IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CHANCERY DIVISION

AMY JOSEPH AND ROBERT O'BRIEN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. MONSTER, INC., A DELAWARE CORPORATION, BEST BUY STORES, L.P., A MINNESOTA CORPORATION, AND BESTBUY.COM, LLC, A MINNESOTA CORPORATION, Defendants, and BENJAMIN A. PEREZ AND DARON JACOBSON, Intervenors.	15 CH 13991 Honorable Franklin U. Valderrama Calendar 03

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Plaintiffs, Amy Joseph and Robert O'Brien's Motion for Final Approval of Proposed Class Action Settlement. For the reasons that follow, Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement is granted.

BACKGROUND[1]

In 2002, leading consumer electronics companies partnered to develop a new digital standard called High Definition Multimedia Interface ("HDMI"). Pls. Compl., ¶ 18. HDMI is a signal for transmitting digital audio and video from high definition ("HD") sources, such as digital cable boxes and Blu-ray devices to HD monitors such as High Definition Televisions ("HDTVs"). Pls. Compl., ¶ 16.

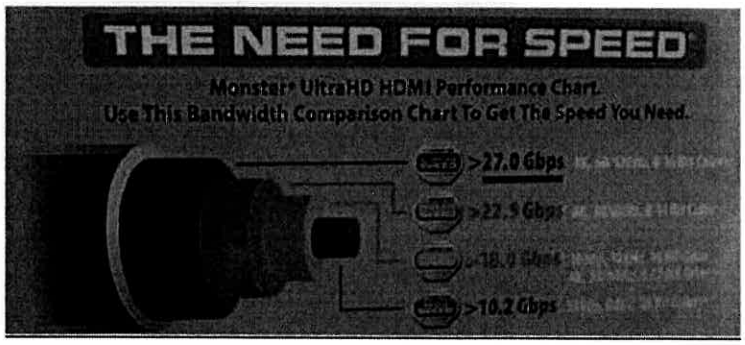
[1] The background information included here is derived from Plaintiffs' First Amended Complaint and prior orders, including the Court's March 6, 2018 Memorandum Opinion and Order granting Plaintiffs' Motion for Preliminary Approval.

Prior to the introduction of HDMI and digital media, all audio and video data was transmitted through analog signals along analog cables. Pls. Compl., ¶ 17. HDMI enabled transmission of advanced video and audio data through a single HDMI cable. Pls. Compl., ¶ 18. HDMI is now the standard format for digital video and, since 2003, has been licensed by more than 1,300 companies that have produced various HDMI products. Pls. Compl., ¶ 18.

There are five categories of HDMI cables: HDMI standard; HDMI standard with Ethernet; HDMI standard automotive; HDMI High Speed; and HDMI High Speed with Ethernet. Pls. Compl., ¶ 20. HDMI cables have two basic classifications: HDMI standard and HDMI High Speed. Pls. Compl., ¶ 20. The official HDMI standards created the High Speed category. Pls. Compl., ¶ 25. To qualify as an HDMI High Speed cable, a cable must be able to transmit digital signals at 10.2 gigabits per second ("Gbps"). Pls. Compl., ¶ 21. A HDMI High Speed cable with a bandwidth of 10.2 Gbps is designed to transmit video resolutions of 1080p and above, including resolutions required by advanced displays for 4K and 3D televisions. Pls. Compl., ¶¶ 21-2. There is no noticeable difference between any two functioning HDMI cables within the same category. Pls. Compl., ¶ 19. As such, manufacturers of 4K devices recommend that consumers use HDMI High Speed cables with their devices, which can usually be purchased for less than ten dollars. Pls. Compl., ¶ 22.

Monster Inc. ("Monster") sells HDMI cables with a bandwidth of 10.2 Gbps and cables with greater bandwidth. Monster, however, has its own categories of High Speed cables: Advanced High Speed, Ultra High Speed and Ultimate High Speed. Pls. Compl., ¶ 25. Monster's cables come in packaging which displays a comparison of bandwidth speeds that informs consumers that they need Monster's faster cables in order to transmit various amounts of data. Pls. Compl., ¶¶ 22-3.

Monster's advertising contains a performance chart detailing the various speeds of its HDMI cables and instructs consumers to choose a cable based on the speed necessary for transmission of digital signals. Pls. Compl., ¶ 26. The performance chart states that "Advanced High Speed" cables with a bandwidth greater than 18.0 Gbps are needed to transmit a signal with "1080p, 120Hz, 16 Bit Color" or "4K, 30/60 Hz, 8-12 Bit Color," "Ultra High Speed Cables" with a bandwidth greater than 22.5 Gbps" are necessary to transmit a signal with "4K, 30/60Hz, 8-14 Bit Color"; and "Ultimate High Speed" cables with a bandwidth greater than 27.0 Gbps are necessary to transmit a signal with "4K, 60/120Hz 8-16 Bit Color." Pls. Compl., ¶ 26.



Best Buy is a consumer electronic retailer that sells, among other consumer products, HDMI cables, including Monster HDMI cables. Best Buy sales personnel repeat and reaffirm the representations about Monster HDMI cables to consumers. Pls. Compl. ¶ 29. BestBuy controls the website www.bestbuy.com. Pls. Compl., ¶ 29. On its website, Best Buy advertises and sells Monster HDMI cables. Pls. Compl., ¶ 29. The descriptions for Monster's HDMI cables on the Best Buy website use the same terminology Monster uses in its advertising. Pls. Compl., ¶ 30. Best Buy also advertises that certain cables are necessary to transmit digital signals. Best Buy states that Advanced High Speed cables with a bandwidth greater than 18.0 Gbps are needed to transmit a signal with 1080p, 120Hz, 16 Bit Color" or "4K 30/60 HZ, 8-12 Bit Color"; "Ultra High Speed" cables with a bandwidth greater than 22.5 Gbps" are necessary to transmit a signal with "4k, 30/60 Hz, 8-14 Bit Color"; and that "Ultimate High Speed" cables with a bandwidth greater than 27.0 Gbps are necessary to transmit a signal with "4K, 60/120 Hz, 8-16 Bit Color." Pls. Compl., ¶ 30. Best Buy also advertises and sells Monster HDMI cables in its retail stores. Pls. Compl., ¶ 31.

Amy Joseph ("Joseph") purchased a Monster HDMI cable from a Best Buy retail store in Illinois. Pls. Compl., ¶ 11. According to Joseph, she "carefully reviewed" the Monster HDMI cable's packaging prior to her purchase. Pls. Compl., ¶ 34. Joseph noted that Monster's packaging represented that a cable exceeding 10.2 Gbps was necessary to transmit HDMI signals to her 4K television. Pls. Compl., ¶ 34. Due to Monster and Best Buy's alleged misrepresentations, Joseph purchased a more expensive HDMI cable when a lesser priced HDMI cable would have sufficed. Pl. Compl ¶ 34.

In March 2014, Benjamin Perez ("Perez") allegedly purchased a Monster Ultra High Speed HDMI cable from a Best Buy store in Orange, California, for approximately $189.00. According to Perez, he allegedly reviewed the packaging—which represented that a HDMI cable with a bandwidth exceeding 10.2 Gbps was needed to transmit video signals to his television—before buying the cable.

