No. 18-1074

In The Supreme Court of the United States

BRIAN PERRYMAN,

Petitioner,

v.

JOSUE ROMERO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PROVIDE COMMERCE, LLC'S RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 31, 2019

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QUESTION PRESENTED

Whether the district court abused its discretion in approving the parties' use of *cy pres* to distribute unclaimed settlement funds where the district court found the *cy pres* recipients are tethered to the underlying claims and would advance class members' interests.

PARTIES TO THE PROCEEDINGS

Petitioner Brian Perryman was the appellant in the court of appeals and the lone objector to the class action settlement in the district court.

Respondents Josue Romero, Deanna Hunt, Kimberly Kenyon, Gina Bailey, Alissa Herbst, Grant Jenkins, Bradley Berentson, Jennifer Lawler, Daniel Cox, Jonathan Walter, and Christopher Dickey were appellees in the court of appeals and the named plaintiffs in the district court.

Respondent Provide Commerce, LLC (formerly known as Provide Commerce, Inc.) ("Provide Commerce") was an appellee in the court of appeals and a defendant in the district court.

Respondent Regent Group, Inc. d/b/a Encore Marketing International ("Regent Group") was an appellee in the court of appeals and a defendant in the district court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Provide Commerce, LLC (formerly known as Provide Commerce, Inc.) is a wholly-owned subsidiary of FTD, Inc.

FTD, Inc. is owned by FTD Group, Inc., which in turn is owned by FTD Companies, Inc., the ultimate parent company of Provide Commerce, LLC.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT—Continued

FTD Companies, Inc. has issued stock that is publicly traded. Qurate Retail, Inc., which also has issued stock that is publicly traded, owns 36% of the stock issued by FTD Companies, Inc. There are no other publicly traded business entities that own more than 10% of the stock issued by FTD Companies, Inc.

Other than FTD Companies, Inc., there are no other parents, trusts, subsidiaries, or affiliates of Provide Commerce, Inc. that have issued shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

In a misguided effort to obtain review, Petitioner portrays this case as raising the same question presented as *Frank v. Gaos*, No. 17-961, and as an "ideal vehicle for addressing the issue of *cy pres*." Pet. 1, 10–11. Petitioner's portrayal misses the mark. *Gaos* was an injunctive relief and *cy pres*-only settlement with no direct financial award to the class. This case, however, provides direct monetary relief—cash refund for money allegedly lost on fees paid—and a $20 credit to each class member, and *cy pres* is used only as a mechanism to distribute unclaimed funds. What Petitioner actually seeks is review of a case-specific question: whether the district court abused its discretion under Rule 23(e)(2) by approving a class action settlement that uses *cy pres* as a mechanism to distribute unclaimed funds where the district court carefully evaluated silent class members' interests and those sought to be advanced by the underlying claims.

The Petition should be denied. Although Petitioner contends there is a circuit conflict on the applicable legal standards, there is none. Each of the other circuits that have addressed use of *cy pres* to distribute unclaimed settlement funds applies the same or substantially similar standards as the Ninth Circuit did here. These include the circumstances for employing *cy pres* to distribute unclaimed funds and the criteria for selecting recipients of such funds to protect the interests of silent class members. The Petition also does not present an important, recurring question of law warranting this Court's review. Instead, it takes issue with the

district court's exercise of discretion in applying these standards to the specific factual aspects of this particular settlement. Even if there was a need to take up certain *cy pres* issues, such as *cy pres*-only settlements, this case is not the right vehicle to do so because *cy pres* was employed here in a narrow, universally approved circumstance—as a device to distribute unclaimed settlement funds. Further, both the district court and Ninth Circuit below considered and rejected Petitioner's two proposed alternative distribution methods for compelling reasons under established law as applied to the unique circumstances here. Finally, the Ninth Circuit's decision affirming the district court's approval of the limited *cy pres* aspect of the settlement as "fair, reasonable, and adequate" under Rule 23(e)(2) was correct on the merits.

