. Corp*., 135 S. Ct. 897 (2015):

> The MDL court dismissed one of several complaints (Gelboim-Zacher complaint), alleging (solely) Sherman Act §1 violations in its entirety.
>
> The Second Circuit dismissed the Gelboim-Zacher appeal for lack of appellate jurisdiction because the "orde[r] appealed from did not dispose of all claims in the consolidated action." *Id.* at 904.
>
> Gelboim and Zacher argued that the order dismissing their case removed them from the consolidated proceeding, thereby triggering their right to appeal under § 1291. Respondents urged that consolidated cases proceed as one unit for the duration of the consolidation.
>
> ***Held*:** "[T]he Gelboim-Zacher complaint retained its independent status for purposes of appellate jurisdiction under § 1291. Petitioners' right to appeal ripened when the District Court dismissed their case, not upon eventual

completion of multidistrict proceedings in all of the consolidated cases." *Id*. at 902.

"Cases consolidated for MDL pretrial proceedings ordinarily retain their separate identities, so an order disposing of one of the discrete cases in its entirety should qualify under § 1291 as an appealable final decision." *Id*. at 904.

"When the transferee court overseeing pretrial proceedings in multidistrict litigation grants a defendant's dispositive motion 'on all issues in some transferred cases, [those cases] become immediately appealable . . . while cases where other issues remain would not be appealable at that time.'"). *Id*. at 905-06 (quoting D. Herr, Multidistrict Litigation Manual § 9:21, p. 312 (2014)).

2. Dismissal of fewer than all claims in a master complaint may not be final.

"It is important to understand the nature of MDL transfer. Cases the Panel transfers are not consolidated in the transferee court, and are only centralized for pretrial proceedings . . . Filing a consolidated complaint, however, creates something of a hybrid proceeding." David Herr and Steve Baicker-McKee, *Appealability - Multidistrict Litigation - Finality of Dismissal Where Master Complaint Filed*, 28 No. 12 Federal Litigator 15 (Dec. 2013).

"Like snowflakes, no two MDLs are exactly alike and, no doubt, whether to require the filing of a consolidated complaint and, if so, whether to treat such a complaint as 'administrative' or 'superseding' will depend on the particulars of a given MDL." *In re General Motors LLC Ignition Switch Litig*., 2015 WL 3619584, at *8 (S.D.N.Y. June 10, 2015) (citation omitted).

"Parties may elect to file a 'master complaint' and a corresponding 'consolidated answer,' which supersede prior individual pleadings. In such a case, the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings. *Gelboim*, 135 S. Ct. at 590 (citing *In re Refrigerant Compressors Antitrust Litig*., 731 F.3d 586, 590-92 (6th Cir. 2013)). "No merger occurs, however, when 'the master complaint is not meant to be a pleading with legal effect but only an administrative summary of the claims brought by all the plaintiffs.'" *Id*. at 590 n.3; *see also In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig*., 835 F.3d 1195, 1208 n.4 (10th Cir. 2016) (no merger "if these pleadings are not meant to have legal effect but serve only administrative convenience by summarizing the claims of all plaintiffs.").

See In re Refrigerant Compressors Antitrust Litig., 731 F.3d 586, 590 (6th Cir. 2013) – viewed master complaint as substantive and held that dismissal of some but not all claims in master complaint was not a final order:

"Because each transferred case comes with its own pleadings, a multidistrict transfer threatens to submerge the transferee district court in paper. A

common solution to this difficulty, one adopted in this case, is for the plaintiffs to assemble a 'master complaint' that reflects all of their allegations. In many cases, the master complaint is not meant to be a pleading with legal effect but only an administrative summary of the claims brought by all the plaintiffs. When plaintiffs file a master complaint of this variety, each individual complaint retains its separate legal existence." *Id*. at 590.[2]

