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

BACKGROUND

In 2002, leading consumer electronics companies partnered to develop a new digital standard called High Definition Multimedia Interface ("HDMI"). Pl. Cmplt[1]., ¶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"). Pl. Cmplt., ¶16.

1 These facts are derived from Plaintiffs' First Amended Complaint.

Prior to the introduction of HDMI and digital media, all audio and video data was transmitted through analog signals along analog cables. Pl. Cmplt., ¶17. HDMI enabled transmission of advanced video and audio data through a single HDMI cable. Pl. Cmplt., ¶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. Pl. Cmplt., ¶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. Pl. Complt., ¶ 20. HDMI cables have two basic classifications: HDMI standard and HDMI High Speed. Pl. Complt., ¶ 20. The official HDMI standards created the High Speed category. Pl. Cmpl., ¶ 25. To qualify as an HDMI High Speed cable, a cable must be able to transmit digital signals at 10.2 gigabits ("Gbps") per second. Pl. Cmplt., ¶ 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. Pl. Complt., ¶¶21-2. There is no noticeable difference between any two functioning HDMI cables within the same category. Pl. Cmplt., ¶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. Pl. Cmplt., ¶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. Pl. Cmplt., ¶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. Pl. Cmplt., ¶¶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. Pl. Cmplt., ¶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." Pl. Cmplt., ¶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. Pl. Cmplt. ¶29. BestBuy controls the website www.bestbuy.com. Pl. Cmplt., ¶29. On its website, Best Buy advertises and sells Monster HDMI cables. Pl. Cmplt., ¶29. The descriptions for Monster's HDMI cables on the Best Buy website use the same terminology Monster uses in its advertising. Pl. Cmplt., ¶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." Pl. Cmplt., ¶ 30. Best Buy also advertises and sells Monster HDMI cables in its retail stores. Pl. Cmplt., ¶31.

Amy Joseph ("Joseph") purchased a Monster HDMI cable from a Best Buy retail store in Illinois. Pl. Cmplt., ¶11. According to Joseph she "carefully reviewed" the Monster HDMI's cable's packaging prior to her purchase. Pl. Cmplt., ¶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. Pl. Cmplt., ¶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. Cmplt ¶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 ("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. Zimmerman Decl., 6(c). ¶11. Perez further alleges 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 alleges 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." Zimmerman Decl., Exh. 6(c).

On September 22, 2015, Joseph filed a Class Action Complaint against Monster and Best Buy in the Circuit Court of Cook County. 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. Pl. Cmplt. ¶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. Zimmerman Decl., ¶14. Pl. Cmplt. Exh. 6(c). Joseph's counsel subsequently forwarded a copy of the Joseph's 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 the Joseph Complaint. Defendants agreed to participate in mediation with Joseph's counsel. Zimmerman Decl., ¶17. Pl. Cmplt. Exh. 6(c).

The Defendants in the California Action filed a motion to dismiss the case. The court granted in part and denied in part the motion. Perez was given leave to file an amended complaint.

On February 10, 2016, Perez filed an Amended Complaint in the California Action. 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." Zimmerman Decl.. Exhibit 6 (b).

On February 11, 2016, the parties in the California Action disclosed the pendency of the Joseph action to the Northern District of California judge through a Joint Case Management Statement.

On March 16, 2016, Plaintiff Joseph, through her counsel and Defendants attended a mediation before the Honorable Richard J. Billik, Jr. (Ret). 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 Agreement 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 the Preliminary Approval Motion. 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 case 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 matter 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 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 (a California resident) as a plaintiff, substituted out Best Buy Co., Inc., as a defendant and substituted in Best Buy Stores, L.P. and Best Buy.com LLC as defendants. Robert O'Brien allegedly purchased a Monster HDMI cable from a Best Buy retail store in California. Pl. Cmplt., ¶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. Pl. Cmplt., ¶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." Pl. Cmplt., ¶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.

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

On August 15, 2016, Perez's counsel, Arisohn, sent a letter to Plaintiffs' counsel, Thomas A. Zimmerman ("Zimmerman") requesting: all communications between Plaintiffs and Defendants; all documents that Defendants produced to Plaintiffs, whether through formal or informal discovery; all communications between the parties and Steven Weisbrot and/or Angeion Group, LLC, the proposed class administrator; and all documents that the parties provided to Steven Weisbrot and/or Angeion Group, LLC. Arisohn Decl. Exh. A. On August 18, 2016, Zimmerman's office responded and offered hard copies of the documents Plaintiffs considered in the settlement. As for the other documents requested in the August 15 correspondence, Zimmerman's office directed Arisohn to contact Defendants' counsel to obtain said documents. Arisohn Decl. Exh. B. On August 19, 2016, Perez's counsel wrote to Defendants' counsel seeking the documents. Arisohn, Decl. Exh. C. To date, according to Perez's counsel, the Defendants have not produced the requested documents. Arisohn Decl. ¶4.

On August 26, 2016 Perez, filed his Opposition to Plaintiffs' Motion for Preliminary Approval. In support of his Opposition, Jacobson filed the Declaration of his attorney, Joshua D. Arisohn, the Declarations of Michael J. Kaufman, Colin B. Weir and the Amended Declaration of Todd B. Hilsee, along with numerous other exhibits.

