COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

Re: Proposed Amendments to FRCP 23(b)(3)

November 7, 2023

DRI respectfully asks the Advisory Committee on Civil Rules to consider the following submission in support of the amendment to Rule 23(b)(3) proposed by the Lawyers for Civil Justice (LCJ) on September 2, 2022 (22-CV-L), and supplemented on March 23, 2023 (23-CV-J).

WHO WE ARE

The Center for Law and Public Policy ("the Center") is part of DRI, Inc. ("DRI"), the leading organization of civil defense attorneys and in-house counsel. Founded by DRI in 2012, the Center is the national policy arm of DRI. It acts as a think tank and serves as the public face of DRI. The Center's three primary committees—Amicus, Public Policy, and Legislation and Rules—are comprised of numerous task forces and working groups. These subgroups publish scholarly works on a variety of issues, and they undertake in-depth studies of a range of topics such as class actions, climate change litigation, data privacy, MSP, and changes to the Federal

Rules of Civil Procedure and the Federal Rules of Evidence. Since its inception, the Center has been the voice of the civil defense bar on substantive issues of national importance.

RULE 23 SHOULD EXPRESSLY ALLOW COURTS TO CONSIDER NONJUDICIAL REMEDIES IN THE SUPERIORITY ANALYSIS

It does not serve the judicial efficiency goals of Federal Rule of Civil Procedure 23 for courts to blind themselves to superior available nonjudicial remedies in deciding whether to certify a class. In fact, such an approach contradicts the purpose of the rules, which is to assure speedy, just, and inexpensive litigation. If a primary goal of Rule 23 is to reduce the burden on federal courts that would result from resolving the actual or potential claims of large numbers of people individually, then Rule 23 can and should encourage companies to spare courts and consumers the need to litigate at all by offering generous voluntary recalls and repairs, voluntary warranty extensions, voluntary product replacements, voluntary buybacks, remedies and regulatory settlements, and the like.

Rule 23(b)(3)'s current ambiguity needlessly stifles this incentive: many courts have interpreted the literal language of the current superiority rule as prohibiting consideration of available extrajudicial remedies in determining whether a class action is the superior mechanism of resolution. Telling companies that their nonjudicial remediation efforts, no matter how generous, may not provide full (or any) protection even from tag-along class actions largely designed to extract the same relief plus attorneys' fees for class counsel discourages precisely what the rule should be encouraging (i.e., resolution without the need or litigation).

Amending the superiority rule to empower courts expressly to consider nonjudicial remedies does not mean that any voluntary relief effort or alternative resolution mechanism will automatically defeat class certification. It would simply mean that courts would have the express freedom within the rule to consider voluntary relief efforts and other ways of resolving disputes in its determination of whether class treatment is superior. A simple fix of what some courts have perceived as a linguistic barrier in the rule that blocks consideration of nonjudicial remedies would not open a Pandora's Box for other changes to the Rule, nor should it. The issue here is an isolated linguistic barrier in the current rule that—based on the Committee Notes at the time, as LCJ explains in its submissions—appears never to have been intended by rulemakers to be such a barrier. Removing this unintended artifact of draftsmanship to eliminate an ambiguity that has split the courts should be easy and noncontroversial. The objective is not to make wholesale changes to the rule, nor to create any absolute bar to class certification, but simply to have the rule be clear that courts do indeed have the option *to at least consider* extrajudicial remedies that are already available to would-be class members before finding class treatment superior.

In a letter to the Committee dated September 2, 2022 (22-CV-L), LCJ has proposed a simple, straightforward amendment to Rule 23 that would achieve the right balance: it would *empower* the court to weigh whether the potential benefits of claimed additional relief through class adjudication are sufficiently superior to the other procedural and substantive remedies that are otherwise available to putative class members, such that the considerable private and judicial burdens of class adjudication are warranted. The effect would be positive for consumers and

defendants alike. Companies that offer the most effective and efficient nonjudicial alternatives would have at least the *chance* to avoid the notice costs and attorneys' fees associated with unnecessary and unproductive "tag-along" class actions. Companies that refuse or skimp on voluntary relief when a problem is discovered would not. Having more relief available sooner and without awaiting the results of litigation is certainly better for consumers. And of course, even if a court finds class certification is not warranted in any particular case after considering all other forms of available remedies, individual consumers who find the voluntary or other nonjudicial relief insufficient would still have access to the courts individually. It is hard to conceive of a sensible argument that nonjudicial relief already available does not at least deserve a seat at the class certification table among the courts' considerations.