"But, in other cases, the court and the parties go further. They treat the master complaint as an operative pleading that supersedes the individual complaints. The master complaint, not the individual complaints, is served on defendants. The master complaint is used to calculate deadlines for defendants to file their answers. And the master complaint is examined for its sufficiency when the defendants file a motion to dismiss." *Id.* at 590-91.[3]

"Plaintiffs often file something labeled a 'master complaint' without saying whether they mean to file an operative pleading or an administrative summary, prompting satellite litigation about the status of the documents submitted to the court." *Id*. at 591 (citing *Nuvaring*, 2009 WL 2425391, at *1-2; *Propulsid*, 208 F.R.D. at 140-42).

"[T]he master complaint filed in this case was an operative pleading – a consolidated complaint that is – that superseded any prior individual complaints." *Id*. at 591.

> ***Note*:** a consolidated complaint does not "merge[]s the plaintiffs' actions *permanently*. Our decision is limited to the duration of the pretrial proceedings; we do not question the principle that, when the pretrial phase ends and cases not yet terminated return to their originating courts for trial, the plaintiffs' actions resume their separate identities." *Id*. at 592.

***Held*:** "[I]f plaintiffs file a consolidated complaint after a multidistrict transfer, an order disposing of some of the claims or parties in the

---

[2] *See In re Nuvaring Prods. Liab. Litig*., 2009 WL 2425391, at *2 (E.D. Mo. Aug. 6, 2009) ("[T]he filing of the master consolidated complaint in this action was simply meant to be an administrative tool to place in one document all of the claims at issue in this litigation. Neither Plaintiffs . . . nor I . . . contemplated that Rule 12(b) motion practice would be pursued . . . against the master complaint."); *In re Propulsid Prods. Liab. Litig*., 208 F.R.D. 133, 142 (E.D. La. 2002) ("[T]he master complaint [filed in this case] should not be given the same effect as an ordinary complaint. Instead, it should be considered as only an administrative device to aid efficiency and economy.").

[3] *See In re Katrina Canal Breaches Litig*., 309 F. App'x 836, 838 (5th Cir.2009) ("[The plaintiff's] individual complaint was superseded, and ... any arguments or claims that appear in [the] individual complaint but not in the Master Complaint were waived."); *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig*., 2012 WL 3582708, at *4 (N.D. Ill. Aug. 16, 2012) ("MDL courts have entertained motions to dismiss 'master' or 'consolidated' complaints . . . ."); Diana E. Murphy, Unified and Consolidated Complaints in Multidistrict Litigation, 132 F.R.D. 597 (1991).

consolidated complaint is non-final (barring a Rule 54(b) judgment) and non-appealable (barring a § 1292 certification). *Id.* at 590.

> ***Note*:** "If plaintiffs file a consolidated amended complaint in the MDL court, dismissal of their claim could be final, but only if all plaintiffs joined in that amended complaint." D. Knibb, *Do you need a 54(b) certification in consolidated cases?*, Fed. Ct. App. Manual § 3:3 (6th ed.).

3. Attorneys' fee orders may be for various purposes and interim or final.

a) Example: Interim fee awards

See In re Diet Drugs Prods. Liab. Litig., 401 F.3d 143, 156 (3d Cir.2005): District court awarded fees to MDL coordinating counsel, allowing further request for a final award in the future.

> *Held*: Award was not a final order but more "an interim award of attorneys' fees ... [, which] foresees further and additional action by the district court, thus continuing, but not concluding, the fee litigation." Id. at 156-57.

b) Example: Fee assessments

See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 617 F. App'x 136 (3d Cir. 2015):

> Distinguished *In re Diet Drugs*, 401 F.3d 156, from order requiring participating counsel to contribute to litigation expense fund upon settlement. District court definitively ruled upon which cases were subject to assessment and stated how much each settlement was required to contribute. "[B]ecause [counsel's] payment obligation has been reduced to a definite amount, we conclude that the District Court's fee assessment is an appealable, final order, and we have jurisdiction under 28 U.S.C. § 1291." *Id*. at 140-41.

