Federal Bar Association
Orange County Chapter

FBA/OC

The Newsletter of the Federal Bar Association/Orange County Chapter

Fall/Winter 2020

Does Practicing Law Make You Smarter?

By William Domnarski*

Have we been outfoxed by the system we serve? We've long been told that we're smart and even flatter ourselves by believing we have a special way of looking at the world that distinguishes us from everyone else. Is this a good thing, thinking of ourselves this way? Is it even true? And more to the point, we don't ask if, given whatever smartness we might have, that smartness is compromised by what we are asked to do, by the act of lawyering itself? Smartness offers the promise of intellectual satisfaction on its own terms if properly applied. Does practicing law deliver on this promise, offering unfolding chances to get even smarter as we learn how things work, or does it get in the way and strangle smartness in its crib?

It's easy to see why we think we are smart. Ours is one of the learned professions, after all. At law school, because we had a passing acquaintance with a fellow named Socrates, we took to believing we had the intellectual tools to reshape if not conquer the world. That is the mes-

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Five Pitfalls to Avoid in Class Action Settlements

By Steven D. Allison, Samrah R. Mahmoud, & Mary Kate Kamka*

In recent years, courts have more closely scrutinized class action settlement agreements to ensure that the agreements are fairly and adequately benefitting absent class members. Some of this increased scrutiny was brought on by changes to Federal Rule of Civil Procedure 23 at the end of 2018, which included an explicit reference to electronic notice as a means of "the best practicable notice" and four factors that courts must consider in approving class action settlements under Rule 23(e)(2). While courts will of course scrutinize the direct benefit to class members, particularly in Rule

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- **Bench & Bar Webinar with the Hon. Doug McCormick**
  November 19, 2020
- **Civil/Criminal Practice Webinar**
  December 4, 2020
- **Swearing In Event**
  February 9, 2021
- **Supreme Court Update**
  TBD 2021

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From the Editor

Welcome back to another issue of the Newsletter of the Federal Bar Association, Orange County Chapter.

This issue features a checklist of important pitfalls to avoid in class action settlements brought to you by Steven D. Allison, Samrah R. Mahmoud, and Mary Kate Kamka from Troutman Pepper. Stephanie Phan and Sheila Chen also share practical tips for taking and defending remote depositions.

We are also excited to welcome William Domnarski in this issue. In the first entry of what we hope will become a regular column for the FBA/OC Newsletter, Bill asks *Does Practicing Law Make You Smarter*? In addition to being a practicing lawyer, Bill is a prolific essayist and author on topics relating to the judiciary, legal practice, and the legal profession. His works have been published by the American Bar Association, the Daily Journal, and California Lawyer, among many others. Bill is also the author of five books, most recently a biography of Richard Posner published by Oxford University Press in 2016. Bill's essays on the practice of law are freshly perceptive, occasionally rousing, and above all else — thought-provoking.

Thank you to the authors for all your hard work and, as always, we welcome submissions for the next issue of the Newsletter.

Brent S. Colasurdo
Editor-in-Chief

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President's Message

Dean J. Zipser*

What a year.

When I was moving up the ladder to President, one of my worries was the necessity to always make it on time to run our 7:30 a.m. board meetings at the courthouse. That became a non-issue, but not for the reasons I expected. The COVID-19 pandemic changed everything for us — just as it did for the rest of the world.

But, despite the pandemic, and like so many other organizations in our legal community, we did not let it stop us. Although delayed when in-person events were no longer an option, we kept up with our programming, being able to offer some unique content, together with our regular array of events — albeit all virtual once the pandemic hit. And we even managed to update our Bylaws in the process!

"What a year."

Although things were certainly upside down, there were some silver linings. Because all the programming turned virtual, we were able to team up with the FBA chapters in Los Angeles and the Inland Empire to co-present a number of programs that would otherwise not have been available to our membership. These include programs on LGBT+ judges' paths to the bench, emerging issues in blockchain and cryptocurrency, federal criminal practice in the COVID-19 era, and a constitutional law forum featuring Dean Chemerinsky. We also were privileged to co-sponsor a program with the Orange County Women Lawyers Association on the legal and social implications of the Michael Flynn and George Floyd cases. I hope and believe that these types of collaboration will continue, even when things get back to "normal."

Another silver lining is you, our membership, which remains strong. You stood by us and continued to frequent our events and support the organization.

Our board did a phenomenal job of coalescing and making this a successful year despite the challenges. Our board attendance was at all–time highs, everyone picking up the slack and keeping the organization moving forward dur-

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Dean J. Zipser
FBA/OC President

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President's Message

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ing these difficult times. As always, our judges gave generously of their time and contributions – both in helping guide our chapter and being the centerpiece of our programs.