There is no need for an amended rule to spin out every scenario or to restrict the court's discretion one way or the other when evaluating nonjudicial relief. Courts are well-versed in evaluating superiority. All that is needed is to make the rule clear where it presently has proved not to be: courts should be told they do indeed have the discretion to consider nonjudicial remedies in determining superiority. That simple and easy fix eliminates the existing doubt and thereby frees the courts to evaluate each situation on its own merit.

EXAMPLES OF EXTRAJUDICIAL REMEDIES COURTS WOULD HAVE THE POWER TO CONSIDER IN THE SUPERIORITY ANALYSIS UNDER THE PROPOSED LCJ AMENDMENT

The nonjudicial remedies that courts would and should have the power to consider under the revised rule need not be spelled out in the rule itself. But a few examples are offered here to illustrate the value of making the simple clarification that courts can consider all available remedies in evaluating superiority.

1. Voluntary Recall and Repair Programs

Automobile and other product manufacturers frequently offer voluntary recall and repair programs when a recurring issue surfaces. Suppose that an automobile manufacturer discovers that a particular type of transmission is experiencing a particular type of failure earlier and more often than would be expected. Before any class action is filed, the manufacturer voluntarily extends the warranty on all vehicles with that transmission and offers to replace the transmission entirely or buy the car back if the second warranty repair proves unsuccessful. The availability of that existing and readily available, real-world remedy should at least be considered in determining whether a subsequent class action over the allegedly defective original transmission is a superior way of resolving every class member's present and future claims. The proponents of a follow-on class action should have to explain why their approach is more efficient and promises a better and more timely overall result net of their own fees and expenses given the risks of litigation. Otherwise, rather than voluntarily offering such remedies to consumers as soon as a product issue is discovered, companies are perversely incentivized to withhold such relief to use as bargaining chips in the event that class actions are eventually filed. That is hardly a policy stance in which Rule 23 should find itself entrapped by literal interpretation of its existing language.

Some courts have found class certification not to be superior to relief already voluntarily offered. *See, e.g.*, *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (denying motion for class certification when the defendant had a refund and product replacement program in place for individuals still in possession of the products at issue); *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012) (finding existing voluntary remediation program superior to remedies available through class certification). Yet, many courts have held that the existing language of Rule 23 (specifically the word "adjudication") does not allow voluntary recall and other voluntary remediation programs to be considered in the superiority analysis. *See, e.g.*, *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 751–52 (7th Cir. 2011); *Forcellati v. Hyland's, Inc.,* No. cv-12-1983, 2014 WL 1410264, at *12 (C.D. Cal. April 9, 2014); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 34–35 (D. Me 2013). It is time to end the debate. This perceived artificial barrier in the rule should be removed, and it should be made clear that courts have the power to evaluate voluntary recall and refund programs in the superiority analysis. Removing the unintended barrier should be easy and noncontroversial.

2. Prior or Pending Governmental Remediation

Often, governmental action leads to duplicative class litigation. This stands the core policy rationale of Rule 23 on its head. Rather than reducing duplicative litigation, interpreting Rule 23 to ignore regulatory action already taken on behalf of aggrieved customers guarantees duplicative litigation.

