

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES, et al.,

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

Equity No. 49273

**PLAINTIFF'S BRIEF IN  
SUPPORT OF PLAINTIFF'S  
REPLY TO DEFENDANT'S  
OBJECTION AND SECOND  
OBJECTION TO PROPOSED  
NOTICE TO CLASS MEMBERS**

COMES NOW the Plaintiff, Lisa Kragnes, and for her supplemental brief in support of her motion to proposed notice to class members and in support of her response to Defendant's objections to proposed notice respectfully states as follows:

The Iowa Supreme Court has stated as follows:

"It is axiomatic that due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950). In the class action context, the notice must (1) reach the parties affected, and (2) "convey the required information." *In re Nissan Motor Corp.*, 552 F.2d 1088, 1103 (5th Cir. 1977)."

See *Barkema v Williams Pipeline Company*, 666 N.W.2d 612, 615 (Iowa 2003)

In this case, the Defendant mistakenly attempts to utilize the case of *Phillips Petroleum Co. v. Shutts*, 472 US 797, 812 (1985) for the proposition that due process requires an opportunity to opt-out of the class. Unfortunately, the Defendant misinterprets and misapplies the *Shutts* case. In particular, the *Shutts* case does not require opt-out in the present matter.

1. *Shutts* makes clear that it is only in the case of a matter primarily for the recovery of monetary damages that opt-out would be necessary. See *Shutts* at FN 3, page 812. The primary intent of this equitable case is the obtaining of an injunction that invalidates the ordinances passed by the City of Des Moines for the collection of franchise fees to the extent that those fees are illegal taxes. Accordingly the injunction is the initial and primary focus. Secondary focus is the consequent recovery restitution. It has been held in a number of matters that this distinction changes concept of due process. See, e.g. *In Re Global Crossing Securities And ERISA Litigation*, 225 F.R.D. 436, 2004(S.D. N.Y.) ("For non-opt-out cases, such as the ERISA Actions, *Rule 23* requires only such unspecified "appropriate notice" as "the court may direct," *Fed. R. Civ. P. 23(c)(2)(A)*; see, e.g., *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 515 n.19 (S.D.N.Y. 1996) ("Notice under *Rule 23(b)(2)* is flexible, and may consist entirely of published notice in appropriate circumstances."").

Indeed, the ruling in *In Re Global Crossing Securities And ERISA Litigation* cited above, demonstrates another fallacy in the argument of the City. As noted in the cite above, the Court refers to "non-opt-out" case. How can there be "non-opt-out" cases if the City is correct that opt outs are always required by due process? This points out the need to refer to the Federal Rules of Civil Procedure which distinguish between opt-out cases and non-opt out cases. See F.R.C.P. Rule 23(b), attached hereto as Exhibit "1". The Court will note that

under Rule 23(b)(1) and (2) certifications, all that is required is the giving of a due process notice, not an opt out. See F.R.C.P. 23(c). This shows that even under current class action federal rules and law, a class action case can proceed without opt-outs. The City's argument that the Iowa Rules of Civil Procedure allowing the present case to be processed without opt-outs is unconstitutional, is wrong and should be overruled.

2. Furthermore, *Shutts* and its progeny demonstrates that the necessity of opt-out only applies in those cases where the foreign state does not have jurisdiction i.e. minimum contacts with the individuals in the litigation. *Phillips Petroleum Co. v. Shutts*, 472 US 797, 811-812 (1985). To put this into context, if this were a case wherein individuals who were going to be plaintiffs in this case had no minimum contacts with the State of Iowa, due process would require the opting out procedure. For example, if the proposed class members were to be California persons or entities, who did not have minimum contacts with the State of Iowa, then the class action litigation would have to give the right to those plaintiffs to opt-out of the litigation. This is because the State of Iowa would have no constitutional right to litigate and determine the rights of these individuals who do not have minimum contacts with the State of Iowa. Their decision not to opt-out of the litigation supplies the consent to the jurisdiction in Polk County District Court in that instance.

To the contrary is the present case. In this case the only members who are in Plaintiff's class must have minimum contacts with the State of Iowa and

the Polk County District Court. That is because the only way a person or entity can be a member of Plaintiff's class in this case is if the person was a resident and/or paid gas and electric franchise fees during the years July 1999 through the present. The payment of the gas and electric franchise fees would constitute the minimum contacts to establish jurisdiction within the State of Iowa to make a determination of the rights of these plaintiffs. In that situation, generally only notice is required, which of course is the notice required in all litigation. In other words, because the plaintiff's members in this case have minimum contacts with the State of Iowa, the Polk County District Court has jurisdiction to make a determination of the rights of these plaintiffs. See, e.g. *Kramersmeier v R.G. Dickenson & Co.*, 440 N.W. 2d 873, 876-877 (Iowa 1989)(minimum contacts satisfied by connection between nonresident plaintiffs and the State of Iowa such that Iowa's assertion of jurisdiction meets the requirements of fair play and substantial justice underlying the "minimum contacts" standard on *International Shoe*). That eliminates the need for the opt-out and only requires notice. The proposed class notice of the Plaintiffs is intended to give that notice.