STATEMENT

The Contested Membership Programs

This case arises from plaintiffs' online enrollment in certain subscription-based membership programs, each of which was offered and administered by Regent Group. Pet. App. 4–5, 28–29. Plaintiffs claim that, after they ordered items from certain of Provide Commerce's websites, they were presented with an offer to enroll in one of the membership programs. *Id*. As part of the offer to enroll, plaintiffs allege they were presented with the opportunity to claim a gift code for $15 off their next order. *Id*.

Plaintiffs concede that they navigated away from Provide Commerce's websites to Regent Group's membership programs' enrollment webpages, entered their email addresses and zip codes, and clicked the acceptance button. *Id.* at 4, 28. Plaintiffs allege that when they did so, Provide Commerce transmitted their payment and billing information to Regent Group, which proceeded to enroll plaintiffs and class members in one of the membership programs and charged their credit or debit cards a $1.95 activation fee, followed by a monthly fee of $14.95. *Id*. at 4–5, 28–29. Plaintiffs contend they did not intend to enroll in the membership programs, but rather were seeking to claim the $15-off gift code, which they believed was offered without any obligation, despite the clear disclosures to the contrary contained on Regent Group's enrollment pages. *Id*.

Because they purportedly did not intend to enroll in the membership programs, plaintiffs contend that the charges that Regent Group posted to their credit or debit cards for the membership programs' fees were unauthorized. *Id.* Plaintiffs also allege that they did not receive the promised $15-off gift code. *Id*.

Plaintiffs' Claims

Based on the conduct surrounding their enrollment in the membership programs, plaintiffs asserted ten statutory and common law claims for relief against Provide Commerce and Regent Group under various legal theories, including invasion of privacy. Pet. App.

5, 29. Plaintiffs asserted these claims individually and on behalf of a putative nationwide class. *Id*.

Discovery Conducted

In two and a half years of litigation, the parties engaged in extensive discovery, completed pre-class certification fact discovery, and had nearly completed pre-class certification expert discovery when the parties settled. *Id.* at 5, 55–56, 77. Provide Commerce produced more than 450,000 pages of documents, responded to twelve interrogatories, defended six corporate depositions, took six current and former plaintiffs' depositions, and obtained over 29,000 pages of documents from plaintiffs. *Id*. at 55–56, 77. Provide Commerce and plaintiffs served opening expert reports. *Id.* at 56.

Provide Commerce's Positions Were Supported By Several Federal Court Opinions that Called into Question the Viability of Plaintiffs' Claims

Provide Commerce has maintained that plaintiffs' claims were without merit. *Id.* at 55, 70, 83–84. Provide Commerce contended: (i) the terms of the offer and plaintiffs' enrollment in the membership programs were adequately disclosed; and (ii) plaintiffs entered into valid electronic contracts with Regent Group for the membership programs that authorized Provide Commerce to disclose billing and payment information to Regent Group upon Regent Group's request. *Id.*

Before the parties settled, several federal district courts had recently dismissed complaints involving substantially similar enrollment processes and disclosures for other subscription-based membership programs. *See*, *e.g.*, *Baxter v. Intelius, Inc.*, No. SACV 09-1031 AG (MLGx), 2010 WL 3791487, at *3–5 (C.D. Cal. Sept. 16, 2010) (holding that similar enrollment webpage was not deceptive as a matter of law); *Hook v. Intelius, Inc.*, No. 10-CV-239 (MTT), 2011 WL 1196305, at *9–10 (M.D. Ga. Mar. 28, 2011) (same); *Berry v. Webloyalty.com, Inc.*, No. 10-CV-1358-H (CAB), 2011 WL 1375665, at *4–6 (S.D. Cal. Apr. 11, 2011) (same), *vacated on other grounds*, 517 F. App'x 581 (9th Cir. 2013). One such district court opinion had already been affirmed on appeal. *In re Vistaprint Corp. Mktg. & Sales Prac. Litig.*, MDL No. 4:08-md-1994, 2009 WL 2884727, at *8 (S.D. Tex. Aug. 31, 2009) (granting defendants' motion to dismiss and holding nearly identical enrollment webpage was not deceptive as a matter of law), *aff'd sub nom.*, *Bott v. Vistaprint USA, Inc.*, 392 F. App'x 327 (5th Cir. 2010).

