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April 7, 2026

**Via email delivery:**

RulesCommitteeSecretary@ao.uscourts.gov

Carolyn A. Dubay  
Secretary, Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE, Room 7-300  
Washington, D.C. 20544

**Re: Support for Proposal to Clarify the Rule 23(b)(3) Superiority Requirement**

Dear Ms. Dubay:

The Procter & Gamble Company ("P&G") respectfully submits this letter in support of Lawyers for Civil Justice's (LCJ) Rules Suggestion to amend Federal Rule of Civil Procedure 23(b)(3). The amendment would confirm that courts have the discretion to consider out-of-court remedies when evaluating whether class action litigation is a superior method of resolving a dispute as compared to other available types of relief. Allowing courts to evaluate non-litigation remedies, such as voluntary remediation programs, changed practices, refunds, consumer warranties, product recalls, and government settlements would help to eliminate duplicative litigation and conserve judicial resources. In addition, ensuring courts are permitted to consider non-litigation remedies incentivizes companies to implement and promote these programs, thereby increasing consumer access to meaningful avenues of obtaining full and prompt relief when they are not satisfied with a product's performance or attributes.

At P&G, standing behind our products is not merely a legal strategy—it is a core business practice. When a consumer is dissatisfied with a P&G product, the Company routinely offers mechanisms to address consumer concerns through our satisfaction guarantee programs. These programs often provide consumers with 100% of their purchase price back, returned directly to the consumer quickly—without the need to retain counsel, and without the transaction costs that inevitably accompany lengthy and expensive class action litigation. When coupled with changed practices that may have already occurred by the time litigation is filed, such as changes to marketing practices or advertising representations that are often challenged in consumer class action cases, relief to consumers can be accomplished quickly and efficiently without taxing judicial and party resources.

By contrast, class action litigation can take years, and settlements often deliver only a fraction of the relief sought by class members after transaction costs such as attorneys' fees and class notice are considered. The rules should not prohibit judges from weighing these factors against the benefit of voluntary remediation programs, which can allow consumers to obtain promptly the same relief that is sought in litigation, more efficiently and effectively. The proposed amendment would clarify that Rule 23 does not prohibit courts from weighing these considerations on a case-by-case basis when determining if a class action truly serves the interests of the putative class.

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As LCJ's Rules Suggestion recognizes, there is a split in the courts regarding whether Rule 23(b)(3) bars courts from considering non-litigation remedies when determining whether "a class action is *superior* to other available methods for fairly and efficiently *adjudicating* the controversy."<sup>1</sup> A single word in the rule, "adjudicating," has been interpreted by some courts to prohibit them from considering out-of-court remedies in the superiority analysis.<sup>2</sup> P&G respectfully submits that the proposed amendment does not weaken the class action device; nor does it mean that the availability of a non-litigation remedy will always make it a "superior" mechanism to class litigation. Instead, the amendment simply clarifies that courts are permitted to consider the full range of available remedies when conducting the superiority analysis.

The proposed amendment also advances important policy objectives. First, the amendment will help conserve judicial resources by avoiding years of costly litigation over conduct that has already been addressed through voluntary remediation or regulatory action. Class action lawsuits consume significant judicial time and party resources, even though in many situations, consumers already have a mechanism available to obtain the same relief that is sought in litigation. Courts that wish to consider these factors should be permitted to do so and should not be constrained by the inclusion of a single word in the rule. Second, it encourages companies to provide and promote voluntary relief to consumers, knowing that such programs could be evaluated by the courts in the event of follow-on class action litigation. As LCJ has documented, the class action docket today is replete with examples of follow-on lawsuits filed after robust recalls, refund programs, and government settlements have already provided the relief sought by the putative class. Removing the uncertainty associated with the courts' ability to evaluate these programs will help ensure more companies take proactive steps to provide meaningful redress to consumers and change their own practices when appropriate.

P&G therefore respectfully urges the Committee to move forward with consideration of the amendment that would clarify that Rule 23(b)(3) allows trial courts to consider non-litigation remedies when determining whether a class action is superior to other available methods of obtaining relief for the putative class. This common-sense clarification will help ensure that federal courts can direct their limited resources toward disputes where class action treatment is genuinely needed, that consumers receive full and prompt relief, and that companies are encouraged to stand behind their products.

Respectfully Submitted,



Matthew Hannahan  
The Procter & Gamble Company

<sup>1</sup> Fed. R. Civ. P. 23(b)(3) (emphasis added).

<sup>2</sup> Some courts, following the Seventh Circuit's decision in *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748 (7th Cir. 2011), hold that the word "adjudicating" in Rule 23(b)(3) prohibits courts from weighing a defendant's voluntary recall or refund program against a class action because such a program is not an "adjudication". The Ninth Circuit adopted a similar approach in *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 n.4 (9th Cir. 2023), rejecting refund programs as relevant to superiority. Other courts have reached the opposite conclusion, finding that a class action is not superior where a voluntary recall and refund program is already available. *See, e.g., Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012).