State and federal regulators often have the power to bring judicial enforcement actions seeking judicial relief for consumers. Such governmental enforcement lawsuits can and should be considered an alternative means of "adjudication" even under the current rule. *See, e.g.*, D.B. Hoffman, *To Certify or Not: A Modest Proposal for Evaluating the Superiority of a Class Action in the Presence of Government Enforcement*, 18 Georgetown Journal of Legal Ethics 1383 (2005). But the current rule unwisely leaves room for debate. Is a regulatory order that involves no judicial action an "adjudication" as contemplated by the current rule? After all, the rule instructs courts to consider "the extent and nature of any litigation concerning the controversy already begun by or against class members," but it does not expressly instruct courts to consider regulatory litigation or administrative action already pending or concluded that seeks relief *on behalf of* the same putative class members. There is no good policy reason to leave this room for debate in the rule.

For example, the FTC has authority under Sections 5 and 19 of the FTC Act to seek monetary relief, in addition to injunctive relief, directly benefiting consumers when the FTC has engaged in administrative proceedings and issued cease and desist orders. *See* 15 U.S.C. § 45(m)(1)(B); *compare AMG Capital Mngt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (discussing limits on the FTC's authority in the absence of a litigated FTC cease and desist order). Under the Dodd–Frank Act, the CFPB often seeks and obtains both restitution and injunctive relief for consumers when it brings an enforcement action. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Consumer First Legal Grp.*, LLC, 6 F.4th 694 (7th Cir. 2021); *CFPB v. CashCall, Inc. et al.*, 35 F.4th 734 (9th Cir. 2022). The National Highway Traffic Safety Administration and the Consumer Products Safety Commission actively and vigorously monitor for safety defects in automobiles and other consumer products, respectively, and when safety defects are found have full authority to order recall and repair of defective vehicles and replacement of defective components. Yet when

federal regulators announce that they are seeking or have obtained any such relief for consumers, class action lawsuits seeking similar relief (and claiming class action attorneys' fees) regularly follow. State regulators and law enforcement authorities likewise often bring administrative and judicial enforcement actions that produce monetary and injunctive relief for consumers, with the same effect: generating more litigation in the form of tag-along class actions providing relief similar to that already provided. *Cf. Pattillo v. Schlesinger,* 625 F.2d 262, 265 (9th Cir. 1980) (affirming denial of certification, in part because "any claims paid through the class action procedures would be reduced by the costs of suit and attorneys' fees that plaintiffs sought. The district court and this court cannot be unaware of the fact that the principal beneficiaries of the class action would be plaintiffs' attorneys.").

To be sure, some courts have expressly denied subsequent class certifications because of prior or pending governmental enforcement activity. *See, e.g., Lohse v. Dairy Comm'n of the State of Nev.*, 25 Fed. R. Serv. 2d 1018 (D. Nev. 1977) (denying certification in follow-on private antitrust treble damage class action where the state AG had previously brought enforcement actions to stop the alleged price-fixing and obtained monetary settlements benefitting affected consumers); *Kamm v. Calif. City Dev. Co.*, 509 F.2d 205 (1975) (denying class certification on the basis of administrative actions brought by the California Attorney General that sought similar relief for affected would-be class members); *Ostrof v. State Farm Mut. Auto Ins. Co*, 200 F.R.D. 521, 531 (D. Md. 2001) (stating that "allowing for pursuit of claims in the administrative forum is often deemed superior to aggregating all the claims into a class action" and "adding a class action overlay makes little sense" where a remedy is available from an administrative agency): *Com. of Pa. v. Budget Fuel Co., Inc.*,122 F.R.D. 184, 186 (E.D. Pa. 1988) ("[W]here a state attorney general and a private class representative seek to represent the same class members, the *parens patriae* action is superior to that of a private class action."). But as noted above and in LCJ's submission, the rule as currently framed leaves unnecessary and ill-advised room for courts to ignore administrative action altogether. *See, e.g., Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 579 (3d Cir. 1973) ("We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class suit as a superior form of action was to be weighed against the advantages of an administrative remedy.").

There is no reason the Rule should be left susceptible to both interpretations. The Rule can and should make clearer the fact that similar relief has already been sought or obtained for consumers by regulators—whether through judicial action or administrative action—and that this is a factor courts have the power to consider in the superiority analysis. A redundant classwide judicial order essentially requiring a defendant to do what it has already agreed with a regulator to do is not the highest and best use of Rule 23, and the rule should be amended clearly to allow a court to so conclude.