As such, Provide Commerce's motion to dismiss pending at the time of settlement was well-supported, and the district court noted in its order approving the settlement that the viability of plaintiffs' claims was "substantially uncertain" in light of these decisions. Pet. App. 55, 83.

Settlement Process

Throughout the litigation, the parties participated in extensive settlement conferences and mediations in an effort to resolve this case. *Id.* at 5, 56, 83–84. On December 15, 2010, the parties appeared before Magistrate Judge William V. Gallo for an Early Neutral Evaluation conference. *Id*. On May 18, 2011, the parties participated in a full-day private mediation session before Magistrate Judge Leo S. Papas (Ret.). *Id*. On May 20, 2011, the parties again appeared before Magistrate Judge Gallo and participated in a Mandatory Settlement Conference with defendants and their respective insurance carriers. *Id*. Magistrate Judge Gallo conducted follow-up telephone conferences with certain defendants and insurers on July 18, 2011, August 5, 2011, and August 17, 2011. *Id*. Magistrate Judge Gallo also conducted an in-person Mandatory Settlement Conference with plaintiffs only on October 7, 2011. *Id*.

The parties continued to discuss a potential settlement over the next several months, and ultimately agreed to attend a second private mediation with another mediator. *Id.* On April 9, 2012, the parties participated in a full-day private mediation session with Judge Edward A. Infante (Ret.). *Id*. At the conclusion of the mediation, the parties reached an agreement on the high-level terms of a settlement, conditioned on the parties negotiating and executing a final written agreement. *Id*. In the weeks following the mediation, the parties negotiated a formal written settlement agreement. *Id*. at 80–116.

Settlement Terms

The parties structured the settlement to specifically address plaintiffs' core allegations. First, because plaintiffs contended that they and the class had been damaged by Provide Commerce's purported unauthorized or otherwise improper disclosure of their billing and payment information to Regent Group, and Regent Group's alleged unauthorized charges to their credit or debit card accounts for membership fees, Provide Commerce and Regent Group agreed to establish a $12.5 million non-reversionary cash fund to, among other things, make cash payments to authorized claimants up to the full amount of monthly membership fees paid (less any prior full or partial payment for such fees). *Id.* at 5–6, 30–35, 70–72, 80–115. Second, because plaintiffs contended that they and the class were misled by the offering of a $15-off code as part of the enrollment process, and that they did not actually receive the code upon enrollment, Provide Commerce agreed to provide each class member with a $20 credit. *Id*. Class members were not required to submit a claim form to obtain the $20 credit, which is 30% larger than the $15-off code class members originally sought. *Id.*

Notably, the settlement did not include injunctive relief because defendants had voluntarily ended the contested practices before the settlement. Resp. Provide Commerce's App. 29-30.

The main terms of the settlement include:

- Notice to class members by e-mail, followed by U.S. postal mail for undeliverable e-mails, and an Internet website.
- Creation of a cash fund of $12.5 million, to be used to pay the claims of class members, cost of providing notice, claims administration fees and costs, court-approved attorneys' fees and costs, and court-approved plaintiffs' enhancement awards. Any remainder funds would be paid on an equal basis to San Diego State University, the University of California at San Diego, and University of San Diego School of Law, with the payments specified to be used for a chair, professorship, fellowship, lectureship, seminar series, or similar funding, gift, or donation program regarding internet privacy or internet data security.
- To class members who timely submit valid claim forms, a cash payment from the cash fund for the amount of monthly fees paid for membership program(s), less any full or partial payment for such fees previously received.
- To all class members (whether or not they submit claim forms), a $20 credit useable at certain Provide Commerce websites.
- Awards to the named plaintiffs ranging from $5,000 to $15,000 (depending on the

extent of their involvement in the case), subject to court approval.