On October 3, 2016, Plaintiffs and Defendants each filed separate motions to dismiss Perez from the matter based on lack of standing as an intervenor and for Rule 137 sanctions against Perez and his counsel. The Court ordered and subsequently held an evidentiary hearing on the Rule 137 motions for sanctions.

On November 11, 2016, Perez agreed to withdraw 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") has adopted Perez's objection 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 Court, however, deferred ruling on Plaintiffs' motion for preliminary approval pending resolution of several questions raised by the Court.

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. Plaintiffs Joseph and O'Brien's fully briefed Motion for Preliminary for Approval[3] of the Proposed Class Action Settlement is presently before the Court.

3 In support of the Motion, Plaintiffs submitted the Declaration of Thomas A. Zimmerman, Jr., , along with numerous exhibits attached thereto.

STANDARD FOR PRELIMINARY 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; and (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (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. The strength of plaintiff's case on the merits balanced against the settlement amount is the most important factor in determining whether a settlement should be approved. *Id.*

Plaintiffs contend that review of a proposed class action settlement involves a two-step process. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is within the range of a court's possible approval. It is not, according to Plaintiffs, a fairness hearing. Plaintiffs posit that the determination is based on whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing, citing *Steinberg v. Sys. Software Associates*, Inc., 306 Ill. App. 3d 157 (1st Dist. 1999). Once the court finds that a settlement proposal falls within the range of possible approval, contend Plaintiffs, then the case is allowed to proceed to the second step—the final fairness hearing, citing *Stonecrafters, Inc., v. Wholesale Life Ins. Brokerage,* 393 Ill. App. 3d 951 (2d Dist. 2009). As such, Plaintiffs argue at this stage the only inquiry which the Court should undertake is whether the proposed settlement falls within the range of possible approval. Application of the *Korshak* factors, argue Plaintiffs, reveals that the proposed settlement is fair, reasonable, and adequate.

Intervenor, on the other hand, argues that the Court should hold an evidentiary hearing on whether the Proposed Settlement is fair, reasonable, and adequate. Intervenor contends that direct and cross-examination of the parties' experts and the proposed claims administrator would assist the Court in this endeavor. Further, Intervenor asserts that pursuant to the *Korshak* factors, the Court should deny preliminary approval of the Proposed Settlement.

The Court disagrees with Intervenor that it must conduct an evidentiary hearing at this stage of the proceedings. To do so would transform the preliminary approval stage to a fairness hearing proceeding. The two hearings, however, serve distinct purposes. Indeed, the Court notes that Intervenor has cited no authority in support of its contention that an evidentiary hearing is necessary at this stage of the proceedings. The Court finds that an evidentiary hearing is unnecessary to determine whether the proposed settlement falls within the range of possible approval.

DISCUSSION

I. *Proposed Settlement*

The Proposed Settlement allows consumers who purchased the subject Monster HDMI cables to choose between a cash payment or online store credit. The Proposed 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;
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> $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.

Option B provides:

> $15 for each Monster Gold HDMI Cable purchased;
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> $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.

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.

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.

As for notice to the class, the Proposed Settlement provides for: (1) direct notice via email to Class Members that are reasonably identifiable from Defendants' records; (2) publication notice via email and print publications; and (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.

As it relates to attorney's fees, pursuant to the Settlement Agreement, the Defendants will not object to or challenge an award in an amount not to exceed $325,000 in attorneys' fees and for reimbursement of expenses incurred in this matter.

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.

The Proposed Settlement further calls for a Settlement Administrator, who will establish and

maintain an internet website, where Class Members can obtain further information about the terms of the settlement, their rights and deadlines. Class Members shall also be able to upload a claim form electronically via the Settlement Website. The Settlement Administrator is to provide a follow-up round of email notice to those Class Members who have not submitted claims and for whom the Settlement Administrator did not receive a bounce-back to the first round of email notice.

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

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 while 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. The Proposed Settlement, assert Plaintiffs, minimizes these risks to the Class.

Plaintiffs argue that the Proposed Settlement's terms are fair, reasonable and adequate when compared to similar false labeling and consumer fraud cases which courts in various jurisdictions have approved, citing *Suarez v. Anheuser-Busch Cos. LLC*, Case No. 2013-33620-CA-01 (Fla. 11th Cir. Ct.) and *Hall v. Innovative Dining Group LLC*, Case No. BC 493144 (Cal. Sup. Ct. L.A. County). Lastly assert Plaintiffs, the relief demonstrates the fairness, reasonableness and adequacy of the settlement, as class members have three benefit options to choose from that provide a cash benefit ranging from $10 to $35, or online store credit ranging from $20 to $30 for each cable purchased by completing a simple claim form.

Intervenor agrees that Plaintiffs' claims are strong, 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 methodology which the parties employed to calculate the settlement benefits is flawed for three reasons: (1) the comparison of the challenged Monster cables to other Monster cables is not an appropriate estimate of damages due to the alleged misrepresentations because consumers have other cable options that are capable of transmitting 1080p and 4K video signals; (2) the relief obfuscates significant variation in the difference in price between Monster cables and other competing HDMI cables due to differences in product, namely length; and (3) measuring class relief using MSRP or "list price" is not appropriate because doing so allows Monster to control the outcome of the settlement since Monster controls its own MSRP. As such, concludes Weir, the settlement methodology results in the settlement providing inadequate relief to Class Members.