Again, this would not mean that any relief obtained by regulators for consumers will always bar class certification of claims for further relief. It simply would explicitly permit courts to weigh prior relief already obtained and relief currently being sought by regulators in determining the superiority of class treatment. Courts would have the power to ask would-be class plaintiffs and their counsel to demonstrate that layering class litigation on top of pending or concluded regulator remedies would likely produce significant additional benefit to class members as a condition of obtaining class certification. Making the rule clear that a court has the power to consider remedies produced by regulatory action would incentivize settlements with regulators that are more

favorable to consumers. And it would have the potential side benefit of discouraging and disincentivizing only class actions that are mere tag-alongs and largely duplicative, which is good for the judicial system and directly furthers the judicial efficiency policy upon which Rule 23 is premised. Class actions that are not merely duplicative of remedies already available would not be discouraged by the clarification at all.

3. Voluntary Remediation for Data Breaches

Data breaches have become pervasive in our electronic age. Malign state actors and common criminals only need succeed once in their repeated efforts to gain access to company data systems. The company must succeed every time to avoid being the victim of a data breach. Most states now have comprehensive data breach notification laws requiring customers to be notified of data breaches and told of steps they can take to prevent their data from being misused to their detriment. In addition, many companies that suffer data breaches voluntarily offer affected customers and employees free third-party credit monitoring, third-party identity theft protection, free credit reports, and a variety of other proactive relief. Yet follow-on class actions almost always occur, often on behalf of persons who have thus far not suffered any misuse of their personal data, and often seeking the same kinds of prophylactic relief the company is already providing. In 2020, for example, a settlement of a class action related to a 2018 data breach at Facebook was approved even though the relief consisted almost entirely of steps the company had already voluntarily undertaken before settlement. *See Adkins v. Facebook, Inc.*, 3:18-cv-05982-WHA (N.D. Cal) at Docs. 281, 300, and 314.

Companies should be encouraged to provide these kinds of remedies promptly on their own, not incentivized to wait to provide them years later as fodder for a class action settlement. Courts should have power and discretion to find that class actions that provide little if any additional relief are not superior to the defendant's prior voluntary remediation program.

CONCLUSION

DRI and its Center for Law and Public Policy believe that the real value of eliminating the ambiguity in the current superiority Rule is the societal good that will be fostered by encouraging businesses to provide prompt and even more attractive nonjudicial remedies than they have in the past when faced with customer concerns. Changing Rule 23 has no downside for consumers, businesses, or the courts from expressly allowing such nonjudicial remedies at least to be evaluated in determining superiority. But there is plenty of upside for all of them: faster and more attractive remediation for consumers, increased potential for reduced burden on the judiciary, and the potential for attorneys' fee and defense cost savings for businesses more clearly incentivized to address directly the needs and concerns of their customers when product and service issues arise.

By contrast, LCJ's submissions (22-CV-L, 23-CV-J) provide ample evidence that nonjudicial resolutions of class members' claims have been disregarded by courts under the present superiority language of the current Rule 23. The current rule has a known ambiguity that causes some but not all courts to believe they are *expressly prohibited* from considering nonjudicial

remedies serves no legitimate interest. Eliminating ambiguities in the Rule is a core function of the Committee, and doing so in this instance is not complicated. Courts either do or do not have the discretion to consider nonjudicial remedies in deciding the superiority of class treatment. The Rule should clearly tell courts the answer. The Committee can easily make it so.

Respectfully submitted,

/s/ *Lawrence S. Ebner*
Lawrence S. Ebner, Chair
DRI Center for Law and Public Policy

/s/ James L. McCrystal, Jr.
James L. McCrystal, Jr., Chair
Center Legislation and Rules Committee

/s/ Michael R. Pennington
Michael R. Pennington, Chair
Center Class Actions Task Force