- Attorneys' fees and costs of up to a maximum amount of $8.65 million in fees and $200,000 in costs, subject to court approval.

Pet. App. 5–6, 30–35, 70–72, 80–115.

There were approximately 1.3 million class members that received notice, of which approximately 3,000 submitted claims for cash refunds. *Id.* at 6, 34. Each of those claims will be paid in full, equaling about $225,000. *Id*. After accounting for these claims, notice and administration costs, and class counsel's request for fees and costs, there is a remainder of approximately $3 million. *Id*. at 6.

Objection to Settlement

Petitioner filed the lone objection to the settlement, challenging the amount of the attorneys' fees requested, as well as the use of *cy pres* to distribute unclaimed settlement funds and the choice of *cy pres* recipients. Pet. App. 41–49.

As a claimant from the fund, Petitioner will receive a $121.55 cash payment. Resp. Provide Commerce's App. 66. As a class member, he will also receive the $20 credit. Pet. App. 95–96.

Fairness Hearing and Final Approval Order

The district court conducted a fairness hearing on January 28, 2013. Pet. App. 6, 27–28; Resp. Provide Commerce's App. 1–51. After entertaining argument for over 70 minutes, the district court took the matter under submission. Pet. App. 6, 27–28. On February 4, 2013, the district court issued a final order approving the settlement and plaintiffs' requested attorneys' fees and enhancement awards and overruling Petitioner's objections. *Id*. at 27–60. In a thoughtful and well-reasoned 22-page order, the court considered the proposed settlement, weighed the merits of the objection, and ultimately determined that the parties had entered into the settlement in good faith, after extensive arm's-length negotiations, and concluded that the settlement was fair, reasonable, adequate, and in the best interests of class members. *Id*.

Addressing Petitioner's issues with use of *cy pres* to distribute unclaimed funds, the district court first addressed the *cy pres* recipients that the parties selected. As to geographic scope, the district court found that the proposed *cy pres* distribution was "directly tied to the statutes underlying [p]laintiffs' claims" because the funds would "directly contribute to the national academic dialogue involving internet privacy and security," and because the funds would benefit absent class members, all of whom are internet consumers: "Regardless of their physical location, programs furthering the goals of internet security and privacy will benefit users of the internet everywhere." *Id.* at 46–47. The district court noted that the recipient

universities "serve a diverse student population of students from many states, issue widely-distributed publications, and engage in the overall national academic discourse." *Id*. at 46. In rejecting Petitioner's contention, the district court found: "the geographic distribution in this instance satisfies (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members." *Id*. at 48. The district court also rejected Petitioner's argument that the University of San Diego School of Law was an unacceptable *cy pres* beneficiary merely because a couple of the numerous attorneys that had appeared in the case happened to be alumni of that institution. *Id*. at 43–44. In doing so, the court noted that, of the three institutions sharing the *cy pres* award, University of San Diego Law School was not entitled to a greater award than the others. *Id.* The court further noted that, "simply by virtue of it being a law school, USD Law School may be in the best position to develop and research the legal issues associated with internet privacy and security underlying [p]laintiffs' claims." *Id.*

The district court next addressed Petitioner's objection to use of *cy pres* at all as a mechanism to distribute unclaimed settlement funds and his proposed alternative distribution methods. The district court found that a further distribution to claimant class members "would constitute an impermissible windfall" and that the settlement agreement "already authorizes class members to recover the entirety of any unauthorized charges and further awards a $20 credit worth $5 more than the original 'thank you gift' leading

to [p]laintiffs' claims." *Id.* at 48. The district court further found that "silent class members would not benefit from a further distribution to the claimant class members," and they "will receive greater benefit from the remaining funds" if distributed by *cy pres*. *Id*. at 48–49. In overruling Petitioner's *cy pres* objections, the district court found that the *cy pres* here met the Ninth Circuit standards because "[t]he nature of the distribution and the proposed recipients are sufficiently tied to the objectives of the statutes . . . and to the interests of silent class members." *Id.* at 49.

