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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
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Comments on Rule 23(c)(2)(B)*:*
The proposed sentence and accompanying notes regarding electronic notice should not be adopted.

Dear Members of the Committee:

Since 1992, many courts have recognized me as class action notice expert. I have worked *pro bono* with the Federal Judicial Center (FJC) to develop practice standards, including specifically at the request of the Advisory Committee on Civil Rules.[1] I am an independent notice expert, not a notice vendor or claims administrator involved in today's bidding wars. I have continually performed expert analyses to help courts ensure that notice efforts are the "best practicable," and meet the "desire to inform" standard of Due Process. With my media training and experience in major class action cases, I advise judges and the FJC on the changing media landscape today. My c.v. is attached as **Attachment 1**.

I support the edits to Fed. R. Civ. P. 23 except one new sentence in Rule 23(c)(2)(B): "*The notice may be by United States mail, electronic means or other appropriate means*." This only encourages less effective means in lieu of postal mail. I support the accompanying notes except those that encourage electronic notice over postal mail.[2] Email is less expensive than postal mail, but is not, as the notes state, "more reliable." There is no data to support this *more reliable* notion. More reliable implies more likely to be delivered, opened, read, or responded to, relative to postal mail, none of which would be accurate.

[1] I have collaborated *pro bono* with the Federal Judicial Center on Model Plain Language Notices (2002), Judges' Notice and Claims Process Checklist and Plain Language Guide (2010), and notice content in Managing Class Actions: A Pocket Guide for Judges (2010). My case work (notifying Holocaust Survivors, lead-poisoned children, abused aboriginal children, *etc*.), publications including law review articles, speaking including at law schools, and judicial recognition, can be found at www.hilseegroup.org.

[2] **No change to the rule is required in order to allow notice by email when postal mail is not available.** There is no controversy over whether an email to a person who uses email constitutes an individualized communication, and, when *only* email addresses are known, or where a defendant regularly communicates with a class by email, such means are already used. *Note*: my two letters to the Rule 23 sub-Committee, with citations to supporting data, are attached as **Attachments 2** and **3**.

In fact, data shows the opposite to be true: responses to class action notices sent by postal mail are typically higher than by other means—especially when including a claim form with pre-paid return postage.[3] Thus it is counter to class members' interests to encourage courts to avoid postal mail. Data shows that only 7-24% of bulk emails are opened by recipients.[4] Conversely, U.S. Postal Service data shows that 78% of households either read or scan even the *advertising mail* they receive today;[5] of course, notices are not advertisements, and FJC sample envelope designs ensure that notices are recognized as official and important."

Beyond the proposed rule change and related notes encouraging email over mail, the phrase "electronic means" allows "internet banners"—fleeting 10-20 word headlines purporting to target individuals—to suffice in lieu of a Rule 23-compliant notice mailed to a person. Most banner ads are not even "viewable" as that term is defined, many are actively blocked by users, and studies show much of banner audiences are fake, or are viewed by "robots" not humans.[6] Digital audience fraud is of such concern that two U.S. Senators recently wrote to the Federal Trade Commission about it (*see* **Attachment 4**).[7] Regardless of fraud, most of us go about our internet work trying to avoid the banners which few people pay attention to or trust, let alone click. Statistics show that few banner impressions are clicked by humans (0.04% on average), such that when used in class actions few class members are exposed to an actual notice. The attachments hereto detail these facts with data.

Practically speaking, if this electronic notice rule language is adopted, parties will propose the least expensive means of notice the rule specifies—even though less effective—and not just in "small" cases when postal mail is uneconomical. Because of systemic

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[3] *See* **Attachment** 3, at p.3 and Exh.2., citing data and chart provided to Federal Trade Commission by Analytics, LLC showing typical response to mailed notice and claim form outstrips all other means of notice.

[4] *See* **Attachment 3** at p.2-3 and Exh. 1., citing Direct Marketing Association and MailChimp email readership studies.