And then there are the other officers: Damon Mircheff, our Secretary, Brian Claassen, our Treasurer, and David Stein, our President-Elect. I can't begin to tell you what a great team we had. I know they all got more than they bargained for, and I leaned on them constantly.

And last, but certainly not least, is our Executive Director, Heather DeSha. While the board members and officers come and go, she is the one constant. No matter what we may throw at or ask of her, she's on top of it and does everything with a smile.

We still face challenges as we continue to confront and grapple with the pandemic. But the organization remains strong and in great hands, and I hope that all of you will give David the support you gave me.

**Dean J. Zipser is a partner with Umberg Zipser LLP and is President of the Federal Bar Association, Orange County Chapter.*

About the FBA/OC

The Federal Bar Association of Orange County (FBA/OC) is committed to meeting the needs of federal practitioners in Orange County, California by sponsoring important "Bench and Bar" events, CLE events and other social events. These events all focus on issues relevant to federal practitioners and provide an important bridge between the many federal judges in Orange County and the attorneys who practice before them.

We encourage you to join the FBA/OC and benefit from this great and ongoing dialogue between the local federal bench and bar.

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Does Practicing Law Make You Smarter?

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sage delivered by Exhibit One, Professor Kingsfield, who in the film adaptation of John Jay Osborne's novel *The Paper Chase* tells his first-year contracts class that his little questions will spin the tumblers of their minds. "We do brain surgery here," he tells the students. "You teach yourselves the law, but I train your mind. You come in here with a skull full of mush, and you leave thinking like a lawyer."

"We should probably be spending at least half our time saying no to clients, but of course we don't."

The basic understanding is that thinking like a lawyer is the ability to consider both sides of an argument at the same time. But surely that can't be enough for us to make our claim to being special. Only a fool or zealot wouldn't see the need to recognize the other side of an argument. What chutzpah to believe that we are smarter, based on our ability to reason, than, say, scientists, physicians, engineers, and pretty much anyone else who has to think through a problem. Maybe that's been the greatest trick lawyers have played on the public, and a devilish one at that, making it think we have this superior way of thinking.

It is humbling to recognize that we're not so special in the way we think. It's both humbling and embarrassing, if we go further, and recognize the practice of law is hardly a healthy environment for whatever smartness we have to flourish. It is, in fact, an environment hostile to smartness.

Clients don't much care about our smartness unless it supports the grievance they want you to pursue. We live in a client-centered age, an age that roughly tracks that of the baby boomer or "me" generation. We should probably be spending at least half our time saying no to clients, but of course we don't. We have lost our arbiter role and quasi-elitist status due to the pressure to conform our performance to the expectations of the clients. Clients see things in only one way and expect their lawyers to validate their view of things. Great for the client. Not so much for the lawyer.

Our role for clients is to make a claim to truth. The problem is that it leads many of us to deceive ourselves into thinking we are delivering it, no matter where the truth lies. Everything counsels identifying personally with the position you are advocating. It is a natural default position to think it is easier to sell someone something if you yourself believe in what you are selling.

These are hydraulic, transformative forces. While there is a legitimate chicken or egg question as to why we tend to end up specializing. We end up as prosecutors, criminal defense lawyers, plaintiffs' lawyers, insurance lawyers, and the like, not often changing teams and adopting, consciously or not, the attitudes and biases animating a specialty's particular world view. We become what we do. Partisanship gives purpose, motive, and direction. It comes at a high cost, that independence of mind seeking its own satisfaction.

The engineers, physicians, and others I mentioned have an easier and more fulfilling time of it. They get to seek the truth and then to act on it. What they have is what we all should want, a job that makes us smarter, not just more knowledgeable or more experienced, but smarter. It looks like I've buried the lede.

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Remote Depositions in the Time of COVID-19

*By Stephanie Phan and Sheila Chen**

COVID-19 has changed the way we litigate cases in 2020. With court closures and social distancing, we have all had to reimagine the way in which we practice as lawyers, which in these unprecedented times includes litigating and deposing witnesses from our home offices. As remote depositions have become the new normal in many jurisdictions, diving headfirst into these uncharted territories in the early months of the COVID-19 shutdown presented us with the unique opportunity to develop a new skillset amidst a pandemic. For all of the planners out there, we have compiled a list of eight tips that we learned from our last eight remote depositions.

1. Pick the Deposition Technology You Are Most Comfortable With. It is important to select and become familiar with the deposition technology before the remote deposition occurs. There seems to be two main types of platforms: those that run on Zoom technology (which are fairly common) and those that use a proprietary based technology with many bells and whistles. Things we inquired about when deciding between platforms include their document handling features, additional security features, and whether technical support services would be provided during the deposition. We found that the platform that was more intuitive and easier to use with a wider audience more beneficial, particularly when taking depositions.