c) Example: Common benefit award issues

See Boeing Co. v. Van Gemert, 444 U.S. 472 (1980):

> Allowed defendant's appeal from order setting amount of damages and directing that fees be assessed against the shares of all class members whether or not filing a claim. While defendant had no interest in further litigation "between the class and its lawyers over the amount of the fees ultimately awarded," the judgment was final respecting portion of order in which defendant retained an interest, *i.e.*, whether fees could be assessed against the entire fund or only the portion actually claimed. *Id.* at 482 n.7.

d) Example: Common fund award versus allocation

See In re Diet Drugs, 582 F.3d 524 (3rd Cir. 2009):

> Held that aggregate fee award is final although allocation to various counsel pending. *See id*. at 537 n.30 ("While PTO 7763(A) left open issues of allocation and redistribution, it bestowed a definitive award on Class Counsel. It is thus a final decision under our jurisprudence.") (citing *United Auto. Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr*., 501 F.3d 283, 286 (3d Cir.2007) ("Because the District Court's order . . . reduced the fee award to a definite amount, it was a final decision."); *Interfaith Cmty. Org. v. Honeywell Intern., Inc*., 426 F.3d 694, 701 (3d Cir.2005) (Honeywell timely appealed "f[inding] that ICO was entitled to $4,530,327.00 in [attorneys'] fees")).

4. Class certification decisions generally are not final.

See Wright, Miller, et al., Finality – Orders Prior To Trial – Class and Derivative Actions, 15B Fed. Prac. & Proc. Juris. § 3914.19 (2d ed.) ("Orders granting certification are no more final than orders denying certification."); *Vallario v. Vandehey*, 554 F.3d 1259, 1261 (10th Cir. 2009) ("No appeal as of right exists from a district court's class certification order unless that order dismisses the action or renders a decision on the merits.").

F. It Is Possible To Use Rule 54(b) To Obtain Judgment On Fewer Than All Claims.

Federal Rule of Civil Procedure 54(b):

> "Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

See Gelboim v. Bank of Am. Corp., 135 S. Ct. 897 (2015):

> After dismissing the Gelboim-Zacher Sherman Act claims, the MDL court granted Rule 54(b) certifications to other plaintiffs to authorize appeal from dismissal of their antitrust claims while different (federal and state) claims remained pending. *Id*. at 904. After the Second Circuit dismissed the Gelboim-Zacher appeal, the district court withdrew its Rule 54(b) certifications.

> "The banks express concern that plaintiffs with the weakest cases may be positioned to appeal because their complaint states only one claim, while plaintiffs with stronger cases will be unable to appeal simultaneously because they have other claims still pending . . . Rule 54(b) attends to this concern. District courts may grant certifications under that Rule, thereby enabling plaintiffs in actions that have not been dismissed in their entirety to pursue immediate appellate review." *Id.* at 906.
>
> "While Rule 54(b) can aid parties with multiple-claim complaints . . . the rule, properly read, is of no avail to Gelboim and Zacher. Rule 54(b) addresses orders finally adjudicating fewer than all claims presented in a civil action complaint. It "does not apply to a single claim action nor to a multiple claims action in which all of the claims have been finally decided . . . In short, Rule 54(b) is designed to permit acceleration of appeals in multiple-claim cases, not to retard appeals in single-claim cases." *Id.* at 906 (internal quotation and citation omitted).

BUT: The Supreme Court also has instructed that "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980). *See, e.g., Patriot Mfg. LLC v. Hartwig, Inc.*, 2014 WL 4538059, at *1 (D. Kan. Sept. 11, 2014) ("The Court should be reluctant to enter a Rule 54(b) order because the purpose of the rule is limited: 'to provide a recourse for litigants when dismissal of less than all their claims will create undue hardships.'") (quoting *Okla. Turnpike Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir.2001)).