On August 25, 2015, Perez filed a class action lawsuit in the United States District Court for the Northern District of California (the "California Action") against Monster and Best Buy, alleging that Monster misrepresents to customers that 1080p and 4K HDTV's will not work properly unless they use Monster HDMI cables with bandwidths of 18.0, 22.5 or 27.0 Gbps, when in fact any HDMI cable with a bandwidth of 10.2 Gbps can transmit 1080p and 4K signals. Perez further alleged that Monster placed these misrepresentations prominently and conspicuously on the packaging of every HDMI cable that it sells throughout the United States. As for Best Buy, Perez alleged that Best Buy affirms Monster's misrepresentations at the time of sale through sales personnel, floor displays and on its website. The proposed class in the California Action was defined as "all persons in the United States who purchased a Monster HDMI cable" with a sub-class defined as "all persons in the United States who purchased a Monster HDMI cable from Best Buy." Pls. Mot. Prelim. Approval., Ex. A.

On September 22, 2015, Joseph filed a Class Action Complaint against Monster and Best Buy in the Circuit Court of Cook County (the "Joseph Action"). The gravamen of Joseph's Complaint is that Monster, through representations made on its packaging of certain HDMI

cables, induces consumers to purchase higher bandwidth and thus, more expensive cables than they need to make their televisions work. Pls. Compl. ¶ 34. Joseph alleges that she relied on the chart that is printed on the back of the packaging of certain of the Monster HDMI cables. Specifically, Joseph alleges that Monster mispresented that Monster HDMI cables of 10.2 Gbps and faster are required to transmit digital signals and can do so in a superior manner compared to HDMI cables of 10.2 Gbps from other brands. Joseph sued Best Buy because Best Buy allegedly advertises and sells Monster HDMI cables and uses the same terminology as Monster in its advertising. The following day Joseph filed a Motion for Class Certification.

Sometime after filing the Complaint, Joseph's counsel contacted Perez's counsel in the California Action to ascertain whether they were interested in coordinating their efforts and seek a global resolution. Apparently, Perez's counsel were not interested and opted to continue with the lawsuit in California. Pls. Compl. Ex. 6(c). Joseph's counsel subsequently forwarded a copy of Joseph Complaint to Defendants' counsel in the California Action. Zimmerman Decl. ¶ 15. Sometime thereafter, Joseph's counsel commenced settlement discussions with Defendants. *Id.* Defendants' counsel informed Joseph's counsel that they were interested in a nationwide class settlement. *Id.* Joseph's counsel held off on serving Joseph's Complaint. Defendants agreed to participate in mediation with Joseph's counsel. Pls. Compl. Ex. 6(c).

On March 16, 2016, Joseph, through her counsel and Defendants attended a mediation before the Honorable Richard J. Billik, Jr. (Ret) ("Judge Billik"). Prior to the mediation, Defendants' counsel provided Joseph's counsel with Defendants' sales data, including wholesale and retail sales. While the parties did not settle the case at the mediation, they continued settlement negotiations and on June 21, 2016, executed a Memorandum of Understanding reflecting the agreed terms of settlement. On July 13, 2016, the parties executed the Settlement Agreement (the "Settlement"). The Settlement called for Joseph to file an amended complaint, asserting a nationwide class action and to substitute out Best Buy Co., Inc., as a defendant and substitute in Best Buy Stores, L.P. and Best Buy.com, LLC as defendants.

On July 12, 2016, Perez filed a Petition to Intervene and to Stay this case, alleging that he was a member of the class. The Defendants opposed Perez's Petition to Intervene, arguing, among other things, that Perez was not in fact a member of the class. Perez also filed an opposition to preliminary approval of the Settlement. Perez argued that the proposed settlement was a product of collusion. In support of that contention, Perez alleged that: (1) the Joseph Action was filed only a few weeks after Perez filed his complaint; (2) the Joseph Complaint copied generously from his complaint; (3) the Defendants chose not to remove the Joseph Action to federal court where it could have been transferred to the Northern District of California; (4) Defendants failed to advise either Perez or the federal judge in the California Action about this case; (5) the Joseph parties have settled this case without any formal discovery; and (5) the parties in this case seek to settle this matter on a nationwide basis. The Petition was supported by the Declarations of Perez and his counsel, Joshua D. Arisohn ("Arisohn"). The Court[2] granted Perez's Petition to Intervene, concluding that consideration of the objections would assist the

2 At that time, the Hon. Kathleen Kennedy presided over this case. Judge Kennedy subsequently retired and the matter was assigned to this Calendar.

court in seeking to protect the best interests of the class. The Court, however, denied Perez's motion to stay this action

On July 14, 2016, Joseph filed an Amended Class Action Complaint against Monster and Best Buy. The Amended Complaint added Robert O'Brien ("O'Brien") (a California resident) as a plaintiff (hereinafter, Joseph and O'Brien are referred to collectively as "Plaintiffs"), substituted out Best Buy Co., Inc., as a defendant and substituted in Best Buy Stores, L.P. and Best Buy.com LLC as defendants. O'Brien allegedly purchased a Monster HDMI cable from a Best Buy retail store in California. Pls. Compl., ¶ 12. Prior to his purchase, O'Brien allegedly reviewed the Monster HDMI's cable's packaging and noted that Monster's packaging represented that a cable exceeding 10.2 Gbps was needed to transmit HDMI signals to his 4K televisions. Pls. Compl., ¶ 34. Count I alleges a violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act ("ICFA"); Count II alleges Breach of Express Warranty; Count III alleges Breach of Implied Warranty of Merchantability; Count IV alleges Common Law Fraud; Count V alleges Negligent Misrepresentation; Count VI alleges Unjust Enrichment; Count VII alleges violation of the California Consumer Legal Remedies Act; Count VIII alleges Violation of the California Unfair Competition Law; Count IX alleges violation of the California False Advertising Law and Count X alleges Violation of the Consumer Fraud and Deceptive Trade Practices Act of various states and the District of Columbia. The Proposed Class is defined as "all persons who purchased a Monster HDMI Cable advertised as having a bandwidth exceeding 10.2 Gbps in the United States since August 25, 2011 to the date of Preliminary Approval of the Settlement." Pls. Compl., ¶ 39. Plaintiffs also filed an Amended Motion for Class Certification.

Plaintiffs subsequently filed their Unopposed Motion for Preliminary Approval of the Proposed Class Action Settlement. Perez filed a brief in Opposition to Plaintiffs' Motion for Preliminary Approval. In support of his Opposition, Perez filed the Declaration of his attorney, Arisohn, the Declarations of Michael J. Kaufman, Colin B. Weir and the Amended Declaration of Todd B. Hilsee, along with numerous other exhibits.

On November 11, 2016, Perez agreed to withdraw as intervenor and be replaced by three new intervenors. On November 23, 2016, Daron Jacobson ("Jacobson"), Meredith Price and Shannon Anderson filed a Petition to Intervene. Plaintiffs and Defendants opposed the motion. On July 25, 2017 the Court granted the Petition to Intervene in part and denied it in part, granting Jacobson leave to intervene. Jacobson (hereinafter "Intervenor") adopted Perez's opposition to the Motion for Preliminary Approval. On December 18, 2017, the Court granted Plaintiffs' motion for class certification having found that Plaintiffs satisfied all the prerequisites for class certification. The Class in this case is defined as "all persons who purchased a Monster HDMI Cable advertised as having a bandwidth exceeding 10.2 Gbps in the United States from August 25, 2011 to the date of Preliminary Approval of the settlement." Excluded from the Class are: (i) persons who properly exclude themselves from the Settlement; (ii) any persons who are employees, directors, officers, or agents of Defendants or their subsidiaries and affiliated companies; (iii) any judge, justice, judicial officer, or judicial staff of the Court and the Court's immediate family members; or (iv) all persons who purchased a Monster HDMI Cable by or through Target or Walmart Stores. Settlement § II, ¶¶ 12, 38.

