

**FEDERAL TRADE COMMISSION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Re: Class Action Notice Consumer
Perception Study, Project No. P024210

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STATE ATTORNEY GENERAL COMMENT

The Attorney General of Arizona, Mark Brnovich, hereby writes in favor of the Federal Trade Commission’s proposal to conduct a study to examine consumer perception of class action notices, as well as the Commission’s Class Action Fairness Project more generally; the Commission’s efforts are sorely needed given that all too often the class action process fails to benefit the class members it is meant to help.

Empowering class members in the class action settlement process is a key consumer protection issue. Stipulated settlements generally determine consumers’ claims in class actions. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285 (2002) (noting that “most class action suits settle,” and gathering supporting sources as to same). But “[c]ourts have long recognized that ‘settlement class actions present unique due process concerns for absent class members,’” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011), as class members’ interests can (and often do) sharply diverge from those of class counsel and Defendants, *see, e.g., In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013). And there is broad evidence of low class-member engagement. For example, claims rates in smaller-dollar class action cases are reliably in the very low single digits (if not below one percent). *See, e.g., Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc) (noting evidence that “claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns.”); *Pollard v. Remington Arms Co., LLC*, --- F.R.D. ---, 2017

WL 991071, at *13 (W.D. Mo. Mar. 14, 2017) (gathering numerous examples of cases featuring claims rates between ~.25% and ~2%).

Studying consumer perception and understanding of current class action settlement notices would be an important first step toward establishing a better notice system that empowers consumer class members and corrects for the disadvantages class members currently face in the settlement process. As Arizona's chief law enforcement officer, I am fully engaged in protecting Arizona consumers, including by filing briefs in connection with the settlement approval process under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1711 *et seq.* And these efforts have helped generate meaningful outcomes for consumers. *See Allen v. Similasan Corp.*, No. 13-cv-376, Dkts. 219, 223, 257, 261 (S.D. Cal.) (after Arizona-led coalition of state attorneys general filed *amicus* brief and District Court rejected initial settlement proposal, revised settlement was reached that would increase class' cash recovery from \$0 to ~\$700,000). But there can be no substitute for having active and engaged class members who are fully informed about class action settlements and properly empowered to protect their own interests in connection with the settlement approval process.

With this in mind, the Commission should conduct the proposed study, use the findings to better understand consumer perception and understanding of current class action settlement notices, and then (with these insights in hand) push forward with the Commission's Class Action Fairness Project in order to address the failings of current class action settlement notice programs and help to protect consumers from abuse in the class action settlement process.

MARK BRNOVICH
Attorney General of Arizona