See Clos v. Corr. Corp. of Am., 597 F.3d 925, 926 (8th Cir. 2010):

> Found that district court abused its discretion by entering final judgment on partial summary judgment order without reasons adequate under Rule 54(b) and dismissing for lack of appellate jurisdiction.

See Williams v. County of Dakota, Neb., 687 F.3d 1064 (8th Cir. 2012):

> In deciding whether to grant a Rule 54(b) motion, the district court "must first determine that it is dealing with a final judgment . . . in the sense that it is an ultimate disposition of an individual claim" and second, "[i]n determining that there is no just reason for delay, . . . must consider both the equities of the situation and judicial administrative interests, particularly the interest in preventing piecemeal appeals." Id. at 1067-68 (internal quotations and citation omitted).
>
> "Certification should be granted only if there exists 'some danger of hardship or injustice through delay which would be alleviated by immediate appeal.'" *Id.* at 1067-68 (quoting *Hayden v. McDonald*, 719 F.2d 266, 268 (8th Cir.1983)).

See also, e.g. (in MDLs):

Rollins v. Mortgage Elec. Registration Sys., Inc., 737 F.3d 1250 (9th Cir. 2013) (MDL court's failure to expressly determine that there was no just reason to delay made it unclear whether the MDL court intended that order to be appealable, requiring limited remand for purposes of making that determination).

Franklin v. Dana Holding Corp., 2016 WL 125357, at *2 (N.D. Ala. Jan. 12, 2016) (denying motion based on inadequacy of analysis in motion).

In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig., 859 F.3d 178, 187–88 (2d Cir. 2017) (dismissing appeal of dismissed claims not mentioned in Rule 54(d) order); ***compare*** *Meadaa v. K.A.P. Enterprises, L.L.C.*, 756 F.3d 875, 879 (5th Cir. 2014) ("Plaintiffs argue that this court lacks jurisdiction to review the four orders because 'Rule 54(b) only grants an appellate court jurisdiction to review final judgments that are explicitly designated as such under the Rule.' This is a misstatement of the law.").

Counsel Fin. Services LLC v. Wood, 2012 WL 13029403, at *2 (N.D. Ala. Oct. 18, 2012) (denying motion where "certification at this stage would risk multiplying the amount of litigation by prompting an appeal during the pendency of the remaining aspects of the case and would exacerbate the difficulties associated with the heavy docket our court of appeals is experiencing.").

G. Interlocutory Appeals

1. 28 U.S.C. §1292(b):

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

"The manifest purpose of § 1292(b) is to support appeal from orders that cannot otherwise be reviewed by final-judgment appeal." Edward H. Cooper, Permissive Interlocutory Appeals – Relation to Other Appeal Statutes, 16 Fed. Prac. & Proc. Juris. § 3929.1 (3d ed.)

Section 1292 entails a two-step process: "(1) if the district-court judge certifies that the interlocutory order involves "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal ... may materially advance the ultimate termination of the litigation" and (2) if the court of appeals "permit[s] [the] appeal to be taken." *Anderson Living Tr. v. WPX Energy Prod., LLC*, 904 F.3d 1135, 1139 (10th Cir. 2018).

See United States v. Missouri, 2016 WL 783067 (E.D. Mo. Feb. 29, 2016):

> It is "the policy of the courts to discourage piece-meal appeals because most often such appeals result in additional burdens on both the court and the litigants." Section 1292(b) "should and will be used only in exceptional cases where a decision on appeal may avoid protracted and expensive litigation. . . ." *Id*. at *1.
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> "The question for appeal must be a question of law as opposed to a question of fact or matter for the court's discretion." *Id*. at *2.
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> "Substantial grounds for a difference of opinion exists when: "(1) the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions"; (2) the question is one of first impression; (3) a difference of opinion exists within the controlling circuit; or (4) the circuits are split on the question." *Id*. at *2.
>
> ***Held*:** denied motion as, among other things, it would not materially advance ultimate termination of the case: "If Ameren's motion for interlocutory appeal is granted, and my order denying full summary judgment is reversed, the case would reach termination at appeal. However, if my decision is affirmed, granting the interlocutory appeal will only have delayed the ultimate resolution of this case." *Id*. at *3.