2. Look for Opportunities to Streamline Efficiencies. It may be helpful to confer with opposing counsel and see if there is agreement over the platform. If so, this would allow you to avoid having to learn and switch between different platforms during the course of discovery.

3. Finalize Exhibits Early to Save Time During Depositions. With remote depositions, we have found that we needed to finalize the exhibits much earlier than we did with in-person depositions. Some witnesses have found it difficult to review lengthy documents on a screen without the ability to turn pages in a paper copy. One potential solution is to provide a paper copy of lengthy documents to the witness so that the witness could easily review the exhibits when they were identified at the deposition. When taking the deposition, this can assist with the flow of questioning and increase the pace since there is an inherent lag built into the remote deposition process.

4. Bring Additional Help. If possible, it can often be helpful to have a second chair attorney or paralegal in the depositions to help upload and publish the documents during questioning. Entering an exhibit into the record is not as seamless as with in-person depositions, as documents may take longer to locate on your computer and upload. Having a colleague in the deposition with you allows the next exhibit to be uploaded while you work through the questioning of the prior exhibit. This allows you to listen to the witnesses' answers without also having to juggle the deposition technology. Many remote deposition

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Remote Depositions

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companies also provide a technical support person who can attend the deposition to resolve any technology issues that may occur.

5. Break Witness Preparation into Multiple Sessions. It is often harder for a witness to keep concentration through a video conference than it is in person in a conference room; witness preparation can be challenging remotely as a result. This is especially true if you have a lot of documents to go through with the witness. For this reason, we have found it helpful to break up the preparation into a couple of sessions instead of one all-day session.

6. Defending is Easier, Taking is Harder. While prepping witnesses remotely is challenging, defending a witness remotely is not that much different than defending a witness in person. While the brief delay inherent in remote deposition technology can impact the timing related to asserting objections, the witness may have an advantage by not being in the same physical space as the questioner, which can be intimidating for some. Questioning is usually less intense and done at a slower pace, which can also benefit the witness. However, we have found that taking remote depositions can be more challenging. Handling the technology and the documents makes it harder to get a questioning rhythm going. It is also much easier for a witness to get distracted or interrupted by technology issues or outside factors. One option is to deal with this at the beginning of the deposition and ask the witness to turn off any other devices and find a place that is quiet before the deposition begins. Doing this on the front end can help minimize unintentional appearances by other household members and pets.

7. Think About Your Virtual Background. While it may be common for attorneys to think about their professional appearance on camera, it is also important to think about the appearance of your surroundings and of your desktop screen. You should make sure you do not have any confidential or privileged material laying around in your home office that could be visible on camera. Additionally, you should make sure your desktop screen is clean, and pop-up notifications are disabled, as we have found it sometimes necessary to share our screens to show the witness specific portions of an exhibit.

8. Prepare to be Flexible. Lastly, we know depositions can be a contentious environment, but the new remote nature can lead to additional frustrations and issues, so be prepared to be flexible. Technology issues, audio delays, slow internet, pets barking, and phones ringing are all things that we experienced when participating in remote depositions. This is a new way of litigating for everyone, and we should all be patient and understanding as we navigate this new norm.

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* *Stephanie Phan and Sheila Chen are associates in the Orange County office of Troutman Pepper.*

Does Practicing Law Make You Smarter?

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No, practicing law does not make you smarter. It can even have the opposite effect.

We would be better off, though we would be playing against type, if we could stay above the fray. Here our barrister counterparts in England and Australia have perhaps shown us a better way, if we have to be in the advocacy business. Everything is different for them. Layers of insulation protect them from being sucked into the vortex of trial emotions and client expectations. They are trained as forensic debaters and keep their distance from the litigant through a solicitor who is both an intermediary and the actual client. None of that identifying with the client's plight in their system. We face forces pushing us to become the client. They push the litigant away from the barrister and create breathing and thinking space for him.

"We need something in the way of a buffer to keep us from falling down the rabbit hole."

Stuck as we are with our system, we need a counterbalance to push against the forces urging us to become what we do. We need something in the way of a buffer to keep us from falling down the rabbit hole.

My own solution, my own modest proposal to save the profession, turns on extracurricular reading — a lot of it. I read a great deal of fiction and complement that reading with a pretty close examination each week of the Times *Literary Supplement*. More than reading about and hearing from people in other professions, I like to see other minds at work in fiction and criticism working through problems. I use these intellectual adventures to remind me that there isn't anything particularly special about the law and that there's just so much a lawyer can do in any given case, short of prostituting himself for the client's benefit. More to the point, I use my reading to confirm the idea that lawyering is what I do, not who I am.