Plaintiffs and Defendants subsequently filed a Joint Supplement in support of the Motion for Preliminary Approval. Intervenor filed the Supplemental Declaration of Todd B. Hilsee on Assessment of Settlement Notice Plan in opposition to the Motion. On March 6, 2018, the Court granted Plaintiffs' Motion for Preliminary Approval.

On January 25, 2019, Plaintiffs filed their Motion for Final Approval of the Parties' Proposed Class Action Settlement. Intervenor filed an objection to the Motion ("Objection"). A final fairness hearing was held on February 7, 2019 (the "Final Fairness Hearing"). The Court did not grant the motion at that time. Instead, the Court issued an order setting the matter for status to update the Court on the class size and claims, and granted Plaintiffs leave to file Monster's financial statements under seal, among other things. By Order dated March 27, 2019, the Court directed Plaintiffs to file a supplement to the motion addressing issues concerning the size of the Class and the claims administration and approval. A briefing schedule was entered with respect to the supplement. Thereafter, Plaintiffs filed a Supplement to their Motion for Final Approval of the Parties' Proposed Class Action Settlement (the "Supplement") and a Motion for Approval of an Award of Attorney's Fees, Costs, Expenses, and Service Awards. Jacobson filed a response opposing the Supplement, and Plaintiffs and Defendants jointly filed a reply. Plaintiffs' Motion for Final Approval is presently before the Court.

STANDARD FOR FINAL APPROVAL

The law favors settlement of class actions, and a trial court should not "disapprove a settlement...unless, taken as a whole, the settlement appears on its face so unfair as to preclude judicial approval." *Gowdey v. Commonwealth Edison Co.*, 371 Ill. App. 3d 140, 149-149-150 (1st Dist. 1976). The standard to be used in evaluating the compromise settlement of a class action is that the agreement must be fair, reasonable, and adequate. *People ex rel. Wilcox v. Equity Funding Life Insurance Co.*, 61 Ill. 2d 303, 317 (1975). Although review of class action settlements necessarily proceeds on a case-by-case basis, the following factors have been consistently identified as relevant to the determination of whether a settlement is fair, reasonable and adequate: (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement; (2) the defendants' ability to pay; (3) the complexity, length and expense of trial; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; and (6) the stage of the proceedings and the amount of discovery completed. *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1s Dist. 1990); *appeal denied* 139 Ill. 2d 594 (1991). These are known as the *Korshak* factors.

DISCUSSION

I. THE SETTLEMENT

The terms of the Settlement allow consumers who purchased the subject Monster HDMI cables to choose between a cash payment or online store credit. The parties agreed to certification of a Settlement Class for settlement purposes only. The Settlement provides class members with three (3) options. The amount of the benefits for which a class member is eligible depends on the bandwidth that each purchased and which of the three options the class member

chooses.

Option A provides:

> $10 for each Monster Gold HDMI cable purchased (approximately 62.5% of the average cost differential between the weighted average MSRP of the 10.2 Gbps cables and weighted average MSRP of the Gold Cables);
>
> $10 for each Monster HDMI cable purchased that was advertised as having a bandwidth exceeding 10.2 Gbps and that is not a Monster Gold, Platinum or Black Platinum model cable;
>
> $13 for each Monster Platinum HDMI Cable purchased (approximately 39% of the average cost differential between the weighted average MSRP of the 10.2 Gbps cables and the weighted average MSRP of the Platinum Cables);
>
> $18 for each Monster Black Platinum HDMI Cable purchased (approximately 22.5% of the average cost differential between the weighted average MSRP of the 10.2 Gbps cables and the weighted average MSRP of the Black Platinum Cables).

Option A claimants must submit an acceptable form of proof of purchase which includes: purchase receipt, credit card statement, photograph of the Monster HDMI cable box or a photograph of an end of their Monster HDMI cable. The Settlement Administrator received 15,341 Claim Forms under Option A. Pls. Mot., Ex. 1, ¶ 25.

Option B provides:

> $15 for each Monster Gold HDMI Cable purchased;
>
> $15 for each Monster HDMI cable that was advertised as having a bandwidth exceeding 10.2 Gbps and that is not a Monster Gold, Platinum or Black Platinum model cable;
>
> $25 for each Monster Platinum HDMI Cable purchased;
>
> $35 for each Monster Black Platinum HDMI Cable purchased.

Option B claimants must return their existing HDMI Cable to the Settlement Administrator. Option B Claimants will also receive a replacement 10.2 Gbps cable and a postage reimbursement of up to $5.00. The Settlement Administrator received 303 Claim Forms under Option B.

Option C provides:

> $20 credit on Monsterproducts.com for each Monster Gold HDMI Cable

purchased;

$20 credit on Monsterproducts.com for each Monster HDMI cable that was purchased as having a bandwidth exceeding 10.2 Gbps and that is not a Monster Gold, Platinum or Black Platinum Model;

$25 credit on Monsterproducts.com for each Monster Platinum HDMI Cable purchased;

$30 credit on Monsterproducts.com for each Monster Black Platinum HDMI Cable purchased.

No proof of purchase is required for Option C unless the claimant submits more than one claim. If more than one claim per claimant is submitted, then each claim must be supported by acceptable proof of purchase as set forth in Option A. The Settlement Administrator received 43,698 Claim Forms under Option C.

In addition to monetary relief, Monster has also agreed to modify the language of the subject cable packages. According to Monster, the new "Need for Speed" charts would identify the various speeds of Monster's cables without stating that any particular speed is required for any particular function. Plaintiffs provided mock ups of the new packaging. Pls. Mot., Ex. 6.

Angeion Group ("Angeion") was retained to serve as the Settlement Administrator for the Settlement in this case. Plaintiffs submit the Declaration of Denise Earle ("Earle"), Project Manager with Angeion in support of their Motion for Final Approval. Plaintiffs submitted a Supplemental Declaration of Earle in support of the Supplement. Angeion completed its review of the submitted claims in the Settlement and determined that 59,867 claims were filed in total, and that 58,351 have been approved for payment. Pls. Supp., Ex. 1, ¶ 6. From the initial round of notice ("Initial Round"), Angeion approved 38,920 claims for payment. From the second round of notice ("Second Round"), Angeion approved 19,431 claims for payment.

Under the Settlement, note Plaintiffs, Monster is responsible for paying all costs associated with the notice and administration of the Settlement. Settlement, § VII, ¶ 73. Thus far, state Plaintiffs, the Settlement Administrator, Angeion Group, has incurred $339,058.91 in notice and administration costs, which includes costs for de-duping the customer contact data, sending the email and postcard notices, locating updated information for returned notices and re-mailing, the banner notice, the publication notice, and intake and processing of the claims forms, among other things. According to Plaintiffs, the Settlement Administrator estimates that it will incur an additional $60,000 in costs to complete the administration of the Settlement.

In recognition of their efforts on behalf of the Settlement Class, note Plaintiffs, Defendants have agreed not to object to service awards not to exceed $3,000 for each class representative. Settlement, § XII, ¶ 104.

As for attorney's fees, Plaintiffs indicate that the Settlement provides for the payment of attorney's fees and expenses in an amount not to exceed $325,000. Settlement, § XII(A), ¶ 101.

As for notice to the class, the Settlement provided for: (1) direct notice via email to Class Members that are reasonably identifiable from Defendants' records; (2) publication notice via email and print publications; (3) the creation of a settlement website; and (4) a toll-free phone line. Class Members who have not submitted claims and for which there has been no email bounce-back shall receive a follow-up email.

In exchange for the benefits provided in the Proposed Settlement, the Class Members agree to release all claims, known and unknown, arising from sale or marketing of Monster HDMI cables.