Compare *Fox v. TransAm Leasing, Inc*., 2015 WL 4243464, at *3 (D. Kan. July 13, 2015) (granting motion).

See also (in MDLs):

In re TD Bank, N.A. Debit Card Overdraft Fee Litig., 2016 WL 7320864, at *5 (D.S.C. July 18, 2016) ("Early resolution of Plaintiff Robinson's usury theory on appeal would not dispose of her Regulation E claim, nor would it dispose of the other claims remaining in MDL 2613. The first requirement of § 1292(b) certification is not met.").

In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., 2010 WL 286428, at *2 (W.D. Mo. Jan. 19, 2010) (denying request for interlocutory appeal)

2. Class Actions - Federal Rule of Civil Procedure 23(f):

> "Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."

Whether to allow immediate interlocutory appeal of a class certification decision is committed to the discretion of the Court of Appeals. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1710 (2017).

An order striking class allegations, which is "'functional[ly] equivalent' to an order denying class certification" may be appealable under Rule 23(f). *See id.* at 1711 n.7 (quoting *Scott v. Family Dollar Stores, Inc*., 733 F.3d 105, 110-11, n. 2 (4th Cir. 2013)). However, voluntary dismissal after an adverse certification decision was held in *Microsoft* to not create appeal as of right. 137 S. Ct. at 1711-15; *see also Anderson Living Tr. v. WPX Energy Prod., LLC*, 904 F.3d 1135, 1137 (10th Cir. 2018) ("Voluntarily dismissing the Trusts' individual claims with prejudice after settling them doesn't convert the class-certification denial . . . into a final decision under 28 U.S.C. § 1291."). ***Compare*** *Brown v. Cinemark USA, Inc*., 876 F.3d 1199, 1201 (9th Cir. 2017) (rejecting argument for dismissal of appeal of order denying class certification of certain claims and dismissing others after settlement of remaining claims: "Unlike the plaintiffs in [*Microsoft v*.] *Baker*, [plaintiffs] continued litigating their remaining individual claims after the district court denied class certification . . . No facts suggest that [plaintiffs] engaged in sham tactics to achieve an appealable final judgment.").

To obtain interlocutory review, the petitioner must seek it within 14 days of the order that grants or denies certification. *In re Wholesale Grocery Products Antitrust Litig*., 849 F.3d 761, 766 (8th Cir. 2017); *see also Carpenter v. Boeing Co*., 456 F.3d 1183, 1191 (10th Cir. 2006) ("An order that leaves class-action status unchanged from what was determined by a prior order is not an order 'granting or denying class action certification.' Of course, when the district court accepts a suggestion and the certification decision is changed, the new order, to the extent it modifies the prior order, is indeed such an order and an interlocutory appeal under Rule 23(f) is permitted.").

"[T]he grant of a petition for interlocutory review constitutes 'the exception rather than the rule.'" *Vallario v. Vandehey*, 554 F.3d 1259, 1262 (10th Cir. 2009) (citations omitted); *see also id*. at 1263-64 (discussing standards for determining when review may be granted, taking care to explain: "The limits of human foresight simply preclude the formulation of a rule that would clearly delineate every instance in which our interlocutory review of a class certification order is appropriate.")