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* *William Domnarski practices law in the Southland, hires out as an editor, and writes about the profession. His latest book is* Richard Posner *(Oxford University Press, 2016).*

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Pitfalls in Class Settlements

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23(b)(3) classes, there are several other settlement provisions to which courts have begun to pay closer attention. Understanding these class action settlement "pitfalls" can be key to getting your class action settlement approved.

Courts Are Starting to Require Some Form of Electronic Notice to Class Members:

While some form of electronic notice such as email, digital ad campaigns, or social media postings, has become increasingly common in class action settlements, a recent Ninth Circuit opinion, *Roes 1-2 v. SFBSC Management, LLC*, suggests that electronic notice may not only be an approved notice method but *potentially a required one*.[1] Rule 23 requires that notice to (b)(3) class members be "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(b). In December 2018, the Rule was amended to explicitly recognize electronic notice as one of the forms of notice that may be appropriate under the circumstances.

> "[E]lectronic notice may not only be an approved notice method but *potentially a required one*."

In *Roes 1-2 v. SFBSC Management, LLC*, the Ninth Circuit reversed approval of a class action settlement in part because it found that mailed notices and posters in Defendant's clubs were not "the best notice" practicable.[2] The Court stated there were numerous other reasonable options for notice, including email, social media, and online message boards. The court went on to note that "technological developments are making it ever easier to target communications to specific persons or groups and to contact individuals electronically at little cost." Given the public's increased reliance on social media and the internet for news and information, it is likely that more courts will follow the Ninth Circuit's lead in requiring some form of electronic notice in addition to or in lieu of traditional forms of notice.

Parties should therefore consider adding one or more forms of electronic notice to their notice schemes to provide the "best notice that is practicable . . . ."

The Class Representative Must Have Article III Standing:

In March 2019, the United States Supreme Court made clear that a federal court cannot approve a class action settlement where the named plaintiff lacks Article III standing.[3] In *Frank v. Gaos*, the named Plaintiffs challenged Google's practice of sharing user's search terms with third-party websites. The parties reached a class settlement that was approved by the District Court and upheld by the Ninth Circuit. The United States challenged the settlement through an amicus brief alleging that the class representative lacked Article III standing. Ultimately, the Supreme Court reversed and remanded the order approving the class settlement because the District Court failed to evaluate the issue of standing. In doing so, the Supreme Court made clear that a "court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute."[4]

For class actions involving consumer protection statutes, defendants sometimes agree to class settlements with plaintiffs with questionable claims to mitigate the risk of potential liability associated with large statutory penalties. *Frank v. Gaos* dictates that the parties should know whether the class representative suffered a concrete injury under Article III as a result of the statutory violation before seek-

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Pitfalls in Class Settlements

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ing approval of any class settlement.

Clear Sailing Provisions Will Draw Heightened Scrutiny:

Under Rule 23, the parties must demonstrate that a class action settlement resulted from an arm's length negotiation void of collusion. A "clear sailing" provision is an agreement between the parties that defendant will not challenge plaintiff's request for attorney fees in a class action settlement up to a set amount. While such provisions are not prohibited, they will draw increased scrutiny of the plaintiffs' fee request. As the Ninth Circuit explained, "clear sailing" provisions are "important warning signs of collusion" because they "increase the likelihood that class counsel will have bargained away something of value to the class."[5] A district court's failure to adequately scrutinize settlement agreements that contain "clear sailing" provisions is reversible error.[6] To survive this scrutiny, practitioners must identify specific facts demonstrating the settlement resulted from fair negotiations.

"[P]ractitioners must identify specific facts demonstrating the settlement resulted from fair negotiations."

Example of facts that have appeased courts' concerns of collusion when the agreement contains a "clear sailing" provision include: (1) the settlement resulted from a mediator's proposal;[7] (2) the fee demand was within the range the Circuit court previously held was acceptable;[8] and (3) the fee request fell below counsel's lodestar amount.[9] The most conservative option, of course, would be to omit the provision all together.[10]

Cy Pres Recipients must be closely tied to the purpose of the litigation:

Cy pres recipients in class action settlements have long been preferred over provisions that revert unclaimed funds to the defendant (i.e., reversionary clauses).[11]

But courts have increasingly required parties to identify cy pres recipients whose goals are closely tied to the purpose of the lawsuit. For instance, in Johnson *v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, a district court in New York required the parties in an FDCPA lawsuit to provide additional information regarding how the parties' designated cy pres recipient, the National Consumer Law Center, aligned with the litigation's purpose before granting preliminary approval.[12] Indeed, legal services organizations, even ones that provide general legal aid, may be insufficient cy pres recipients unless they do work that aligns with the subject matter of the litigation.[13]

Parties should therefore select a cy pres recipient that is closely aligned to the litigation's purpose and be prepared to explain this connection to the Court on preliminary approval.