[5] *See* 2014 Household Diary Study, United States Postal Service, http://www.prc.gov/docs/93/93171/2014%20USPS%20HDS%20Annual%20Report_Final_V3.pdf, last visited Oct. 27, 2016.

[6] *See* **Attachment 3** at p.2, (citing Media Rating Council definition of a "viewable" banner impression: "*1/2 of the pixels are visible on the screen for a minimum of 1 second")*; See *also* Exh. 4 therein, citing Google data showing 56% of "impressions" are not viewable; *See also* U.S. ad block usage expected to more than double by 2020, Business Insider, May 17, 2016, (citing expectation that 37% of online users will block banner ads by 2020), http://www.businessinsider.com/us-ad-block-usage-expected-to-more-than-double-by-2020-2016-5, last visited Oct. 29, 2016. *See also* **Attachment 3** at p.3 and Exh. 5, citing many reports of a $7+ billion digital ad fraud finding significant percentages of purported audiences are outright fake or are fabricated by "robots," *i.e.,* computer-automated programs referred to as "botnets" or "bots," which mimic human behavior to siphon ad dollars.

[7] Letter from Sens. Schumer and Warner to FTC, July 11, 2016, citing Adrian Neal, Quantifying Online Advertising Fraud: Ad-Click Bots vs. Humans, Jan. 2015, http://oxford-biochron.com/downloads/OxfordBioChron_Quantifying-Online-Advertising-Fraud_Report.pdf: "*According to one study, between 88 and 98 percent of all ad-clicks on major advertising platforms such as Google, Yahoo, LinkedIn, and Facebook in a given seven-day period were not executed by human beings.*"

disincentives (*see* **Attachment 2**), the revised rule will legitimize the avoidance of readily available mailed notice as a condition of any claims-made settlement—*even where public safety risks are involved*. For example, in *Pollard v. Remington,* a case involving 7.5 million allegedly defective rifles, a settlement notice plan relied heavily on internet banner impressions in lieu of mailed notice to warranty card and other databases, resulting in only 2,327 claims (0.031%) for a trigger repair; meaning 99.97% of guns the lawsuit says can fire unintendedly causing injuries or deaths would remain in use, with many owners unaware.[8] Lawyers agree to such low-cost banner-reliant plans, lest a defendant settle with other law firms that *will* agree. Then, when response is low, the lawyers argue that their fees should be based on the "potential" settlement value—irrespective of how little is actually claimed by the class due to the failed notice. Parties and courts have been misled by unqualified vendors who hype banner ads while budgeting much less than would truly be required to reach the audiences they purport to reach, while knowing that fewer claims will result. Unscrupulous vendors do this to undercut experienced professionals, and they expect no serious challenges.[9]

This rule change may *seem* to be a simple "modernization." But 41% of adults age 65 and older do not use the internet, nor do 13% of adults overall.[10] A notice campaign that leaves between one third to one half of senior citizens uninformed by design will be vulnerable to objection and collateral attack. For the rest of us, communicating with friends, family, and business associates by email does not mean we open unsolicited emails from bulk senders. Indeed, data shows we typically do not. Using the internet does not mean we see or click on the "needles" that are the banners within the colossal "haystack" that is the internet. In fact, studies show digital notice plans grossly underperform relative to what courts are promised.[11]

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[8] "*The Court cannot conceive that an owner of an allegedly defective firearm would not seek the remedy being provided pursuant to the Settlement Agreement. Thus, this low response rate demonstrates the notice process has not been effective."* Order Deferring Consideration of Settlement …Cancelling Final Approval Hearing… *Pollard v. Remington*, Case No. 13-00086, W.D. Mo., ECF No. 112, Dec. 8, 2015. *See also* **Attachment 5**, Scott Cohn, CNBC, Expert Blasts Proposed Remington Rifle Settlement, July 31, 2016.