H. Review Of Orders From Courts Outside Circuit After Remand?

Example: *Kalaa v. Matson Navigation Co., Inc*., 875 F.3d 297 (6th Cir. 2017):

> Plaintiffs began filing asbestos-liability suits in the Northern District of Ohio, which ruled that it lacked personal jurisdiction over certain defendants. Cases eventually were consolidated into multidistrict litigation in the Eastern District of Pennsylvania. That court also held that N.D. of Ohio lacked personal jurisdiction over relevant defendants and dismissed thousands of parties.
>
> Plaintiffs' cases were remanded back to the N.D. of Ohio, which completely disposed of the cases by dismissing remaining defendants. Plaintiffs appealed from that order as well as from the E.D. of Pennsylvania's orders dismissing defendants for lack of personal jurisdiction.
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> "28 U.S.C. § 1294(1) provides for appellate jurisdiction over 'appeals from reviewable decisions" of a U.S. district court in the "court of appeals for the circuit embracing the district.' Pursuant to § 1294(1), we are usually asked to review judgments arising entirely out of a district court within the Sixth Circuit's territorial jurisdiction. This case presents an odd scenario, which asks us to review non-final orders issued by the MDL transferee court in the E.D. of Pennsylvania, outside the Sixth Circuit's territorial jurisdiction. Because the MDL court's orders became reviewable only after plaintiff-appellants' cases reached a final judgment in the N.D. of Ohio, however, we have appellate jurisdiction over the orders." *Id*. at 304.

I. Consolidation Of Appeals

Federal Rule Appellate Procedure 3(b):

> "(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.
> (2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals."

Notes:

1. The Court may decide on its own to consolidate. If there are meritorious reasons against it, consider a motion to de-consolidate.

2. Each appeal must be within the Court's jurisdiction.
   See United States v. State of Wash., 573 F.2d 1121 (9th Cir. 1978):
   > "Consolidation . . . may be ordered where the court in its discretion deems it appropriate and in the interests of justice, but each of the matters to be consolidated must be within the jurisdiction of the court." *Id*. at 1123.

3. Generally, consolidated (as opposed to joint) appeals retain their own identity.

See Fed. R. App. Proc. 3, Committee Comment (1998) ("In consolidated appeals the separate appeals do not merge into one. The parties do not proceed as a single appellant."); *Washington Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 4 (D.C. Cir. 2015) ("Although Rodberg's appeals are consolidated, we analyze them separately."); *United States v. Tippett*, 975 F.2d 713, 718-19 (10th Cir. 1992) ("the appeals were not merged by virtue of their consolidation").

4. Practical Considerations:

a) Consolidation may make sense from an efficiency standpoint. Also, it may be possible to consolidate appeals from more than one ruling.

b) You may well be limited not only to a single brief but one person for argument. *See, e.g.*, Tenth Circuit Local Rule 31.3 ("In civil cases involving more than one appellant or appellee, including consolidated cases, all parties on a side (including intervenors) must – to the extent practicable – file a single brief. Where, however, multiple response briefs are filed pursuant to 10th Cir. R. 31.3(B), the appellant may file only one reply except upon motion to the court seeking an exemption."); Tenth Circuit Local Rule 34.1(B) ("Cases that have been consolidated for briefing purposes will be treated as one case for oral argument. The court disfavors divided arguments on behalf of a single party or multiple parties with the same interests.").

J. Appealing Bellwether Trials

1. Bellwether trials may frame issues for future discovery, trials, and settlement discussions.

2. Mandamus may be difficult to obtain.

See, e.g., *Greer v. DePuy Orthopaedics, Inc.* 870 F.3d 345 (5th Cir. 2017):

Describing series of bellwether cases and stating that MDL court erred in treating *Lexicon* waiver as global as opposed to limited to first bellwether. Recognized that mandamus relief is "particularly appropriate" where an issue's importance extends "beyond the immediate case," *id*. at 352, but denied mandamus: "We hold that petitioners have the usual and adequate remedy of ordinary appeal. In fact, they have taken advantage of that remedy by appealing the judgment in the third bellwether trial on personal-jurisdiction grounds." *Id*. at 353.