The Class Members' recovery pursuant to Option B,[4] according to Intervenor, is no better

[4] Intervenor cites the Declaration of Dean Michael Kaufman in support of this proposition. However, the Court, by separate order granted Plaintiffs' motion to strike Dean Kaufman's Declaration and therefore, does not consider any

than Option A.

Intervenor argues that the coupons provided pursuant to Option C should not be credited their face value. Intervenor maintains that coupons in class action settlements usually benefit the defendant and are worth much less than their face value to the class members.[5]

As to the injunctive relief which the Proposed Settlement offers, Intervenor argues that it will not provide the class with any meaningful relief because the basic premise underlying Monster's performance chart—that Monster's more expensive cables are somehow better—will remain unchanged.

The Defendants filed a reply to Intervenor's Opposition to Plaintiffs' Motion for Preliminary Approval. Defendants assert that the essence of Intervenor's objection is that he could have struck a better deal. That objection, however, argue Defendants, is not valid. Defendants maintain that Intervenor overstates the strength of his case and submits inadmissible hearsay and supposition of his purported expert, Weir. Defendants note that Intervenor does not use any evidence produced in the California Action in support of his claim of the strength of his case. Instead, note Defendants, he relies on a number of articles which Defendants speculate were obtained from the internet. These articles, according to Defendants constitute hearsay and should not be considered by the Court. However, posit Defendants, if the Court were to consider the articles, they fail to support Intervenor's contention because they are off-topic, outdated, and undermine Intervenor's position.

Next, Defendants take aim at Intervenor's expert—Weir's—conclusions. As a preliminary matter, Defendants point out that Weir has testified at least fourteen (14) times for Intervenor's counsel's law firm, ten of which took place over the last three years. More substantively, Defendants contend that Weir did not review any of Defendants' actual sales data in arriving at his opinions. Rather, assert Defendants, Weir merely relied on his review of Joseph's original complaint, Perez's Amended Complaint, the Settlement Agreement, and publicly-available current retail prices which he found on certain retailers' websites.

Continuing, Defendants argue that Weir bases his conclusion that the settlement benefits are inadequate on the price difference between Monster's cables— Monster's Gold cable (18.0 Gbps), Monster's Platinum cable (22.5 Gbps) and Monster's Black Platinum cable (27.0 Gbps)—on the one hand and the retail prices of 10.2 Gbps cables produced by other manufacturers on the other. Defendants assert that this reliance is misplaced because the HDMI cable market is competitive and consumer's choices are influenced by other considerations besides price, such as brand recognition, warranty, and product quality, among others.

Finally, Defendants submit the Declaration of Christian M. Dippon, Ph.D ("Dippon") in response to Weir's Declaration. Dippon states that Weir's opinion regarding the inadequacy of the Proposed Settlement benefits is incorrect. Weir's opinion is wrong, according to Dippon, because

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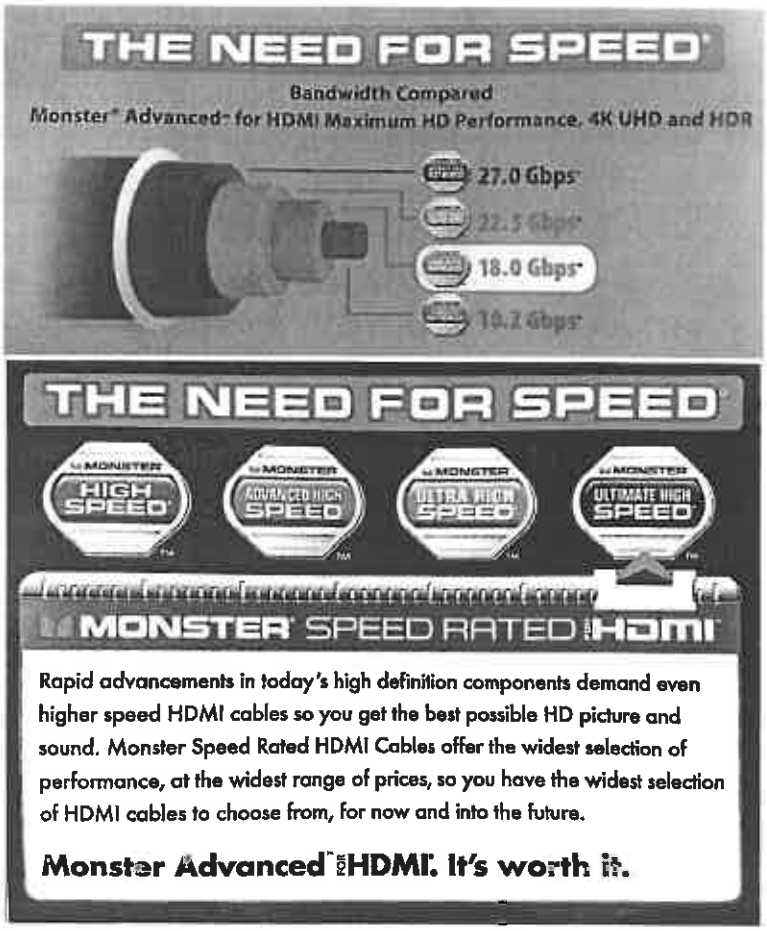
arguments based on that Declaration.