3. The actual issue before this Court at this time is: What notice must be made to class members? Due process, as seen above, requires the need to give mailed notice, if, in fact, it is reasonably possible. In the present case the Plaintiffs have made arrangements to obtain from MidAmerican the name and last known address of all members of the class. A mailing will then be made to all of those individuals. To address those individuals who have moved and the

address known is no longer valid, publication will be accomplished. Plaintiffs have proposed publishing in the City of Des Moines newspaper, the Des Moines Register, which has statewide publication and distribution. Plaintiffs also believe that the Court could allow the Plaintiffs to issue a press release to the various news agencies so that publication can be made by the news media if they do so. Plaintiffs contend that this is sufficient due process under the circumstances for notice in this case.

4. The Defendant has submitted several affidavits from the individuals who also sit on the City Council for the City of Des Moines, and the Mayor and the Assistant City Attorney in which these individuals assert that they do not want to be included in this class action. They assert this creates "competing interests" within the class and that class cannot represent the class members due to the potential conflict. However, this type of assertion was long ago rejected by the Iowa Supreme Court in the case of *Vignaroli v Blue Cross of Iowa*, 360 N.w.2d 741 (Iowa 1985). In the *Vignaroli* case, there was an alleged forced transition of employees to the subsequent employer by the dismissal of all employees and the simultaneous offer of employment with the subsequent employer. Some of the employee/class members accepted the new employment and others did not. The Defendants asserted this created a conflict of interest as some of the persons who willingly accepted the employment rather than severance pay, may have no complaint against their employer-the

Defendant. The Iowa Supreme Court dismissed this argument by stating as follows:

“Not every disagreement between a representative and other class members will stand in the way of a class action suit. See 1 Newburg on Class Actions § 1120F, at 203. The conflict must be fundamental, going to the specific issues and controversies. *Id.* The issues in this case, *i.e.*, the alleged violation of the employment manual; the third-party beneficiary claims; the unjust enrichment claims; and the claimed violation of the Wage Collection Act, focus on the dismissal and failure to pay severance benefits. The plaintiffs have no conflict with each other with regard to those issues. As one court has noted,

not every difference in view creates the antagonism which will defeat the bringing of a class action for the antagonism must relate to the subject matter of the suit.

The fact that some members of an alleged class do not favor the bringing of a lawsuit, or may feel that the representative party may have ulterior motives for bringing the suit, will not defeat the bringing of a class action.

*Jacobi v. Bache & Co.*, 16 Fed. R. Serv. 2d 71, 73 (S.D. N.Y. 1972) (citing *First American Corp. v. Foster*, 51 F.R.D. 248, 250 (N.D. Ga. 1970); accord *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465, 468 (S.D. N.Y. 1968).”

See *Vignaroli v Blue Cross of Iowa*, 360 N.W.2d 741,746-747 (Iowa 1985).

The affidavits submitted by the Defendant do not raise fundamental conflicts. Rather, they merely bring forth the issues wherein the affiants do not believe in the validity of the case and do not favor the bringing of the case. They also assert ulterior motives in the bringing of the case. Yet, they do not address the fundamental issue of the validity of the ordinances and the correct amount of franchise fee which are the central issues presented in this case.<sup>1</sup>

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<sup>1</sup> The Defendant cites two inapplicable cases. The first is *Ortiz v Fibreboard Corp.*, 527 U.S. 815,856 (1999) and the second is *Moore v Margiotta*, 581 F. Supp.

5. The Defendant asserts, but supplies no argument for and no authority for, the assertion in the affidavits submitted as to a deprivation of freedom of association. Accordingly, the Court should overrule such a contention as failing to be properly presented and preserved for the Court.

But even if the Court were to address the issue, the assertion should be denied. The Defendant's argument that class membership deprives them of the freedom of association is simply ungrounded in law and fact. The United States Supreme Court described the two lines of cases that establish the freedom of association in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244 (1984). The Supreme Court described the freedom of association as arising in two distinct senses. *Id.*, 468 U.S. at 617-618. The first line of cases establishes a constitutional right to "enter into and maintain certain intimate human relationships" which "must be secured against undue intrusion of the State because of the role of such relationships in safeguarding" individual freedom. *Id.* The second area the Court recognized for protection was "a right to associate for the purpose of engaging in those activities protected by the *First Amendment*." (emphasis in original) *Id.* The Constitution protects this freedom of association as an indispensable means of preserving other individual liberties. *Id.* The Court emphasized that both such considerations may apply to certain cases. *Id.*

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619, 651-53(E.D. N.Y. 1984). *Ortiz* was a case involving the settlement of a class action when different terms were proposed for different members of the class. That fact pattern does not exist in the present case. *Moore* involved a conflict due to two separate class plaintiffs. There were two separate groups and they were seeking different remedies. Again, that fact pattern does not exist in the present case.