II. DUE PROCESS: NOTICE PLAN

Intervenor raises several objections to the form of the notice, including (1) that physical mail is preferred over email; (2) that retailers should be subpoenaed; (3) that the class size is not accurate; and (4) that the claims approval rate is thus inaccurate.

The notice requirements for a class action are set forth in section 2-803 of the Illinois Code of Civil Procedure, which provides that:

> Upon determination that an action may be maintained as a class action, or at any other time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.

735 ILCS/5-2-803 (West 2014).

The plain language of section 2-803 reveals that the Illinois General Assembly did not prescribe the specific type of notice that must be given in class action litigation. However, to satisfy due process, the notice must be the "best practicable, reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Due process considerations come into play because in class action litigation, all members of the class are bound by the result. *Frank v. Teachers Insurance & Annuity Ass'n of Am.*, 71 Ill 2d 583, 596 (1983). To satisfy due process, the question of what notice must be given to absent class members necessarily depends upon the circumstances of the individual action. *Miner v. Gillete Co.*, 87 Ill. 2d 7, 15 (1981). In other words, the General Assembly left this determination to the trial court's discretion on a case-by-case basis. The Court will address each of Intervenor's objections in turn.

A. Physical Mail

Plaintiffs state that in the first round of notice provided to Class Members, the Settlement Administrator received electronic files from Defendants, then analyzed and de-duplicated the 1,590,622 records in the files. Pls. Mot., Ex. 1. On May 4, 2018, the initial email notice went out to 578,934 Class members for whom a unique email address was present. *Id.* ¶ 8. Mailed notice was sent to 15,156 individuals whose records included a postal address, but not an email address.

Id. Whenever an email notice was blocked or returned as undeliverable ("bounced back"), mailed notice was sent via First Class Mail to the postal addresses that corresponded with the "bounced back" email address. *Id.* ¶ 9. In some cases where an individual customer had two addresses on file, mailed notices were sent to both addresses. *Id.* Where mailed notices were returned, they were sent to the forwarding address on file, or skip traces were conducted and the notices were re-mailed to the updated addresses. *Id.* On or about September 14, 2018, the Settlement Administrator received electronic files from Defendants, analyzed and de-duplicated the records, and sent an additional 688,646 email notices to Class Members. *Id.* ¶ 15.

Intervenor contends that email notice is inadequate when physical mail is available, citing, among others, *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 91 (E.D.N.Y. 2007) and *Sharma v. Burberry Ltd.*, 52 F. Supp. 3d 443 (E.D. N.Y. 2014). According to Intervenor, email notice tends to generate lower claims than notice through physical mail, offering Todd B. Hilsee's—Intervenor's expert on notice issues—Amended Declaration[3] in support of this contention. Intervenor asserts that the costs of physical mail are not a valid reason to rely solely on email notice. In any event, argues Intervenor, the cost of physical mail in this case is not out of proportion to the damages at issue. Intervenor notes that Defendants have contact information for 1,680,000 class members. Hilsee estimates that the cost of sending physical mail would be $713,770. In other words, Intervenor estimates based on these two numbers that physical mail notice would cost between $0.43 and $0.59 per identifiable class member. Intervenor concludes that these costs are reasonable.

Whether the proposed notice satisfies due process depends upon the circumstances of the individual action. *Miner*, 87 Ill. 2d at 15. The class in this case is comprised of consumers who purchased HDMI cables—in fact, relatively speaking, fairly expensive HDMI cables. It is not a stretch of the imagination to conclude that it is precisely these types of consumers who are just as likely to receive and open an email as they would be to receive and open a first class letter. More importantly, Intervenor's objection to email notice is generalized but not specific to this case. Nowhere to be found in Hilsee's Declaration is there an analysis as to why email notice in this case, as opposed to generally, is inappropriate.

The Court agrees with Intervenor that wherever possible, direct notice should be provided to potential class members. However, considering the specific circumstances and facts in this case, the Court finds that the notice plan satisfies due process requirements. In light of the fact that mailed notice was used in conjunction with emailed notice, in cases where an email address was unknown or where an emailed notice bounced back, the Court finds that the plan as implemented satisfies due process.

B. Subpoenaing Retailers

In its objection to final approval, Intervenor asserts that the Notice Plan is deficient because the parties did not subpoena retailers for information on customers that purchased Monster cables. According to Intervenor, many addresses not already in the Defendants'

[3] Intervenor subsequently filed a Supplemental Declaration of Todd B. Hilsee on the Proposed Notice Plan

possession would be available through subpoenas to third parties. Intervenor Objection, Ex. C, ¶ 19.

Plaintiffs contend that they were not required to subpoena retailers by the Court's Order granting preliminary approval of the Settlement. Plaintiffs note that they have already responded to this argument, and that Intervenor has not cited any authority finding that subpoenaing third parties to obtain class member information is required for due process. Plaintiffs further point out that Amazon raised numerous objections to the subpoena, and that trying to obtain sales information from any other retailer would be time consuming and involve unnecessary costs. Moreover, Plaintiffs submit that Amazon comprised only 0.9% of Monster's retail sales during the Class period. Pls. Supp., Ex. 3.

In its Memorandum Opinion and Order granting preliminary approval of the proposed settlement, the Court noted that it would assess whether this was necessary in light of the responses to the notices issued. Now, Plaintiffs have submitted evidence that the Notice Plan resulted in a net reach of 80.53%, and that the claims rate was 4.1%. As such, the Court finds that subpoenaing retailers is not necessary. See, Pls. Mot., Ex. 1.

C. Class Size

In support of their Motion for Final Approval, Plaintiffs submit the Declaration and Supplemental Declaration of William Bainbridge ("Bainbridge"), Senior Mix & Merchandising Analyst with Monster. Pls. Supp., Ex. 3. Bainbridge attested that the updated retail sales information between the period of August 25, 2011 and March 6, 2018 (the period covered by the settlement ("Class Period")), shows that Best Buy comprised 72.8% of Monster's retail sales and that Monster comprised 0.9% of its sales for the HDMI cables at issue in this matter. Pls. Supp., Ex. 3, ¶ 3. The records of Monster HDMI cable sales and customer data provided by Defendants to Angeion comprised 73.7% of the retail sales for the HDMI cables at issue, as those records were from Best Buy and Monster's retail sales. The transaction records associated with an individual product purchase contained two different fields for the same purchase: a "billing" mailing and email address, and a "loyalty" mailing address and email address. As some transaction records contained data in all fields, some of the emailed and mailed notices that Angeion sent were duplicative, so some Class Members received multiple Notices. Deduplication of the records based on Class Members' first and last names resulted in 1,042,746 unique Class Members in the records provided by Defendants. Pls. Supp., Ex. 1, ¶ 6.

Plaintiffs estimate the total number of Class Members to be 1,414,851 (*i.e.* 1,042,746 divided by 73.7%). The claims rate for the Settlement is thus estimated to be 4.1%, as 58,351 claims were approved and the total class is comprised of 1,414,851 members. The total monetary value of the approved claims in the Settlement is $1,414,648. Pls. Supp., Ex. 2.

Plaintiffs maintain that a 4.1% claims rate is not unusual in class action settlements and is within an acceptable range for approval, citing, among others, *Pollard v. Remington Arms Co., LLC,* 896 F.3d 900, 906 (8th Cir. 2018). Moreover, Plaintiffs note that in one approved settlement, notice was sent to only 57% of the class and resulted in a 3% claims rate, citing *Keil*

v. Lopez, 862 F.3d 685, 701-02 (8th Cir. 2017). Thus, Plaintiffs conclude that the notice plan here was effective and generated a claims rate of 4.1%, which is within the acceptable range for final approval.