[5] Again, Intervenor cites Dean Kaufman's Declaration in support of this contention.

Weir's assumption that class members would purchase another brand's cable ignores Monster's brand recognition and value. As for Weir's criticism that the Proposed Settlement does not account for the extra cost of buying cables, Dippon counters that the Proposed Settlement adjusts for the distribution of purchased cable lengths by using weighted averages of the price differentials between Monster's High-Speed cables and the 10.2 Gbps Monster cables. Dippon charges that Weir's third criticism, that it is inappropriate to use MSRPs as the pricing benchmark because Monster "controls its own MSRP" and the MSRP represents Monster's "inflated pricing," is economically incorrect.

As a preliminary matter, the Court agrees with Intervenor that the proposed changes to the Monster HDMI cables' packaging provides no value to the Class Members. The proposed changed packaging is as follows:



These proposed changes to the packaging of Monster's HDMI cables, from the Court's perspective, still seem to suggest that customers should purchase more expensive cables for a better experience. "The Need for Speed" chart highlights—for no apparent reason—the 18.0 Gbps cable, although as thoroughly discussed in this litigation, the 10.2 Gbps cable is sufficient for any high-end HDMI device. Moreover, the "Monster Speed Rated HDMI" chart and legend, not only have a red arrow pointing to the Monster Ultimate High Speed cable with 27.0 Gbps bandwidth, but actually

states that technological developments in high definition devices "*demand* even greater speed HDMI cables so [customers] get the best possible HD picture and sound." (emphasis added). As such, the Court finds these proposed changes to the packaging meaningless within the context of this litigation, and will not give them any weight when evaluating the value of the Proposed Settlement to the Class Members.

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 Proposed 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.

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 Proposed Settlement.

B. The Defendants' Ability to Pay

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

Proposed Settlement.

Intervenor contends that Defendants have the ability to pay the class substantially more, as Best Buy has over $14 billion in assets. As to Monster, Intervenor notes that it has billions of dollars in annual sales. Based on these two assertions, Intervenor concludes that Defendants are solvent and well-financed to pay the class more what is currently proposed.

Plaintiffs reply that where a defendant's financial condition precludes the defendant from paying a larger settlement amount, courts weigh this factor in favor of settlement approval, citing *Rinky Dink, Inc., v. World Bus. Lenders, LLC,* No. C14-0268-JCC, 2016 WL 3087073 (W.D. Wash. May 31, 2016). In this case, Plaintiffs maintain that Monster's inability to pay was a significant factor in reaching the terms of the Proposed Settlement.[6] Pursuant to a document detailing Monster's financial condition which was filed in this Court under seal, Plaintiffs contend that Monster's financial condition raises significant concerns as to whether Monster would be able to satisfy any judgment if Plaintiffs were to prevail on the merits.

As for Best Buy's financial condition,[7] according to Plaintiffs, that concern is not relevant for two reasons: (1) Best Buy has an indemnification agreement with Monster; and (2) Best Buy has strong defenses to its liability because generally, a retailer is not merely liable for failing to disclaim a manufacturer defendant's misrepresentations.

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 Proposed 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. Intervenor does not challenge this factor. Therefore, the Court finds that this factor weighs in favor of approving the Proposed Settlement.

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

The amount of opposition to the settlement is another factor which the Court must consider. As to this factor, courts routinely consider the opposition to the settlement and the reaction of the members together. *GMAC Mortg. Corp. v. Stapleton,* 236 Ill. App. 3d 486, 496 (1st Dist. 1992). Here, Intervenor opposes preliminary approval. Yet, simultaneously, Intervenor argues that it would

[6] Plaintiffs, in support of this contention filed Monster's Income Statement as of December 31, 2015.

[7] Plaintiffs make this argument in a footnote. Such a practice, however, is discouraged. *Chicago Bd. Options Exch., Inc v. Int'l Sec. Exch.*, LLC 2012 IL App (1st) 102228, ¶18.

be premature to consider opposition to the settlement and the reaction of class members because notice has not been sent out yet. The Court finds Intervenor's argument circular and thus, unavailing. While it is true that notice has not yet been sent to the class, the Court will evaluate this factor at the fairness hearing after notice has been given to the class. Therefore, at this stage of the proceedings in this matter, the Court finds that this factor weighs in favor of approving the Proposed 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 maintain that the proposed settlement is the result of arms-length, protracted negotiations amongst the parties which included the exchange of relevant information—such as relevant sales data—before attending mediation before a retired—and thus impartial—judge, the Honorable Richard J. Billik, Jr.

Intervenor counters that there is collusion in this case due to the evidence of the existence of a reverse auction.[8] In support of that contention, Intervenor argues that: (1) Joseph's 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 Joseph's action to federal court where it could have been transferred to the Northern District of California; (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 Richard J. Billik, Jr. (Ret), which according to Plaintiffs, Intervenor ignores.