Class Representative Incentive Payments Must Be Proportional and Relate to The Work Performed:

Class representatives almost always receive incentive awards as compensation for the work they performed on behalf of the class and the risk they undertook in bringing the lawsuit. When evaluating class action settlements, courts must scrutinize these payments carefully to ensure they do not undermine the adequacy of the class repre-

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Pitfalls in Class Settlements

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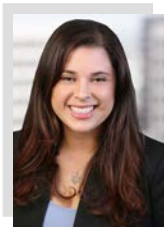
sentative by creating a conflict of interest between the representative and the other class members.[14] Though incentive awards rarely bar approval of a class settlement, courts routinely adjust the amount based on the facts of the case. Courts have decreased incentive payments when the payments were not proportional to the relief received by other class members and when the actual work performed, or risk undertaken by the class representative did not substantiate the incentive award.[15]

Therefore, when seeking approval for a class settlement, practitioners should clearly demonstrate how the incentive award relates to the work performed by the class representative and are proportional to other class members' relief.

Although parties and counsel may feel like they are nearing the finish line when class action settlements are reached, the bar for class action settlement approval is high, and courts are not afraid to send counsel back to the drawing board on particular settlement components or to deny settlement approval entirely. Anticipating the above pitfalls in settlement negotiations and drafting will help ensure a smooth settlement approval process and insulate such approval from reversal on appeal.


*Steven D. Allison and Samrah R. Mahmoud are partners in the Orange County office of Troutman Pepper. Mary Kate Kamka is an associate in the firm's San Francisco office.

[1] 944 F.3d 1035, 1047 (9th Cir. 2019).

[2] 944 F.3d at 1047.

[3] *See Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019).

[4] *Id.*

[5] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

[6] *See Roes 1-2 v. SFBSC Management, LLC*, 944 F.3d 1035, 1049-1050 (9th Cir. 2019).

[7] *See Kutzman v. Derrel's Mini Storage, Inc.*, No. 118CV00755AWIJLT, 2020 WL 406768, at *13 (E.D. Cal. Jan. 24, 2020)

[8] *Benitez v. W. Milling, LLC*, No. 1:18-CV-01484-SKO, 2020 WL 309200, at *12 (E.D. Cal. Jan. 21, 2020).

[9] *Id.*

[10] *See Azar v. Blount Int'l, Inc.*, No. 3:16-CV-0483-SI, 2019 WL 7372658, at *9 (D. Or. Dec. 31, 2019) (the parties' omission of a "clear sailing" clause indicated that no collusion occurred).

[11] *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (discussing courts skepticism of reversionary clauses and the benefits of cy pres recipients in contrast).

[12] No. 19-CV-5460 (JSR), 2019 WL 6798980, at *6 (S.D.N.Y. Dec. 13, 2019) (denying preliminary approval on multiple grounds); *see also Raffin v. Medicredit, Inc.*, No. CV154912MWFPJWX, 2018 WL 8621204, at

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  TBD 2021

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Pitfalls in Class Settlements

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*7 (C.D. Cal. Nov. 30, 2018) (resolving dispute between parties over cy pres recipient and choosing Legal Aid Association of California because organization's consumer privacy work was closely tied to purpose of class action under California Invasion of Privacy Act); *see also See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015) (vacating approval of class action settlement and remanding for court to identify cy pres recipient "more closely tailored to the interests of the class and the purposes of the underlying litigation").

[13] *See Johnson v. Rausch,* 2019 WL 6798980, at *6.

[14] *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013).

[15] *See e.g. Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1027 (E.D. Cal. 2019) (decreasing requested incentive award from $90,000 to $45,000 because other class members received just over $1,000 in relief); *Altnor v. Preferred Freezer Servs., Inc.*, 197 F. Supp. 3d 746, 769 (E.D. Pa. 2016) (reducing requested incentive award from $4,000 to $1,410.80 given the class representatives limited involvement and failure to identity any specific risks they face by serving as a class representative); *Ridgeway v. Wal-Mart Stores Inc.*, 269 F. Supp. 3d 975, 1003 (N.D. Cal. 2017) (reducing the requested incentive awards from $50,000 to $15,000 after reviewing the evidence of the actual work performed by the class representatives).

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