Intervenor retorts that Plaintiffs have miscalculated and inflated the claims rate. From Intervenor's perspective, the claims rate is below 1%. According to Intervenor, rather than providing information regarding how many cables were sold at retail during the Class Period, Plaintiffs provided a calculation based on the number of Class Members identified from the Best Buy records as a proxy for the number of people who purchased cables from Best Buy. However, asserts Intervenor, Best Buy did not identify everyone who purchased a cable at its stores. Intervenor posits that Monster tracks either directly through retailers or through data that they purchase from market research companies how many cables it sold during the Class Period. Intervenor further asserts that Monster can discern from its own records how many units of the Class Product was sold at wholesale during the Class Period, and that this figure would provide a good estimate for the number of units sold at retail and the class size, because "there is rarely a disconnect between retail and wholesale numbers for consumer goods..." Intervenor Resp. to Supp., p. 4.

Intervenor submits the declaration of Anya Verkhovskaya ("Verkhovskaya"), in support of his argument that Plaintiffs miscalculated the class size and claims rate. Intervenor Resp. to Supp., Ex. 2. Verkhovskaya is the president of Class Experts Group, LLC, which offers litigation support services with a focus on consumer class action litigation, class notice expertise, class action administration, and data management and analysis. Intervenor Resp. to Supp., Ex. 2, ¶ 7.

Intervenor maintains that Plaintiffs' class size calculation is based on a faulty premise, as Best Buy was likely not able to identify class members who purchased Monster HDMI cables in the store without using a rewards card, and paid using a regular non-Best Buy credit card, a gift card, or cash. Intervenor further points out that in the August 8, 2016 Declaration of Claims Administrator Steven Weisbrot, Weisbrot explained that his company was going to receive "approximately 1,680,000 email addresses, accounting for approximately 61.5% of the class. Accordingly, concludes Intervenor, as of August 8, 2016, the class was comprised of 2.73 million members (1,680,000/.615), and that the Class Period ran for additional 19 months thereafter. As such, assuming that sales remained steady, Intervenor estimates the class to have 3,594,500 members, and the claims rate to be 1.6%. Intervenor asserts that the industry average is 5%-10%. Intervenor Resp. to Supp., Ex. 2, ¶ 39.

Plaintiffs and Defendants (the "Settling Parties") first jointly reply that Intervenor's response to the Supplement cites no legal authority, and instead relies upon the opinions of two declarants whose purported expertise has not been tested by the Court and who Intervenor declined to present for voir dire and cross-examination at the Final Fairness Hearing. According to Plaintiffs, the party offering expert opinion bears the burden of proving its admissibility under Illinois Rule of Evidence 702 by a preponderance of the evidence. Here, the Settling Parties assert that Intervenor fails to establish that (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of

reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. As such, the Settling Parties conclude that the declarations proffered by Intervenor should be rejected.

Next, the Settling Parties maintain that they have reasonably estimated the class size. Importantly, note the Settling Parties, they have been transparent for the past two years in explaining the data produced to the Settlement Administrator, and how they arrived at the estimated Class Size. The Settling Parties point out that Intervenor's primary objection during that time period was to the use of direct email notice as opposed to notice via regular mail, and the Settling Parties insist that this concern has been put to rest in light of the success rate. The Settling Parties further assert that Intervenor's response to the Supplement speculates without any foundational basis that Monster knows exactly how many cables it sold to customers during the Class Period. The Settling parties insist that the sales of Monster cables were not independently tracked. Intervenor Resp. to Supp., Ex. 3, ¶ 11.

The Settling Parties further contest Intervenor's unsubstantiated argument that "there is rarely a significant disconnect between retail sales and wholesale numbers for consumer sales." Moreover, the Settling Parties dispute Intervenor's contention that the class size estimate does not include Best Buy transactions where there is no consumer contact information. Intervenor, note the Settling Parties, cites no evidence or support for the proposition that the number of people who purchased Monster cables from Best Buy without providing contact information is not already included in the sales data used to estimate the Class size. The Settling Parties maintain that they calculated the estimated Class size using available sales data, noting that it is well-settled that the class size can be estimated, citing, among others, *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 942 (D. Minn. 2016).

The Settling Parties retort that Intervenor misstates the record in an attempt to argue that there is a much larger class, which results in a lower claims rate. In support of his proffered class estimate, Intervenor relies on a 2016 declaration stating that the Settlement Administrator would receive approximately 1,680,000 email addresses from the Defendants. Based on this statement, and an assumption that sales remained steady throughout the entire Class Period, note the Settling Parties, Intervenor estimates that the Class consists of over 3,500,000 members, thus dropping the claims rate down to less than 1%. The glaring error, note the Settling Parties, is that this estimated figure was based upon the initial production of email addresses, and not the de-duplicated amount of email addresses. Thus, the Settling Parties conclude that Intervenor's estimation of the class size based on these preliminary estimates and assumptions is factually erroneous.

The Court begins with the Settling Parties' contention that Intervenor's experts' testimony is not admissible because Intervenor has not proven its admissibility by a preponderance of the evidence pursuant to Illinois Rule of Evidence 702.

Illinois Rule of Evidence 702 provides, in relevant part:

> If scientific, technical, or other specialized knowledge will assist the trier of

> fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise...

Ill. R. Evid. 702 (eff. Jan. 1, 2011).

An expert's opinion is only as valid as the basis and reasons for the opinion. *City of Chicago v. Eychaner*, 2015 IL App (1st) 131833, ¶ 101. A party must lay a foundation sufficient to establish the reliability of the bases of the expert's opinion. *Petraski v. Thedos*, 382 Ill. App. 3d 22, 28 (1st Dist. 2008). Expert opinions based on guess, speculation, or conjecture are inadmissible. *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 80. However, the basis for a witness' opinion generally does not affect his standing as an expert. *Snelson v. Kamm*, 204 Ill. 2d 1, 26 (2004). Rather, such matters only go to the weight and not the admissibility of the evidence. *Id.*

In reviewing Intervenor's Response to the Supplement, as well as Verkhovskaya's declaration, the Court finds that Intervenor has sufficiently set forth that Verkhovskaya possesses specialized knowledge that will assist the Court to understand the evidence or to determine a fact at issue. However, the Court finds that Verkhovskaya's assertions as to the "correct" class size lack foundation in the record. First, Verkhovskaya's conclusion that the correct Class size is 3,600,000 is based upon extrapolation of a figure from Weisbrot's declaration that represented *de-duplicated* email addresses. Thus, as the Settling Parties point out, Verkhovskaya's estimate stems from an incorrect figure. Moreover, Verkhovskaya's estimation of the Class size is based upon the assumption that the rate of sales remained steady. Intervenor does not cite any evidence in the record that the sales rate for the particular HDMI cables at issue in this litigation was steady for the remainder of the Class Period. Thus, the Court finds that Intervenor has not established that Plaintiffs miscalculated the Class size, and therefore the claims rate.

Even assuming the validity of Verkhovskaya's figures, however, the claims rate works out to 1.6%. Intervenor Resp. to Supp., Ex. 2, ¶ 30. While Verkhovskaya asserts that 1.6% is "less than the industry average of about 5%-10%, the test for whether a class action settlement should be approved is not whether the claims rate falls squarely into the "industry average." Intervenor Resp. to Supp., Ex. 2, ¶ 39. Indeed, courts have approved class action settlements were the claims rates were far below 5%-10%. See, *Pollard,* 896 F.3d 900 (approving a settlement with a 0.29% claims rate); *Poertner v. Gillette Co.*, 618 F. App'x 624 (11th Cir. 2015) (approving a settlement with a 0.76% claims rate); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944-45 (9th Cir. 2015) (approving settlement with less than 4% claims rate).