A reverse auction is a practice whereby the defendants in a series of class actions pick the most ineffectual class counsel with which to negotiate a settlement, hoping that the district court will approve a weak settlement, thus precluding other claims against the defendant. *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 282, (7th Cir. 2002). The gravamen of Intervenor's

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

contention is that Defendants opted to settle with Joseph's counsel rather than Intervenor's counsel because Joseph's counsel as compared to Intervenor's counsel, is ineffectual. There are several problems with that proposition. First, it overlooks the courts' role in the settlement approval process. To risk stating the obvious, a court must approve any proposed class action settlement. If a plaintiff's attorney accused of being part of a reverse auction sells out the class for a meager and unfair nationwide settlement in return for a quick payday, the court will not approve such settlement. Second, taking Intervenor's contention to its logical extension, where there are parallel class actions "none of the competing cases could settle without being accused by another of participating in a collusive reverse auction." *Rutter v. Willbanks Corp., v. Shell Oil Co.*, 314 F.3d 1180, 1189 (10th Cir. 2002). In this case, at this time, the Court finds no evidence of collusion. As such, the Court finds that this factor weighs in favor of approval of the Proposed 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 been involved in complex litigation for many years and have significant experience in class action lawsuits. Thus, Plaintiffs contend that Zimmerman's opinion is competent.

Intervenor argues that Zimmerman's opinion regarding the propriety of the Proposed Settlement should be "discounted heavily" because: (1) Zimmerman did not litigate the case; (2) Zimmerman did not engage in formal discovery; (3) there is evidence of a reverse auction; (4) Zimmerman has a guaranteed fee in this case; and (5) the possibility that this case could be mooted by the California Action.

The Court find's Intervenor's arguments as to why the Court should "heavily discount" Zimmerman's opinion unavailing. None of the arguments which Intervenor raises directly challenge the notion that Plaintiffs' counsel is competent. It is undisputed that Zimmerman is an attorney experienced in class action litigation. *See* Zimmerman Decl. Exh. G. 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 extensive informal discovery throughout the course of their settlement negotiations. Plaintiffs note that Defendants produced to them the same documents that the Defendants produced to Perez in the California Action. In addition, Plaintiffs state that they received numerous documents pertaining to Defendants' financial information. Plaintiffs maintain that they also reviewed Defendants' sales data, including wholesale and retail sales, as well as other records containing class information. Plaintiffs note that they actually reviewed more documents from the Defendants than from Perez.

Intervenor charges that Plaintiffs failed to undertake the requisite amount of investigation necessary in a class action before settlement. As noted, Intervenor points out that Plaintiffs did not engage in any formal discovery. According to Intervenor, formal discovery could have uncovered information illuminating the relative strength of Plaintiffs' case. As for any informal discovery, Intervenor contends that any such discovery cannot be considered because the Plaintiffs have declined to provide any such documents to Intervenor.

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. The Court notes that the law and policy of Illinois favors class action settlements even in cases where the class has yet to be certified. *See Security Pac. Fin. Servs. v. Jefferson*, 259 Ill. App. 3d 914, 919 (1st Dist. 1994).

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. In fact, Defendants' counsel produced over 3,500 pages of documents. *See* Michelle Floyd Decl. ¶9. 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 Proposed Settlement.

In sum, having weighed all six of the *Korshak* factors, the Court finds that the proposed settlement is within the range of possible approval.

II. DUE PROCESS: NOTICE PLAN

The Court next addresses the proposed notice plan. 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.

In support of their Motion for Preliminary Approval, Plaintiffs submit the Declaration and Supplemental Declaration of Steven Weisbrot ("Weisbrot"), Executive Vice-President of Notice and Strategy at Angeion Group, LLC ("Angeion"), a settlement administration firm. According to Weisbrot, the direct notice to the Class will be conducted through email to each Class Member for whom the Defendants have an email address. Weisbrot, Decl. ¶10. Defendants informed Weisbrot that they have approximately 1,680,000 email addresses belonging to Class Members. Weisbrot, Decl. ¶10. To address the possibility of any "undeliverable" email notices—for example, in the event that some of the Class Member's emails in Defendants' possession are incorrect—Angeion will send a physical postcard notice via first-class mail for which Defendants have a U.S. postal address.

In addition, to supplement the direct notice plan, Weisbrot profiled the members of the class using an online research tool called comScore. According to Weisbrot, advertising agencies and other communications professionals use comScore data to understand the socio-economic characteristics, interests and practices of a target group so that potential members of the profiled target group can be reached online. *Id.* at 11. Weisbrot created the target definition of the profiled Class Members as those who: purchased stereo components and other electronic equipment in the last six (6) months; and shopped at Best Buy in the last six (6) months. *Id.*

Notice of the class action settlement will also include internet banner advertisements and print publication in Electronic House, a nationwide print and digital publication that addresses home automation technologies. Weisbrot, Decl. ¶¶12, 16. Additionally, to comply with California Consumer Legal Remedies Act, Angeion will publish the summary notice once per week for four consecutive weeks in the California Regional Edition of USA Today. Weisbrot Decl. ¶17. Weibrot opines that the notice portion of the plan is designed to reach 75.4% of the Class on average three times per week.

Intervenor, not surprisingly, contends that Plaintiffs' notice plan fails to satisfy due process. Specifically, Intervenor argues that: (1) physical mail notice is preferable to email notice; (2) the notice plan is deficient in that the parties decline to seek additional contact information from other retailers who sell Monster's HDMI cables; (3) internet banners are a weak form of notice; (4) print publication is a poor substitute where class members can be reached directly; (5) a claims process is unnecessary in this case; and (6) the notice plan does not have sufficient reach. The Court addresses each argument in turn.