Here, the members of the class in this case still have the right to speak out against the lawsuit as clearly the mayor and members of the city council have exercised that right both in private and in public media sources. The class action does not abridge a members' right to seek public redress of wrongs, instead it promotes and facilitates individuals in seeking public redress. Any member of the class is free to hire their own representation in the class action. This does not deprive the individual of the right to seek public redress.

In this case the State of Iowa passed the Iowa Rules of Civil Procedure, and the corresponding provisions concerning when an opt-out is appropriate in a class action lawsuit, for purposes of allowing efficient adjudication of certain claims that effect large groups of people. The Rules of Civil Procedure allow individuals to represent a class for a multitude of reasons including sparing litigants and the court system a multiplicity of litigation involving joint or common interests; avoiding the potential for varying determinations in similar cases; and avoiding dispositive determinations affecting the interests of others not parties to the litigation that would otherwise occur in the absence of class action statutes. It is a proper and accepted process and offends no constitutional rights.

6. It is true the Defendant has attempted to claim that multiple languages should be required. While the Defendants state that multiple languages are necessary, that is not generally required. In fact if the Court

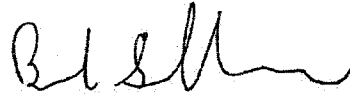
reads the Iowa Rules of Civil Procedure no mention is made of this requirement. This Court should presume that the Iowa Supreme Court in proposing, and in the Iowa legislature in adopting, the Rules of Civil Procedure intended to enact procedures that would be constitutional. Furthermore, the State of Iowa has a statute which states that official language of Iowa is English and that proceedings should be conducted therein. See Iowa Code Sections 1.18, 4.14, 618.1 and 618.2. This class action notice is appropriately to be published in English.

7. As noted in the response filed herein, Plaintiff agrees that a disclaimer should state that the class certification by the Court is not approval of or even comment upon the merits of the case. This has been added to Plaintiff's proposed class action notice.

8. Relating to informing the members of the class as to outcomes of particular rulings by the Court, including the tort immunity ruling, there is no requirement that that be provided in the initial class notice. Rather, that information will be available to all of the members of class if that investigation is desired by the members of the class, by reviewing the website or requesting a copy of the significant rulings directly from the attorneys for the Plaintiffs.

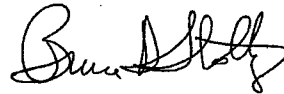
WHEREFORE the Plaintiff respectfully the requests the Court enter an order allowing the Plaintiff to provide appropriate notice to the class members as set out by Plaintiff in its documentation submitted herein.

Respectfully submitted,



By: \_\_\_\_\_

Brad Schroeder      PK# 000015582  
Hartung & Schroeder LLP  
Equitable Building, Suite 100  
608 Locust Street  
Des Moines, Iowa 50309  
Telephone: (515) 282-7800  
Facsimile: (515) 282-8700  
E-mail: schroeder@handslawfirm.com  
ATTORNEY FOR PLAINTIFF



By: \_\_\_\_\_

Bruce H. Stoltze      (AT0007521)  
Stoltze & Updegraff, P.C.  
P.O. Box 93295  
300 Walnut Street, Suite 260  
Des Moines, Iowa 50393  
Telephone: 515-244-1473  
Fax: 515-244-3930  
Email: bruce.stoltze@stoltzelaw.com  
ATTORNEY FOR PLAINTIFF

**ORIGINAL FILED.**

**CERTIFICATE OF SERVICE:**

**A COPY** of the foregoing has been hand-delivered this  
20<sup>th</sup> day of August, 2008, to the following:

Mark Godwin  
Deputy City Attorney  
City Hall  
400 East First Street  
Des Moines, IA 50309  
ATTORNEY FOR DEFENDANT

Judge Joel D. Novak  
Polk County Courthouse  
500 Mulberry  
Des Moines, Iowa 50309

*Michelle Hirsch*

By: \_\_\_\_\_

(f) **Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) **Class Counsel.**

(1) *Appointing Class Counsel.*

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) *Appointment Procedure.*

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) **Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) *Motion for Award of Attorney Fees.* A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) *Objections to Motion.* A class member, or a party from whom payment is sought, may object to the motion.

(3) *Hearing and Findings.* The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) *Reference to Special Master or Magistrate Judge.* The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

[Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003.]

## RULE 23.1 DERIVATIVE ACTIONS BY SHAREHOLDERS

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

[Adopted February 28, 1966, effective July 1, 1966; amended March 2, 1987, effective August 1, 1987.]

subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

[Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987.]

## RULE 20. PERMISSIVE JOINDER OF PARTIES

(a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) **Separate Trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

[Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987.]

## RULE 21. MISJOINDER AND NON-JOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

## RULE 22. INTERPLEADER

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their

claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

[Amended December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987.]

## RULE 23. CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of

separate actions: (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.**

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the

provisions of this rule shall then be construed and applied accordingly.

**(d) Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(e) Settlement, Voluntary Dismissal, or Compromise.**

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Action permitted by this rule after an proceeding judge or

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