Moreover, a relatively low claims rate is not necessarily indicative of a deficient notice plan. There are sundry reasons why class members might opt not to participate, including that Class members might be satisfied with their Monster HDMI cable, or they find that the effort it takes to submit a claim is not a worthwhile investment of their time. See, *Pollard,* 896 F.3d at 906. Accordingly, the Court will not withhold final approval on the bases that the Class size was improperly calculated or that the claims rate was insufficient.

D. Claims Approval Rate

In response to the Supplement, Intervenor next asserts that the claims should be independently audited, as the reported 97.5% of claims approved is "likely a world record." Intervenor Resp. to Supp., Ex. 2, ¶ 34. Intervenor also submits the Supplemental Declaration of Todd B. Hilsee Intervenor's class action notice expert. Intervenor Resp. to Supp., Ex. 1. Intervenor claims that further details are needed to substantiate the claims approval process. Intervenor Resp. to Supp., Ex. 1. According to Intervenor, the Settlement provided that the Settlement Administrator was required to create and provide to Class Counsel and Defendants' Counsel a complete and final list of valid claimants, including each claimant's name, payment, amount, and selected option. Intervenor Resp. to Supp., Ex. 1, ¶¶ 23-24; Settlement, ¶ 59. Intervenor submits that this information would help the Court independently scrutinize the result of the settlement claims process.

Intervenor also cites to Hilsee's Declaration in which Hilsee points to several cases where the need for an independent audit of claims was purportedly found, including a settlement of NCAA concussion claims (citing a National Law Journal article which the Court cannot access), and *Charvat v. Resort Marketing Group, Inc.*, Case No. 1:12-cv-05746. Hilsee also notes that the Securities and Exchange Commission audits all claims in its "Fair Funds" distributions, and that the Department of Justice audits claims. Intervenor Resp. to Supp., Ex. 1, ¶ 29. Given the paucity of information provided about the claims validation process, and the implausibly high claims rate, submits Intervenor, the Court should order an independent audit of the claims in this case.

The Settling Parties dispute that the Court should order an audit of the approved claims. According to the Settling Parties, there is nothing in the record to suggest that invalid claims were submitted and approved, and that more claims should have been rejected. Moreover, because there is no limited settlement fund, contend the Settling Parties, the number of valid claims does not reduce the amount of relief to Class Members. The Settling Parties point out that the cases cited by Hilsee in his Declaration that "courts regularly require claims audits" are distinguishable. As Intervenor has not shown any need for an audit of the claims process, and the high validation rate corresponds to the direct notice to Class members who are known to have actually purchased the cables, an audit would only serve to delay relief to the Class Members who submitted valid claims.

In addressing this argument, the Court notes, first, that the Settlement provides that the Settlement Administrator will have discretion to determine the validity of all Claims in accordance with the requirements of the Settlement, including whether the requirements for submitting a valid claim have been satisfied and whether the proof of purchase is adequate. Settlement, ¶ 58. The Court agrees that Intervenor has not pointed to any evidence to suggest that invalid claims were approved.

Intervenor submits Verkhovskaya's Declaration in support of his argument that the claims rate is too high. The Court notes, once again, that Verkhovskaya's Declaration in this regard lacks foundation. Verkhovskaya simply states that in her experience, it would be "unusual" for there to be a rejection rate of less than 15%-25% after a standard duplicate and

fraud review in a consumer case administration where a larger proportion of claims had no proof of claim required. Intervenor Resp. to Supp., Ex. 2, ¶ 34.

Moreover, the Court agrees with the Settling Parties that the cases cited by Hilsee in support of his contention that an audit is required here are distinguishable. First, the Court cannot access the article cited by Hilsee in regard to the NCAA concussion settlement, and thus cannot consider it. In the *Charvat v. Resort Marketing Group, Inc.* Order cited by Hilsee, the Court notes that the district court ordered the settlement administrator to request additional documentation to complete the claims of individual claimants who received publication notice of the settlement, after being advised by the settlement administrator that a substantial number of the claims were potentially fraudulent. Contrary to Intervenor's assertion, that situation differs from the instant matter, as Intervenor cites no evidence in the record that the claims either (1) came from individuals who received publication notice of the settlement, or (2) are potentially fraudulent. The Court does not find this Order instructive simply because these circumstances were present before the district court in one particular case. As to the contention regarding the policies of the Securities and Exchange Commission, and Department of Justice claims, the Court agrees with Plaintiffs that the governmental proceedings based upon unique rules are inapposite. Thus, the Court is not convinced that an independent audit of the approved claims is necessary here.

The Court now turns to evaluate the *Korshak* factors as applied to the Settlement.

III. *KORSHAK* ANALYSIS

At the outset, the Court notes that Intervenor argues that final approval of the Settlement should be denied on the ground that the lead plaintiffs do not adequately represent the interests of the class. Intervenor notes that class counsel has a close relationship with Joseph and O'Brien, including filing multiple cases with them as lead plaintiffs which, according to Intervenor, creates an inherent conflict of interest. Intervenor asserts that class counsel has represented Joseph as a lead plaintiff in at least 14 different actions, and has represented O'Brien in at least seven actions, citing Exhibits I and J to his Objection. In addition, Intervenor asserts that the procedural history of the case raises a red flag, as it was filed just a few weeks before the California Action. Moreover, Intervenor notes that there was no formal discovery, and Defendants were not served with the Complaint prior to the announcement of a settlement. As such, Intervenor concludes that Joseph and O'Brien do not adequately represent the interests of the class.

Whether the lead representatives adequately represent the interests of the class is not one of the *Korshak* factors, although this arguably could go to the presence or absence of collusion. Notably, this issue was addressed previously, both in the Court's ruling on Plaintiffs' Petition for Class Certification and Motion for Preliminary Approval. There, the Court found that Plaintiffs' interests and those of the class were the same, and that there was no evidence of collusion. The fact that Plaintiffs' counsel filed cases with Joseph and O'Brien as lead plaintiffs in prior actions, without more, does not mean that the class plaintiffs are inadequate representatives of the class. As addressed previously, the Court finds that the procedural history of the case and lack of

formal discovery did not constitute evidence of collusion. The issue is not how much or how little discovery was completed before the parties reached a settlement, but whether the discovery that was completed was sufficient for effective representation. *McBean v. City of New York*, 233 F.R.D. 377, 384 (S.D.N.Y. 2006). As such, the Court finds that Joseph and O'Brien are adequate class representatives.

The Court will address each of the *Korshak* factors as applied to the Settlement in turn.

A. The Strength of the Case for Plaintiffs on the Merits, Balanced Against the Amount Offered in the Settlement

The first factor, the strength of plaintiffs' case balanced against the settlement offer, is considered to be the most important of the *Korshak* factors. *Steinberg v. System Software Assocs.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999). In this case, while arguing that they have a strong case, Plaintiffs acknowledge that the expense and duration, as well as the complexity of protracted litigation, would be substantial. Plaintiffs further acknowledge that the outcome of a trial would be unpredictable. Moreover, Plaintiffs assert that in deciding to settle the case, they considered Monster's ability to pay any damages award should Plaintiffs prevail at trial. In contrast to the chance of prevailing if litigation continues and obtaining payment from Monster pursuant to any judgment, contend Plaintiffs, the monetary relief offered here is significant and immediate.

Plaintiffs state that there were 59,342 claims submitted to the Settlement Administrator and the value of the claims is $1,438,811. Pls. Mot., Ex. 1, ¶ 25. According to Plaintiffs, the Settlement provides a real and substantial remedy to the Class for the alleged misrepresentations without the risk or delay inherent in prosecuting Plaintiffs' claims against Defendants.