A. Physical Mail

Intervenor notes that there is no provision in the proposed class action settlement for direct notice by physical mail. Yet, physical mail, according to Intervenor, is the best form of notice and Defendants already have the addresses of many class members. On the other hand, email notice, posits Intervenor is not sufficient, citing *Karvaly v. eBay Inc.*, 245 F.R.D. 71 (E.D.N.Y. 2007), *Sharma v. Burberry Ltd.*, 52 F. Supp. 3d 443 (E.D. N.Y. 2014) and *Duran v. Obesity Research Inst., LLC*, 2016 Cal. App. Unpub. Lexis 4726 (an unpublished California state court opinion). According to Intervenor, email notice tends to generate lower claims than notice through physical mail, offering the Todd B. Hilsee's—his expert on notice issues—Amended Declaration[9] in support of his 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. Defendants' estimate, according to Intervenor, that contacting these class members by physical mail would cost $800,000 to $1,000,000. Hilsee, on the other hand, 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.

Plaintiffs counter[10] that the notice plan comports with due process. Plaintiffs initially note that the parties selected an experienced notice provider—Angeion Group LLC—to create a robust notice plan. Next, Plaintiffs point out that will direct email notice will be sent to each class member for whom the Defendants have an email address. The email will be sent, according to Plaintiffs, to approximately 1,680,000 email addresses obtained from Best Buy's sales data, as well as Monster's online store. This accounts for approximately 61.5% of the Class Members in this action. Contrary to Intervenor's suggestion, Plaintiffs assert that physical mail notice is not required to satisfy due process. Plaintiffs point out that Intervenor's own notice expert, Hilsee has been critical of direct mail. In addition, note Plaintiffs, Intervenor fails to cite any Illinois case that requires physical mail notice. Further, the federal cases cited by Intervenor, according to Plaintiffs, do not stand for the proposition that email notice does not satisfy due process. Rather, in those cases, posit Plaintiffs, the courts found that notice accomplished by mail satisfied due process requirements. Moreover, Plaintiffs contend that the federal cases cited by Intervenor were controlled by Federal Rule 23 but that rule was amended in August 2016 to provide for notice by electronic means. Nor did the *Duran* court—the fourth district court of appeal of California—according to Plaintiffs, conclude that email notice does not satisfy due process. Lastly, Plaintiffs note that the Defendants previously advised the Court that employing physical mailing of the notice was cost-prohibitive and that Defendants would not have settled the matter if physical mail notice were required as part of the settlement.

Whether the proposed notice satisfies due process depends upon the circumstances of the individual action. *Miner v. Gillette Co.*, 87 Ill. 2d 7, 15 (1981). While Intervenor contends that physical mail notice is required to satisfy due process, Intervenor cites no Illinois authority for such a

[9] Intervenor subsequently filed a Supplemental Declaration of Todd B. Hilsee on the Proposed Notice Plan
[10] Plaintiffs submitted a Response to the Supplemental Declaration of Todd B. Hilsee.

sweeping statement. The Court suspects that this omission was not due to oversight, but rather, due to the fact that in Illinois, courts look to the specific facts of the case to determine the most appropriate notice—whether it be physical mail or a different kind of notice. The class in this case will be 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 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. Intervenor further maintains that while Weisbort calculates that 75% of the emails will be delivered, that number is irrelevant where studies show that as little as 7-8% of emails are opened—with 23-24% being on the high end. However, the Court notes that if it turns out that the response rate is too low, the Court may revisit this issue at the fairness hearing. Indeed, that is what occurred in *Duran,* 2016 Cal App. Unpub. Lexis 4726—which, although Plaintiffs fail to address this issue, is improperly cited by Intervenor, as it is an unpublished California state court opinion.[11]

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 proposed notice plan satisfies due process requirements. The notice program in this case will provide direct email notice to each class member for whom the Defendants have an email address, which is approximately 1,680,000 email addresses derived from Best Buy's data and Monster's online store data. This accounts for approximately 61.5% of the Class Members in this case. Further, the class administrator estimates that 75% of the emails will be delivered. At this time the Court finds that email notice to this class satisfies due process concerns.

B. Subpoenaing Retailers

Intervenor asserts that due process requires that individual notice be sent to all class members whose names and addresses may be ascertained through reasonable effort, citing *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974). In this case, Intervenor contends that any addresses not in Defendants' possession would be available through subpoenas to third party retailers such as Amazon, Fry's and Adorama. According to Intervenor, courts have approved of this practice, citing *Ebin v. Kangadis Food Inc,* 2014 U.S. Dist. LEXIS 25838 (S.D.N.Y. Feb. 25, 2014) and *In re Bayer*

[11] The California Rules of Court 8.1115, the counterpart to Illinois Supreme Court Rule 23, states that "an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." Cal. Rules of Court, Rule 8.1115. *See also* Ill. Sup. Ct. R. 23(e)(1) "an order entered under [this subsection] is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." *Id.* The Court would be remiss to observe that the parties' briefs more often than not cite unpublished opinions liberally, despite the fact that, as noted, citations to such authority have no precedential value and are improper. As such, the Court respectfully reminds the parties that citations to unpublished opinions have no place in briefs filed before the Court, that the Court will not consider unpublished opinions from Illinois or other jurisdictions except as the constraints of the applicable rule or rules permit, and that dedicating lengthy discussion to such opinions in briefs is an unnecessary expense of time and effort for the parties and the Court.