Petitioner's First Appeal

Petitioner appealed. *Id.* at 7. On March 19, 2015, after all parties to the appeal completed briefing, but before oral argument, the Ninth Circuit vacated the judgment and remanded the case for further proceedings consistent with its newly issued opinion *In re Online DVD Antitrust Litig*., 799 F.3d 934 (9th Cir. 2015). *In re EasySaver Rewards Litig.*, 599 F. App'x 274 (9th Cir. 2015); *id*. at 7, 66–68.

Remand and Order Reinstating Prior Final Approval Order and Judgment

Upon remand, the district court ordered supplemental briefing from the parties and Petitioner regarding the import of *In re Online DVD Antitrust Litig*. Pet. App. 69–70. By order filed August 9, 2016, the district court again rejected Petitioner's contentions regarding attorneys' fees and costs, and adopted and reinstated

the prior final approval order and final judgment. *Id*. at 69–78. The district court did not readdress Petitioner's objections regarding *cy pres* as it was not an issue in *In re Online DVD Antitrust Litig*. *Id*.

Petitioner's Second Appeal

Petitioner again appealed. On October 13, 2018, the Ninth Circuit issued its opinion holding that Petitioner's "challenge to the attorney's fee award succeeds because the district court failed to treat the $20 credits as coupons under CAFA, but [] reject[ing] his *cy pres* arguments." *Id.* at 8–9. The Ninth Circuit further held that given the settlement agreement's structure and the focus of Petitioner's challenges to the settlement, that it need not reverse the entire settlement approval in vacating and remanding the attorneys' fee award. *Id*. at 25. As such, it reversed the fee award, but otherwise affirmed the district court's settlement approval. *Id*. at 25–26.

REASONS FOR DENYING PETITION

The Petition seeks review of a case-specific decision that applies settled law on the use of *cy pres* to distribute unclaimed settlement funds based on the unique facts of this particular case, a decision that is correct on the merits.

There is no circuit conflict as to the standards district courts apply in assessing the use of *cy pres* to

distribute unclaimed remaining settlement funds. Every circuit to address the issue has held that district courts may approve use of *cy pres* to distribute such remaining funds. Every circuit court likewise applies a substantially similar standard in evaluating *cy pres* recipients: requiring a sufficient nexus between the objectives of the underlying statute(s) or claim(s) and the interests of silent class members. Courts have recognized that use of *cy pres* under these circumstances serves the policies favoring settlement and benefits the class. They also recognize the need to scrutinize such settlements to ensure that they are fair to silent class members. Both the district court and the Ninth Circuit followed these established standards in evaluating the proposed settlement here.

Petitioner tries to manufacture a conflict by citing four cases that involved the use of *cy pres* to distribute unclaimed funds, but none of these cases applied a different legal standard; they merely reached different results based on different sets of facts. In the end, all the Petition offers is nothing more than an argument that the Ninth Circuit did not correctly apply the prevailing standard in this particular case. The claimed misapplication of a properly stated rule of law does not, however, warrant review by this Court. Sup. Ct. R. 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925). The Petition seeks a case-specific examination of whether the district court and Ninth Circuit correctly applied settled legal standards to the unique facts of this case.

Finally, the decision below was correct. The district court and Ninth Circuit applied settled standards

to the facts here, and reached a decision on the *cy pres* issues that is consistent with decisions from other circuit and district courts. Given these considerations and the questionable viability of plaintiffs' underlying claims, the district court acted within its discretion in finding the settlement "fair, reasonable, and adequate," and use of *cy pres* to distribute unclaimed funds to be appropriate under the circumstances here.