Plaintiffs point out that the Court previously took issue with the fact that the mock ups state that technological developments in high definition devices "demand even higher speed HDMI cables so [customers] get the best possible HD picture and sound." Pls. Mot., Ex. 6. Plaintiffs, however, note that Defendants' expert Professor Christian M. Dippon stated that the speed of HDMI cables is relevant and that higher speeds are becoming necessary. Pls. Mot., Ex. 7. Plaintiffs emphasize that the mockup of the new packaging simply identifies the various speeds of the Monster Cables without stating that any particular speed is required for any particular function, thereby eliminating the complained-of representations about "requirements" on Monster's packaging which allegedly induced customers to purchase cables with greater bandwidths to make a 1080p and 4k television work.

While Intervenor previously argued in opposition to the Motion for Preliminary Approval that the settlement relief to Class members is low in relation to the strength of the case, note Plaintiffs, the Court found that the settlement was adequate and that this *Korshak* factor weighs in favor of approval of the settlement. Plaintiffs contend that Intervenor does not make any new arguments in this regard in his current Objection, and that the Court should once again reject Intervenor's objection to the adequacy of the relief provided by the settlement.

Intervenor agrees that Plaintiffs' case is strong on the merits, but counters that the settlement is inadequate. In support of that proposition, Intervenor submits the Declaration of Colin B. Weir ("Weir"), an economist. Weir opines that the class relief under the terms of any of the three options A, B, and C, above, is grossly inadequate, and that according to his own calculation, the class members would receive just pennies on the dollar under the Settlement. Moreover, Intervene contends that the coupons offered are beneficial to the Defendants, and worth far less than their face value, citing the Declaration of Dean Kaufman.[4]

As to the injunctive relief offered, namely, the packaging changes, Intervenor asserts that the proposed changes to the packaging are minimal, and still imply that a higher speed is needed. As such, Intervenor concludes that the relief is not commensurate with the strength of Plaintiffs' case.

The essence of Intervenor's objection is that given the strength of the case, Plaintiffs could have obtained a better settlement. Perhaps it is the case that Intervenor's counsel believes he could have negotiated a better deal. That, however, is not the standard pursuant to which the Court evaluated the Proposed Settlement. The issue before the Court is whether the Proposed Settlement is within the range of possible approval. "The fact that a proposed settlement may only amount to a fraction of a potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney v. Cellular Alaska P'Shp,* 151 F.3d 1234, 1243 (9th Cir. 1998).

As such, the Court disagrees with Intervenor and finds that the Settlement is adequate. Under Option A, a class member retains his or her current Monster HDMI cable and can receive a monetary credit for the alleged unnecessary bandwidth. While under Option B, a class member must return their existing Monster HDMI cable exceeding 10.2 Gbps, they would receive $15 for each Monster Gold HDMI Cable purchased; $15 for each Monster HDMI cable that was advertised as having a bandwidth exceeding 10.2 Gbps and that is not a Monster Gold, Platinum or Black Platinum model cable; $25 for each Monster Platinum HDMI Cable purchased; and $35 for each Monster Black Platinum HDMI Cable purchased. Option B claimants would also receive a replacement 10.2 Gbps cable and a postage reimbursement of up to $5.00. Under Option C, a class member would get $20 credit on Monsterproducts.com for each Monster Gold HDMI cable purchased; $20 credit on Monsterproducts.com for each Monster HDMI cable that was purchased as having a bandwidth exceeding 10.2 Gbps and that is not a Monster Gold, Platinum or Black Platinum cable; $25 credit on Monsterproducts.com for each Monster Platinum HDMI cable purchased and; $30 credit on Monsterproducts.com for each Monster Black Platinum HDMI cable purchased. The relief offered is based on the difference between the purchase price of a 10.2 Gbps Monster cable and Monster cables in excess of 10.2 Gbps.

As to the packaging changes, the Court initially found that the packaging changes were "meaningless." The proposed changed packaging is as follows:

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[4] Intervenor cites Dean Kaufman's Declaration in support of this claim. The Court, however, previously struck Dean Kaufman's Declaration and therefore, will not consider it.

Pls. Mot., Ex. 6.

The Court's earlier finding that the packaging changes were "meaningless," however, was based upon a misunderstanding of the mock up of the packaging submitted with the motion. As Plaintiffs point out in their motion, the 18.0 Gbps is highlighted because that is a mockup for the 18.0 Gbps cable. Plaintiffs argue that the change in packaging no longer indicate that any particular speed is required for any particular function. The Court agrees. Upon a second look, the Court finds that the change in packaging removes the complained-of "requirement" that a cable with a particular bandwidth be purchased to make a particular television work.

A settlement compromising conflicting positions in class action litigation serves the public interest. *People ex rel. Wilcox v. Equity Funding Life Insurance Co.*, 61 Ill. 2d 303, 317 (1975). Since a settlement is a compromise, the trial court may not decide the merits of the case, attempt to resolve disputed issues of fact or law, or substitute its own judgment for that of the parties. *Id.* Instead, the court must view the settlement as a whole, considering all relevant factors in assessing the compromise. *Id.* at 319. The Court, having considered the settlement as a whole,

finds that this factor weighs in favor of approval of the Settlement.

B. The Defendants' Ability to Pay

The Court next addresses Defendants' ability to pay in determining the reasonableness of the Proposed Settlement.

Plaintiffs contend that the Court previously considered Defendants' financial condition, including the information[5] filed under seal detailing Monster's financial condition, and found that this factor weighs in favor of approving the Settlement. As nothing has changed in regard to Monster's ability to pay, assert Plaintiffs, this factor favors final approval. Intervenor does not address this factor in his Objection.

Having considered the Defendants' financial condition, including the information which Monster filed under seal detailing its financial condition, the Court finds that this factor weighs in favor of approving the Settlement.

C. The Complexity, Length and Expense of Further Litigation

The Court must also consider the complexity, length and expense of further litigation. Intervenor does not challenge this factor. As is the case generally with class action litigation, it is clear that in this case the litigation would be complex, lengthy, and costly. The Court finds that this factor weighs in favor of approving the Settlement.

D. The Amount of Opposition to the Settlement and the Reaction of Members of the Class to the Settlement

Plaintiffs note that the fourth and sixth *Korshak* factors, the amount of opposition to the Settlement and Class members' reactions to the Settlement, are closely related and often examined together, citing *Korshak*, 206 Ill. App. 3d at 973. Plaintiffs point out that out of the 1,299,486 notices that were sent, there was one objection from a consumer who was satisfied with his Monster cable, and did not believe there should be a lawsuit filed. Besides Intervenor, assert Plaintiffs, no other Class member objected to the Settlement. Moreover, note Plaintiffs, only 33 opt-outs were received. Pls. Mot., Ex. 1, ¶¶ 13, 19. Plaintiffs maintain that this lack of resistance to the terms of the Settlement strongly favors final approval, citing *e.g. G M A C Mortgage Corp. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992).

As for the reaction of members of the class to the Settlement, Plaintiffs indicate that a total of 59,342 claims were submitted to the Settlement Administrator. According to Plaintiffs, this amounts to a 4.6% claims rate. Plaintiffs maintain that this rate is within the acceptable range for approval, citing several cases where courts approved settlements with claims rates at or below 5%, including *Pollard*, 896 F.3d 900 (approving a settlement with a 0.29% claims rate); *Poertner*, 618 F. App'x at 625 (approving a settlement with a 0.76% claims rate); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 944-45 (approving settlement with less than 4% claims

[5] The Court reviewed *in camera* Monster's November 30, 2018 Financial Statement.

rate). In *Pollard*, Plaintiffs emphasize, the court noted that the low claims rate could simply be the result of class members deciding not to participate in the settlement, and that it was not necessarily indicative of the adequacy of the notice. *Pollard*, 896 F.3d at 906.