Corp. Combination Aspirin Products Mktg. & Sales Practices Litig., 2012 U.S. Dist. LEXIS 143955 (E.D. N.Y. Oct. 4, 2012). Intervenor maintains that parties can easily obtain the information needed to contact many additional consumers directly without undue expense, delay or effort.

Plaintiffs respond that issuing subpoenas to retailers for class members' information is not as easy as Intervenor suggests. Plaintiffs claim that (1) third-parties are likely to move to quash the subpoenas, and (2) the process would be time-consuming and involve unnecessary additional costs.

Plaintiffs further posit that the cases which Intervenor cites are distinguishable. The *Ebin* court, according to Plaintiffs, did not state that issuance of subpoenas to third parties is required in all cases. Rather, argue Plaintiffs, it found that in that case, the best notice practicable required participation from third parties. As for *Bayer*, Plaintiffs note that the parties in that case reached a class-wide settlement and agreed to seek contact information from third party retailers.

The Court does not, at this time, find that issuing subpoenas to third-parties is necessary to satisfy due process. Whether due process requires that Plaintiffs obtain the addresses of potential class members from third-parties—namely, other retailers—is something which the Court must assess in light of the responses to the notices issued. The Court, therefore, will make such determination at the time of the fairness hearing.

C. Banner Notice

Plaintiffs' proposed notice plan includes an internet banner notice program. The internet campaign will target people navigating the internet by profiling them through certain predetermined criteria, such as search targeting, demographic targeting, category targeting, contextual targeting and purchase targeting to name a few. Such targeting works by analyzing internet searchers in light of certain criteria consistent with the Class Members in this case, such as belonging to a particular demographic, purchasing certain items, or entering certain key words or phrases on an internet search engine such as Google. Once a person is profiled and targeted through the internet, he or she will see a banner advertisement informing them of the class action settlement in this case. The internet banner notice program, according to Plaintiffs, will be implemented using a four-week desktop and mobile campaign. A "3x frequency cap" will also be imposed. Plaintiffs maintain that the banner notice is designed to result in serving approximately 8,169,000 impressions.

Intervenor retorts that internet banners are a weak form of notice. According to Hilsee, claims administrators often overstate the effectiveness of notice through internet banners. Hilsee states that data indicates that only 0.04% of banner impressions are actually clicked by users. Here, notes Hilsee, the notice plan does not indicate where the banners would appear or how the inventory would be purchased. Nor do Plaintiffs, according to Intervenor, include a draft mock-up of any internet banner notice for the Court's approval. Intervenor concedes that internet banners can be useful, but only when supplementing a robust physical mail notice.

The Court agreed with Intervenor that without a draft of the mock-up, the Court could not

assess the internet banner. Plaintiffs addressed this issue in Weisbrot's Supplemental Declaration. In his Supplemental Declaration, Weisbrot provides a rendering of the proposed banner.

Not surprisingly, Plaintiffs disagree with Intervenor's characterization of the internet banner plan. Plaintiffs note that the internet banner advertisement utilizes a state-of-the-art approach to internet media advertisements. Standard advertisement sizes will appear, according to Plaintiffs, on both, potential class members' desktop and on mobile devices. This, conclude Plaintiffs, is the best practice in the industry. As for Hilsee's contention that digital banners are virtually useless, Plaintiffs respond that this contention is out of mainstream knowledge regarding digital banners. Banner advertisements, argue Plaintiffs, are a recognized means of providing notice where individual notice is not practicable.

The Court agrees with Plaintiffs that the proposed internet banner advertisement in this case comports with due process. As such, the Court finds that the proposed internet banner advertising to potential class members, combined with the other types of notice which Plaintiffs propose be employed in conjunction, satisfy due process considerations in this case.

D. Print Notice

Plaintiffs will publish a copy of the summary notice in Electronic House, a national print and digital publication which publishes content relating to home automation technologies. Additionally, Plaintiffs note that the summary notice will be published once a week for four consecutive weeks in the California regional edition of USA today. A copy of the summary notice is attached as an exhibit to Weisbrot's Declaration.

Intervenor claims that the inadequacies of the direct plan cannot be remedied by notice through print publication. Intervenor submits that publication is not an adequate substitute for notice to class members who can be reached directly, citing *Shurland v. Bacci Café & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139 (N.D. Ill 2010) and *Mirafshi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir. 2004). Further, relying on Hilsee's Declaration, Intervenor argues that print notice will not be meaningful.

Intervenor does not challenge the applicability of the publication, Electronic House, nor does Intervenor object to selection of the California edition of USA Today. Instead, Intervenor's objection is, once again, part and parcel of Intervenor's previously rejected contention that notice by physical mail is required. The Court having already considered and rejected this objection, finds that the proposed print notice, as a supplement to the other forms of notice, satisfies due process considerations.

E. Claims Process

The Proposed Settlement calls for a claims process. Specifically, a class member must submit a claim form either by U.S. mail or electronically through the Settlement Website to make a claim for compensation under Options A, B or C.

Intervenor suggests that a claims process is not necessary in this case because the identities of many class members are already known to the Defendants, and as such, concludes Intervenor, class members should be paid directly.

