

## PROCEDURAL GUIDANCE FOR CLASS ACTION SETTLEMENTS

The following guidance is offered for parties submitting class action settlements for preliminary and final approval. Failure to address all of the issues discussed below may result in unnecessary delay, or even failure, of approval. Parties should consider this guidance during settlement negotiations and when drafting settlement agreements. Parties should also consider the suggested language below when drafting class notices.

### Preliminary Approval

- 1) INFORMATION ABOUT THE SETTLEMENT – The motion for preliminary approval should address the following information:
  - a. If a litigation class has not been certified, any difference between the settlement class and the class proposed in the complaint.
  - b. If a litigation class has been certified, any differences between the settlement class and the class certified.
  - c. Any differences between the claims to be released and the claims set out in the operative complaint.
  - d. The likely recovery per plaintiff under the terms of the settlement and the potential recovery if plaintiffs were to prevail on each of their claims.
  - e. The fairness of the allocation of the settlement fund among class members.
- 2) SETTLEMENT ADMINISTRATION – The parties should identify their proposed settlement administrator in their motion for preliminary approval. The parties should also address the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement and who will pay the costs. The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing. In general, unused funds allocated to settlement administration fees should be distributed to the class pro rata or awarded to a cy pres recipient.
- 3) NOTICE – The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members. The notice should include the following information: (1) contact information for class counsel to answer questions; (2) the address for a website, maintained by the claims administrator or class counsel, that has links to the notice and other important documents in the case; (3) instructions on how to access the case docket via PACER or in person at any of the court's locations. The notice should state the date of the final approval hearing and clearly state that the date may change without further notice to the class. Class members should be advised to check the settlement website or the Court's PACER site to confirm that the date has not been changed. The notice distribution plan should be an effective one.

The envelope should be designed to enhance the chance that it will be opened. Notice should be supplemented by email notice if feasible.

Below is suggested language for inclusion in class notices:

“This notice summarizes the proposed settlement. For the precise terms and conditions of the settlement, please see the settlement agreement available at [www.\\_\\_\\_\\_\\_.com](http://www._____.com), by contacting class counsel at \_\_\_\_\_, by accessing the Court docket in this case through the Court’s Public Access to Court Electronic Records (PACER) system at <https://ecf.cand.uscourts.gov>, or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, [insert appropriate Court location here], between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.

PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK’S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.

- 4) **EXCLUSIONS** – The notice should instruct class members who wish to exclude themselves from the settlement to send a letter only to the settlement administrator, setting forth their name and a statement that they request exclusion from the class and do not wish to participate in the settlement. It should not require extraneous information not needed to effect an exclusion.
- 5) **OBJECTIONS** – The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filing. The notice should make clear that the court can only approve or deny the settlement, not change the terms of the settlement.

Below is suggested language for inclusion in class notices:

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

You may object to the proposed settlement in writing. You may also appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for paying that attorney. All written objections and supporting papers must (a) clearly identify the case name and number ( \_\_\_\_\_ v. \_\_\_\_\_, Case Number \_\_\_\_\_), (b) be submitted to the Court either by mailing them to Class Action Clerk, United States District Court for the Northern District of California, [insert appropriate

Court location here], or by filing them in person at any location of the United States District Court for the Northern District of California, and (c) be filed or postmarked on or before \_\_\_\_\_.”

- 6) ATTORNEYS’ FEES – The court will not approve a request for attorneys’ fees until the final approval hearing. However, the parties are encouraged to include information about the awards they intend to request, including information about the relationship between the amount of the award and the amount of common fund and counsel’s lodestar calculation. In general, unused funds allocated to attorneys’ fees, should be distributed to the class pro rata or awarded to a cy pres recipient.
- 7) INCENTIVE AWARDS – The court will not approve a request for incentive awards until the final approval hearing. However, the parties are encouraged to include information about the awards they intend to request as well as the evidence supporting the awards. The parties should ensure that neither the size nor any conditions placed on the incentive awards undermine the adequacy of the class representatives. See, e.g., Radcliffe v. Experian Info. Solutions, 715 F.3d 1157 (9th Cir. 2013). In general, unused funds allocated to incentive awards should be distributed to the class pro rata or awarded to a cy pres recipient.
- 8) CY PRES AWARDEES – The parties should address their chosen cy pres awardees, if any, and how those awardees are related to the subject matter of the lawsuit and the class members, including their location. See, e.g., Dennis v. Kellogg Co., 697 F.3d 858 (9th Cir. 2012); Nachsin v. AOL, LLC, 663 F.3d 1064 (9th Cir. 2011). In general, unused funds allocated to attorneys’ fees, incentive awards, settlement administration fees and payments to class members should be distributed to the class pro rata or awarded to a cy pres recipient.
- 9) TIMELINE – When proposing dates for notice, objections, motions for attorneys’ fees and final approval, the parties must ensure that the motion for attorneys’ fees is filed at least fourteen days before the deadline for objecting to the settlement. See In re Mercury Interactive Corp. Securities Litigation, 618 F.3d 988 (9th Cir. 2010).
- 10) CLASS ACTION FAIRNESS ACT (CAFA) – The parties should address whether CAFA notice is required and, if so, when it will be given. In addition the parties should address substantive compliance with CAFA. For example, if the settlement is a coupon settlement, the parties should explain how the settlement complies with 28 U.S.C. § 1712.
- 11) ELECTRONIC VERSIONS – Electronic versions (Microsoft Word or Word Perfect) of all proposed orders and notices should be submitted to the presiding judge’s Proposed Order (PO) email address at the time they are filed.

## **Final Approval**

- 1) **CLASS MEMBERS' RESPONSE** – The motion for final approval should include information about the number of undeliverable class notices and claim packets, the number of class members who submitted valid claims, the number of class members who elected to opt out of the class and the number of class members who objected to the settlement. In addition, the motion for final approval should respond to any objections.
- 2) **ATTORNEYS' FEES** – All requests for approval of attorneys' fees awards must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. Declarations of class counsel as to hours spent on various categories of activities related to the action, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. It is generally not necessary to submit copies of billing records themselves with the moving papers, but counsel should be prepared to submit such records at the court's order.

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

- 3) **INCENTIVE AWARDS** – All requests for incentive awards must be supported by admissible evidence of the proposed awardees' involvement in the case (generally a declaration by the class representative) and other justifications for the awards.
- 4) **ELECTRONIC VERSIONS** – Electronic versions (Microsoft Word or Word Perfect) of all proposed orders and judgments should be submitted to the presiding judge's Proposed Order (PO) email address at the time they are filed.