I. The Petition Presents no Circuit Conflict.

Petitioner contends that other circuits "categorically reject" the Ninth Circuit's standards for use of *cy pres* to distribute unclaimed funds. Pet. 12. This is incorrect. The other circuits have not rejected the Ninth Circuit's standards. All of the circuits apply essentially the same legal standards to determine whether use of *cy pres* to distribute unclaimed funds is appropriate. The Ninth Circuit adheres to these established standards, and has often taken a lead role in developing them. The decision below follows this common approach, and as such, does not create a circuit conflict.

Use of *cy pres* is "likely the most prevalent method for disposing of unclaimed funds" and "[c]ourts in every circuit, and appellate courts in most, have approved the use of *cy pres* for unclaimed class action awards." 4 *Newberg on Class Actions* § 12:32 (5th ed. 2014) (listing cases); *see*, *e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) (quoting Newberg on Class Actions) ("[C]ourts are not in disagreement that *cy pres* distributions are proper

in connection with a class settlement."); *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) ("[A] district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury."); *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 946 (N.D. Cal. 2013) ("[*C*]*y pres* is a well-accepted method for distributing unclaimed settlement funds."), *aff'd sub nom. Fraley v. Batman*, 638 F. App'x 594 (9th Cir. 2016), *cert. denied sub nom. K.D. v. Facebook, Inc.*, 137 S. Ct. 68 (2016).

A. There is no circuit conflict in evaluating proposed alternative remainder distribution methods.

Despite the prevalence of employing *cy pres* to distribute unclaimed settlement funds, Petitioner contends that there is a circuit conflict with respect to the standards for evaluating alternative distribution methods. Pet. 11, 13–16. The Ninth Circuit held that the district court did not abuse its discretion in rejecting Petitioner's two proposed alternatives for distributing the remaining funds: (1) additional distribution to the claimants; or (2) pro rata distribution to the non-claimant class members. Pet. App. 21–22. As to an additional distribution to claimants, the Ninth Circuit held, "the district court was under no obligation to adopt a distribution approach that might overcompensate claimants, all of whom will already be fully reimbursed for the money they lost through the rewards

program." As to a forced distribution to non-claimants, each of whom received direct notice and chose not to make a claim, the Ninth Circuit rejected this approach, recognizing that "each non-claimant's recovery would be '*de minimis*,' . . . particularly once the costs of distribution are deducted." *Id.* at 22. (quoting *Lane v. Facebook*, 696 F.3d 811, 821 (9th Cir. 2012), *cert. denied sub nom*. *Marek v. Lane*, 571 U.S. 1003 (2013)). Given these facts, the panel determined that use of *cy pres* as a remainder distribution method is appropriate where, as here, "the administrative costs of distribution" are substantial compared to "the amount each non-claimant might receive." *Id.*

There is not a circuit conflict in evaluating these two alternative distribution methods.

Other circuits recognize that claimant class members should not be overcompensated at the expense of non-claimants. *See*, *e.g.*, *Baby Prod.*, 708 F.3d at 176 ("[W]here all class members submitting claims have already been fully compensated for their damages by prior distributions . . . additional individual distributions would overcompensate claimant class members at the expense of absent class members.") (internal alterations and citation omitted)); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 35–36 (1st Cir. 2012) (expressing concerns about overcompensating claimants at the expense of absent class members, and rejecting windfall payments to claimants that have already been compensated for harm suffered).

Other circuit courts have likewise recognized that *cy pres* distribution of unclaimed settlement funds is permissible where direct distributions are infeasible or not economically or otherwise viable under the circumstances:

- **First Circuit:** *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) (holding *cy pres* awards are permissible where "[d]istribution of all funds to the class can be infeasible, for example, when class members cannot be identified, when the class changes constantly, or when class members' individual damages—although substantial in the aggregate—are too small to justify the expense of sending recovery to individuals").
- **Second Circuit:** *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) recognizing that *cy pres* distributions may be appropriate in "circumstances in which direct distribution to individual class members is not economically feasible") (citation omitted).
- **Third Circuit:** *Baby Prod.*, 708 F.3d at 169–73 (recognizing that *cy pres* awards are appropriate where the "amounts involved are too small to make individual distributions economically viable"—for instance, where "the cost of distributing individually to *all* class members exceeds the amount to be distributed" and noting general agreement among circuit courts

that "*cy pres* distributions are most appropriate where further individual distributions are economically infeasible") (emphasis added).

