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March 10, 2026

Via email delivery: RulesCommittee_Secretary@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: Rule 23 Proposal for Possible Clarification for the Rule 23(b)(3) Superiority Requirement

Dear Ms. Dubay:

Amazon respectfully requests the Committee on Rules of Practice and Procedure (the "Committee") consider whether to clarify Federal Rule of Civil Procedure 23(b)(3) to explicitly confirm that trial courts have discretion to consider out-of-court remedies and government settlements when evaluating whether class treatment is superior under Rule 23.

The current Rule 23(b)(3) language creates conflicting interpretations across circuits and even within individual districts. Courts disagree on a fundamental question: whether out-of-court resolutions—including government settlements and voluntary consumer remedies—are relevant to the "superiority" analysis. For example, the Ninth Circuit's decision in *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 n.4 (9th Cir. 2023), rejects refund programs as relevant to superiority because they lack "adjudication." Yet, other courts allow for voluntary refund programs to preclude class certification. *See, e.g.*, *Pagan v. Abbott Labs, Inc.*, 287 F.R.D. 139, 141 (E.D.N.Y. 2012) (class action not superior where voluntary recall and refund program was better suited to provide relief) . There are further splits as to whether government settlements that offer consumer refunds should preclude class actions. *Compare Kamm v. California City Development Co.*, 509 F.2d 205, 208 (9th Cir. 1975) (finding that class actions are not superior when a state attorney general settlement already exists because litigation would duplicate prior governmental work), *with Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir. 1973) (Rule 23(b)(3) superiority requirement "focus[es] on the question whether one suit is preferable to several," and that "the rule was not intended to weigh the superiority of a class action against possible administrative relief."). Trial courts in these circuits and beyond continue to adopt these differing approaches and reach conflicting results.[1] These contradictions leave trial courts and parties uncertain.

[1] Some courts expressly consider administrative enforcement actions. *See Conde v. Sensa*, 2019 WL 4277414, at *9–11 (S.D. Cal. Sept. 10, 2019) (applying *Kamm* in context of an FTC settlement and refusing to certify), whereas others do not, *see B.P. v. Balwani*, 2021 WL 4077008, at *2 (9th Cir. Sept. 8, 2021) (affirming class certification; holding *Kamm* does not mean "a prior public settlement necessarily defeats superiority for future class actions").

The problem is not theoretical. For example, in 2021, Amazon and the FTC settled claims regarding alleged tip withholding from Flex drivers, with Amazon agreeing to pay $61.7 million.[2] The FTC explicitly stated that this sum represented "the full amount that Amazon allegedly withheld from drivers and will be used by the FTC to compensate drivers."[3] Less than two weeks after the FTC announced the settlement,[4] the same claims were filed as a class action in *Miller v. Amazon.com*, No. 21-cv-204-BJR (W.D. Wash. 2021). After years of litigation, Judge Rothstein denied class certification, finding that class treatment was not superior given the existing FTC remedy. The Ninth Circuit denied plaintiff's petition for review in that case in August 2025. While Judge Rothstein's reasoning was sound, litigants should not be subjected to years of costly litigation to achieve that sound result, and there is no guarantee other courts will follow this approach. This judicial uncertainty defeats the very goals the rule was designed to achieve and creates three harmful consequences:

1. **Discourages Corporate Voluntary Remediation.** If companies face duplicative class litigation regardless of government settlements or preemptive remedies, there are fewer incentives to resolve disputes with regulators or voluntarily fix issues. Regulators consider voluntary remediation when making critical decisions around litigation, settlement, and potential customer remedies. Rule 23 should work to support that positive policy goal. Instead, Rule 23 works against it by allowing copycat lawsuits filed in hopes of securing duplicative settlements for the exact same conduct and issues previously resolved by either voluntary action and/or a robust government settlement.

2. **Reduces Consumer Compensation.** If class litigation is guaranteed despite prior remedies, companies face incentives to withhold voluntary redress to customers—reserving compensation for negotiated class-action settlements. This results in *less* total consumer recovery because any class relief will typically subtract attorneys' fees from the settlement fund and these fee awards can be substantial.[5]

Some courts raise material public policy considerations in support of at least consideration of government settlements: "[I]f courts consistently allow parallel or subsequent class actions in spite of state action, the state's ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it." *Thornton v. State Farm Mut. Auto Ins. Co.*, 2006 WL 3359482, *2–3 (N.D. Ohio Nov. 17, 2006). Other courts take a literal approach and refuse to consider government settlements. *See de Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 346 (S.D.N.Y. 2021) ("Rule 23 … was drafted 'with the legal understanding of 'adjudication' in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits.'" (alteration in original) (citation omitted)).

[2] *See* Amazon Flex, The Federal Trade Commission, https://www.ftc.gov/legal-library/browse/cases-proceedings/1923123-amazon-flex (last updated Nov. 2, 2021).

[3] *Id.*; *see also* Amazon Flex, The Federal Trade Commission, https://www.ftc.gov/enforcement/refunds/refunds-amazon-flex-drivers (last updated May 2025).

[4] *Amazon To Pay $61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers*, The Federal Trade Commission (Feb. 2, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers.

[5] David Thomas, *Legal Fee Tracker: Settlements Spur Big Fee Awards with More to Come in 2025*, Reuters (Dec. 19, 2024), https://www.reuters.com/legal/legalindustry/legal-fee-tracker-settlements-spur-big-fee-awards-with-more-come-2025-2024-12-19/ (describing several $200M+ fee requests).

3. Wastes Judicial Resources. Duplicative litigation over conduct already addressed by regulatory authorities squanders federal judges' time and resources on disputes that have already been resolved. The *Miller* case exemplifies this problem: the litigation consumed years of court time before the court ultimately determined that the plaintiffs sought identical relief the FTC had already secured. This unnecessary duplication imposed real costs on the judicial system. The court was forced to resolve several motions and issue multiple opinions—all in a case related to issues the regulatory process had already settled. This expenditure of judicial resources was entirely avoidable, and all courts should be able to consider as part of the superiority process whether affected class members have already been provided relief.

Amazon respectfully requests that the Committee clarify Rule 23(b)(3) to confirm that trial courts may consider out-of-court remedies, government settlements, and voluntary consumer programs when determining superiority. This proposed change benefits all participants in the legal system by increasing efficiency and promoting voluntary customer restitution programs and robust government settlements.

Respectfully Submitted,

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