Intervenor opposes final approval on the grounds that the Notice Plan was insufficient. Specifically, Intervenor proffers the Amended Declaration of Todd B. Hilsee on Proposed Settlement Notice Plan, in which he opined that the Notice Plan would result in a claims rate that was close to or less than 1% of the Class. Intervenor Objection, Ex. C.

The Court finds that, in light of the 1,299,486 notices sent and only two objections received, and in light of the 4.6% claims rate, this factor weighs in favor of approving the Settlement.

E. The Presence of Collusion in Reaching the Settlement

Next, the Court must decide whether there was collusion in reaching the proposed settlement. "Courts have long recognized that 'settlement class actions present unique due process concerns for absent class members.' One inherent risk is that class counsel may collude with the defendants, 'tacitly reducing the overall settlement in return for a higher attorney's fee.'" *In re Bluetooth Headset Products Liability Litigation*, 654 F. 3d 935, 946-48 (9th Cir. 2011) (internal citations omitted). In addition, prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed to the class during settlement. *Id.* Accordingly, settlement agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required before securing the court's approval as fair. *Id.*

As to this issue, Plaintiffs argue that the proposed settlement is the result of hard-fought negotiations amongst the parties, and that Intervenor's accusations of a collusive reverse auction are wholly unfounded. Plaintiffs note that Intervenor's Objection to final approval simply restates the objection made to preliminary approval, and continues to rely upon Dean Kaufman's Declaration, which the Court previously struck. Plaintiffs maintain that the Court previously considered Intervenor's assertions of collusion and found no such evidence. As Intervenor has raised nothing new in his objection to final approval, contend Plaintiffs, the Court should once again find that this factor weighs in favor of approval of the Settlement.

Intervenor counters that there is collusion in this case due to the evidence of the existence of a reverse auction. In support of that contention, Intervenor argues that: (1) the Joseph Action was filed only a few weeks after Perez filed his complaint; (2) Joseph's Complaint copied generously from Intervenor's complaint; (3) Defendants chose not to remove the Joseph Action to federal court where it could have been consolidated with the earlier filed *Perez* action; (4) Defendants failed to advise either Perez or judge presiding over the California Action about this case; (5) the Joseph parties have settled this case without any formal discovery; and (6) the parties in this case are seeking to settle this matter on a nationwide basis, citing *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 282 (7th Cir. 2002) and several treatises.

Plaintiffs reply that the evidence shows that the proposed settlement is the result of extensive negotiations between the parties, including informal discovery, formal mediation with, and follow-up negotiations with Judge Billik, which according to Plaintiffs, Intervenor ignores.

The Court previously found no evidence of collusion in its Memorandum Opinion and Order granting preliminary approval of the Settlement. The Court finds no basis to alter its prior finding as to the absence of collusion in reaching the Settlement. As such, the Court finds that this factor weighs in favor of approval of the Settlement.

F. Opinion of Competent Counsel

Another factor which the Court must consider is the opinion of competent counsel. Plaintiffs maintain that Plaintiffs' class counsel, Zimmerman, has extensive experience in consumer class actions and complex litigation. Plaintiffs note that Zimmerman believes that the Settlement provides fair, reasonable, and adequate relief for Settlement Class Members for the alleged misrepresentations, and that the compensation provided is significant considering the financial condition of Monster and that it is unlikely that Monster could withstand a judgment against it.

Intervenor has not argued directly that Plaintiffs' counsel is not competent. It is undisputed that Zimmerman is an attorney experienced in class action litigation. See, Pls. Mot., Ex. 11. As such, the Court finds that this factor weighs in favor of approval of the proposed settlement.

G. The Stage of the Proceedings and Amount of Discovery Completed

The final factor the Court must consider is the stage of the proceedings and the amount of discovery completed.

Plaintiffs assert that the parties have exchanged informal discovery throughout the course of their settlement negotiations. Plaintiffs note that Illinois courts have held that the exchange of informal discovery is sufficient to investigate the merits of a class's claims, citing *Langendorf v. Irving Trust Co.*, 244 Ill. App. 3d 70, 80 (1st Dist.1992). In granting preliminary approval, note Plaintiffs, the Court rejected Intervenor's argument that Plaintiffs failed to undertake the requisite amount of investigation necessary before settling, and that the informal discovery could not be considered because it was not supplied to Intervenor. As nothing has changed with respect to this analysis since the preliminary approval, posit Plaintiffs, this factor weighs heavily in favor of final approval.

Intervenor charges that Plaintiffs failed to undertake the requisite amount of investigation necessary in a class action before settlement. Intervenor points out that Plaintiffs did not engage in any formal discovery. According to Intervenor, Plaintiffs could not have fairly evaluated the strength of their claim against the benefits of Settlement without having engaged n formal discovery.

In reviewing a proposed settlement, courts examine the extent of discovery conducted

and the stage of litigation to determine whether a plaintiff has enough information to make an informed decision regarding such proposed settlement. See *Korshak*, 206 Ill. App. 3d at 974. That being said, courts do not require formal discovery. "In regards to class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement." *Linney*, 151 F.3d at 1239.

As for the amount of discovery completed, while it is true that there was no formal discovery, it is uncontested that the parties informally exchanged relevant information. For example, Plaintiffs reviewed Defendants' sales data, including wholesale and retail sales in making a decision regarding the Proposed Settlement. Pls. Mot., Ex. 11, ¶ 19. The Court finds that Defendants provided Plaintiffs sufficient information to make an informed decision regarding the Proposed Settlement and as such, this factor weighs in favor of approving the Settlement.

In sum, having weighed all six of the *Korshak* factors, the Court finds that all six factors are in favor of approving the Settlement.

IV. SCOPE OF RELEASE

Intervenor argues that the release is overly broad in that the release would cover not only claims regarding Defendants' bandwidth, but also claims based on any other misrepresentations that appeared on the packaging of Monster's cables. At most, asserts Intervenor, the release should be connected to Defendants' misrepresentation about the need for higher bandwidth in HDMI cables.

Plaintiffs counter that the release is not overly broad because the settlement only releases claims arising from the sale or marketing of Monster HDMI cables. Plaintiffs note that Intervenor does not cite any Illinois authority in support of his contention that the release is overly broad.

In a class action a "court may release not only those claims alleged in the complaint but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action." *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 277-74 (7th Cir. 1998) (quoting *Class Plaintiffs v. City of Seattle*, 955 F. 2d 1268, 1287 (9th Cir. 1992)) "Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96,106 (2d Cir. 2005).

In this case, the Released Claims are defined as:

> All claims, known or unknown, that relate to or arise from the sale or marketing of Monster HDMI Cables and/or that relate to, are based on, concern, or arise out of the allegations, facts circumstances, or claims that were asserted or that could have been asserted in the complaint (including the Amended Complaint) in this

Action, regardless of the legal theory and regardless of whether individually and/or on a class-wide basis, against the Released Parties.

Settlement, ¶¶ 33, 107

The Court finds, contrary to Intervenor's assertion, that the release is not overly broad.

As the Court finds that the Notice Plan comports with due process, all six *Korshak* factors weigh in favor of approval of the Settlement, and the release is not overly broad, the Court grants Plaintiff's Motion for Final Approval.

CONCLUSION

For the foregoing reasons, the Court grants the Motion for Final Approval.

ENTERED:

ENTERED
JUDGE FRANKLIN ULYSES VALDERRAMA-1968
JUN 05 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Franklin U. Valderrama

Judge Presiding

DATED: June 5, 2019