- **Fifth Circuit:** *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 & n.15 (5th Cir. 2011) (*cy pres* awards are appropriate "when direct distributions to class members are not feasible") (citation omitted).
- **Tenth Circuit:** *Tennille v. W. Union Co.*, 809 F.3d 555, 560 n.2 (10th Cir. 2015) (recognizing that the "*cy pres* doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries") (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)).

In short, there is not a circuit conflict in evaluating Petitioner's two proposed alternative distribution methods, and Petitioner has not identified any such circuit split.

B. There is no circuit conflict in evaluating *cy pres* recipients for unclaimed funds.

Petitioner also contends that there is a circuit conflict regarding the standards used to evaluate the choice of *cy pres* remainder recipients. In the opinion below, the Ninth Circuit articulated the standard as follows: "recipients of *cy pres* funding should be selected in light of 'the objectives of the underlying statute(s)'

and the interests of silent class members." *Nachshin*, 663 F.3d at 1039. Pet. App. 22. Each of the four cases on which Petitioner relies in support of his position is in accord with the Ninth Circuit's standard. *See Baby Prod.*, 708 F.3d at 172 ("We join other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury."); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1067 (8th Cir. 2015) (noting that a *cy pres* award "should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated") (quoting *In re Airline Ticket Comm'n Antitrust Litig*, 307 F.3d 679, 682 (8th Cir. 2002)); *Klier*, 658 F.3d at 474 (same); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) (where class claims were based on "orthopedic medicine," "the choice of an orthopedic institute as a recipient of money left over after all approved class members' claims are paid is consistent *cy pres*"). There is no circuit conflict on the standard used to evaluate *cy pres* remainder recipients.

Rather than establishing a circuit split, the four cases on which Petitioner relies reflect careful and considered application of the same legal standard to different and often unique sets of facts.

In *Pearson*, the Seventh Circuit applied the well-established standard that a "*cy pres* award is supposed

to be limited to money that can't feasibly be awarded to the . . . class members." *Pearson*, 772 F.3d at 784. This is in accord with the standard applied in every other circuit that has decided the issue. *See*, *e.g.*, *Lane*, 696 F.3d at 819 (holding that *cy pres* awards are appropriate only where "the proof of individual damages claims would be burdensome or the distribution of damages costly") (quoting *Nachshin*, 663 F.3d at 1038). *Pearson* involved fixed damages arising from the purchase of a particular dietary supplement, whereas here, damages were variable and had to be calculated separately for each claimant. *See Pearson*, 772 F.3d at 779–80. Moreover, the *Pearson* court acknowledged that "the choice of an orthopedic institute as a recipient of money left over [was] consistent with *cy pres*"—in other words, the *cy pres* recipient had a sufficient nexus to the class—but determined that a *cy pres* award was not appropriate "in this case" because direct distribution to class members was feasible. *Id.* at 784.

In *BankAmerica*, the Eighth Circuit expressly noted it was in accord with the Ninth Circuit's decision in *Nachshin* in requiring *cy pres* remainder distributions to provide an "indirect class benefit" by going to "uses consistent with the nature of the underlying action." 775 F.3d at 1067 (citations and quotation marks omitted). The Eighth Circuit rejected the *cy pres* award in that case because the recipient, a Missouri legal aid organization, was "totally unrelated" to the securities fraud claims asserted on behalf of a nationwide class. *Id.* Moreover, the court determined that a further distribution was feasible under the facts of that case

because $2.4 million could be distributed at the low cost of $27,000 and claimants had received settlement payments compensating them for only a fraction of the harm incurred. *Id*. at 1064.