[9] *See* **Attachment 5**, Daniel Fisher, Banner Ads Are a Joke in the Real World, But Not in Class-Action Land, Sept. 15, 2016: "*'[W]hoever can come up with the cheapest bid and put an affidavit in that it meets standards of due process, that firm will be hired,' said Katherine Kinsella, the recently retired founder of Kinsella Media, which specializes in legal notification. 'It is a reverse auction.' … 'You can't critique anybody else's work publicly,' said Kinsella, who in retirement feels more free to speak. 'You're blackballed*.'"

[10] *See* Pew Research Center, Sept. 7, 2016. http://www.pewresearch.org/fact-tank/2016/09/07/some-americans-dont-use-the-internet-who-are-they/, last visited Oct. 29, 2016.

[11] *See* Shannon Wheatman, Ph.D. and Alicia Gehring, Accurately Reporting Notice Results to Courts, Dec. 2015, http://rustconsulting.com/Insights/Insights-All. "[*U]nqualified notice providers are making serious errors in their affidavits and declarations*." (citing notification claimed to reach 70% of class, actually reached 16%). *See also* Jeanne C. Finegan, Law360, Think All Internet Impressions Are The Same? Think Again, March 16, 2016, https://www.hefflerclaims.com/wp-content/uploads/2016/03/Think-All-Internet-Impressions-Are-The-Same-Think-Again.pdf (citing analysis of online reach reported to court as 60% that actually reached 9% of the class).

Changing this rule will save money for lawyers and defendants, but will not be better for class members. Specifying and thus encouraging electronic means would weaken the basis for the opt-out mechanism: Class members are supposed to be bound by their silence and inaction only upon being properly notified. But relying on exposure to low budget electronic notice is a "mere gesture"—the modern equivalent of "fine print in the back pages of the classified section." Notice plans that avoid available mailings and rely on unrealistically low-budget digital means are already prevalent in class action practice. These are causing claims rates to drop precipitously, leading to studies lamenting the futility of class actions and to legislation seeking to gut them (*See Forbes*, Banner Ads are a Joke, **Attachment 5**).

A prominent national class action lawyer once made a gracious comment about my dedication to Due Process during a law school panel,[12] and I have not wavered in my intentions since then. The Advisory Committee itself has had faith in me,[13] and the FJC's resulting notice guidance has improved notice practice, having been cited in scores of expert reports and court decisions.[14] I would not jeopardize any of this trust by raising unfounded cautions. The social justice tool that is the opt out class action is too important to be weakened—but this electronic notice rule change would do just that, leaving many class members unaware but nonetheless bound to outcomes without compensation.

I look forward to testifying in Phoenix on January 4, 2017, and I sincerely hope that my information is of assistance to the Committee in reaching the right result, for the right reasons.

Sincerely,

Todd B. Hilsee
Principal

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[12] Elizabeth J. Cabraser, at Tulane Law School, Feb. 2008: "*Todd Hilsee understands and appreciates the profound implications of notice on due process more than many, many lawyers. ... He is a notice expert; he is a communications expert; but his dedication to the idea of due process through communication transcends his work assignments and his living... He is a low key, personable person; very matter of fact about what he does. Do not be fooled; he is a giant in the field.*"

[13] Judge Lee Rosenthal, Advisory Committee on Civil Rules, Jan. 2002: "*I want to tell you how much we collectively appreciate your working with the Federal Judicial Center to improve the quality of the model notices that they're developing. That's a tremendous contribution and we appreciate that very much...You raised three points that are criteria for good noticing, and I was interested in your thoughts on how the rule itself that we've proposed could better support the creation of those or the insistence on those kinds of notices.*"

[14] Judge Barbara J. Rothstein, Federal Judicial Center, 2010, Preface, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES: "*This pocket guide is designed to help federal judges manage the increased number of class action cases filed in or removed to federal courts as a result of the Class Action Fairness Act of 2005. . . This third edition includes an expanded treatment of the notice and claims processes. . . Todd Hilsee, a class action notices expert with The Hilsee Group, supplied pro bono assistance in improving the sections on notices and on claims processes.*"