Plaintiffs reply that claims forms in class settlements are common and courts routinely approve settlement agreements requiring plaintiffs to submit a claim to receive settlement, citing *In re Certainteed Fiber Cement Siding Litig.*, 303 F.R.D. 199 (E.D. Pa. 2014), among other cases.

The Court disagrees with Intervenor and finds that a claims process in this case is appropriate.

F. Reach of the Notice Plan

Plaintiffs submit that the notice program is designed to deliver a 75.4% reach with an average frequency of 3.00 times each. The 75.4 % reach does not, according to Plaintiffs, include the website, and magazine publication, as well as a toll free number which will be available to Class Members. Wesibrot opines that the 74% delivery estimate is likely to be lower than what the actual overall delivery percentage will be in this case. In other words, the email should, according to Weisbrot reach in excess of 75% of the Class Members.

Intervenor, on the other hand, takes issue with Weibrot's conclusions. Intervenor notes that while Weisbrot opines that the estimated overall combined reach in this case would be 75.4%, Weisbrot provides no data in support of this figure. Assuming that the reach was 75.4%, Intervenor contends that such a number falls short of the median reach of 87% for notification in class actions. The inadequacy of the notice plan, according to Hilsee, renders it a *fait accompli* that the claims' rate will be extremely low—maybe as low as less than 1% of the class.

Plaintiffs counter that the 75.4% reach meets or exceeds other similar notice plans for similar settlements and is a minimum reach percentage estimate. The 75.4% reach estimate, according to Plaintiffs, was calculated without considering of the settlement website, newspaper, magazine publication and toll free number which will be available to Class Members. If the actual direct notice through email and targeted advertisements delivery rate is higher than the 75% estimate, the reach percentage of the overall Notice Plan, posit Plaintiffs, will be higher. Conversely, note Plaintiffs, if the email delivery is lower than 75%, Angeion will increase the number of internet impressions such that the reach percentage meets or exceeds the 75% rate. Therefore, conclude Plaintiffs, irrespective of what the actual email delivery rate will be, the reach percentage will exceed 75.4%.

The Court agrees with Plaintiffs and finds that the Notice Plan appears to be designed to have sufficient reach to Class Members. Potential Class Members will receive individual direct notice for whom the Defendants have an email address. Email notice will be sent to approximately 1,680,000 email addresses, which have been derived from Best Buy's sales data and Monster' online store, which the parties estimate constitutes 61.5% of the Class. Notice will be supplemented by publication notice and internet banner advertisement. The test which the Court employs to evaluate the Notice Plan, is that the notice constitute the best practicable notice under the circumstances. The Court finds that the notice plan satisfies this test.

III. 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.

Proposed Settlement, ¶¶33, 107

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

IV. ATTORNEYS FEES

The Proposed Settlement provides that Class Counsel be awarded the sum, not to exceed three hundred twenty-five thousand dollars ($325,000).

Intervenor contends that the requested attorney's fees in this case—$325,000—are problematic for two reasons. First, Intervenor asserts that since this is a claims-made settlement,[12] there is no way to determine how much value will be provided to the Class Members because the relief to the Class Members will depend on how many of them respond to the notice. Second, given the problems with the Notice Plan, contends Intervenor, the value to the class is likely to be "paltry." As to this issue, Intervenor notes that the Seventh Circuit recently disapproved of a similar settlement involving Plaintiffs' counsel, Zimmerman, citing *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014).

Plaintiffs retort that Intervenor's objection is premature, as Plaintiffs' counsel has yet to submit a fee petition. On a more substantive basis, Plaintiffs' counsel notes that Intervenor is incorrect when he states that Plaintiffs' counsel's fee will actually be $325,000. Rather, note Plaintiffs, under the terms of the Proposed Settlement, Defendants merely agree not to oppose an application for a Fee and Expense Award that does not exceed $325,000. Continuing, Plaintiffs note that Intervenor does not contend that a fee of $325,000 is unreasonable on its face. Rather, observe Plaintiffs, Intervenor suggests that the fee award is problematic because this is a "claims-made settlement" and there is no way to know how much value will be provided to the class. Intervenor's argument, assert Plaintiffs, relies on the assumption that there will be a low claims rate. Such an assumption, argue Plaintiffs, is premature.

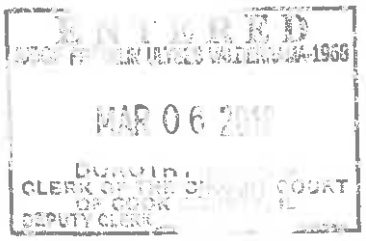
The Court agrees with Plaintiffs. At this time, there is no fee petition before the Court and there is no data showing a low claims rate—because there has been no notice provided to the Class Members yet. If and when a fee petition is presented, the Court will assess the reasonableness of the petition against the value provided to the class. Today, however, is not that day.

[12] A "claims-made settlement is one that does not have a fixed fund, but rather provides the defendant will pay claims of class members who file them." RUBENSTEIN, NEWBERG ON CLASS ACTIONS (5th ed. 2014), §13:17, p. 287. In "common-fund" settlement, by contrast, the defendant contributes a fixed settlement amount, which is then distributed to settlement class members directly or through a claims process. *Id.* at §13:7, pp. 287-88.

CONCLUSION

In conclusion, the Court grants the Motion for Class Certification and Preliminary Approval.

ENTERED:



Franklin U. Valderrama
Judge Presiding

DATED: March 6, 2018