In *Baby Products*, the Third Circuit vacated the district court's approval of the settlement because—unlike here—the district court "was apparently unaware of the amount of the fund that would be distributed to *cy pres* beneficiaries rather than being distributed directly to the class." 708 F.3d at 170; *see also id.* at 175 ("We vacate the District Court's orders approving the settlement and the fund allocation plan because it did not have the factual basis necessary to determine whether the settlement was fair to the entire class. Most importantly, it did not know the amount of compensation that will be distributed directly to the class.").

Finally, the Fifth Circuit's decision in *Klier* is not relevant here because it did not involve a district court's approval or enforcement of the parties' agreed use of *cy pres* to distribute unclaimed settlement funds. *See Klier*, 658 F.3d at 476–78. Rather, the district court *sua sponte* ordered a *cy pres* distribution of unclaimed settlement funds, despite the settlement agreement's explicit direction that any leftover funds "shall be distributed pro rata to all Claimants in that subclass." *Id.* at 476. The decision expressly stated that it did not "implicate the line of authority giving careful scrutiny to class settlement agreements in which the parties agree to a *cy pres* distribution." *Id.* at 478 n.29.

In sum, Petitioner has failed to demonstrate a circuit conflict meriting review. As such, the Petition should be denied.

II. The Petition Does Not Present an Important Recurring Question Warranting Review.

Relying on *Gaos* and *Marek*, Petitioner contends "the Rule 23 questions presented in this case are important and recurring." Pet. 16. In doing so, Petitioner overlooks that *Gaos* and *Marek* were *cy pres*-only settlements with no direct financial award to the class, whereas the settlement here provides direct monetary relief—cash refund payments for money allegedly lost on fees paid—and a $20 credit to each class member. Further, *cy pres* is used here only as a mechanism to distribute unclaimed funds. This fundamental mischaracterization of the settlement aside, Petitioner advances six policy arguments in support of his contention. None establishes that this case presents an important and recurring question warranting review.

First, Petitioner argues "*cy pres* is a poor fit for class actions when courts permit settlements to be gamed to divert material amounts of money away from the class." *Id.* at 18. But as set forth in Section I. above, *cy pres* is a prevalent and well-established mechanism for disposing of unclaimed settlement funds. Petitioner's statements regarding a lack of "'charitable objective[s]'" (*id.* at 18) for class actions also overlooks that Congress has expressly authorized a distribution to charities in class actions in the context of unclaimed

coupons in coupon settlements. 28 U.S.C. § 1712(e) (stating in relevant part: "[t]he court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties."). Additionally, Petitioner fails to establish any actual widespread gaming of settlements resulting in the diversion of material amounts of money from class members at the time settlements were made. That certainly is not the case here, where the settlement established a cash fund to make payments to authorized claimants up to the full amount of monthly membership fees paid and the settlement agreement contemplated the possibility of a pro-rated reduction if the total number and dollar value of claims exhausted the cash fund. The parties employed *cy pres* here only to distribute any unclaimed remaining funds.

Second, employing *cy pres* to distribute unclaimed funds does not necessarily create conflicts of interest for class counsel, and there are existing protections in place to guard against such a prospect. District courts review class-action settlements to ensure that they are fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(2). Further, circuit courts have articulated standards used to evaluate the choice of *cy pres* remainder recipients as established above in Section I.B. Also, there is no conflict of interest here. The district court found that there was "a rational connection between the chosen recipients and the nature of the settlement" and no impropriety in the selection process due merely

to the alumni status of a small number of the numerous attorneys that appeared in this case as there is "no suggestion that counsel has any further relationship with the school than simply graduating from there." Pet. App. 44. The Ninth Circuit likewise found that "the alumni connections of three of the (many) involved attorneys did not impermissibly taint the selection process." *Id*. at 24.

Third, the use of *cy pres* here does not create the appearance of impropriety for district court judges because the parties, not the district court, selected the *cy pres* remainder recipients in the settlement agreement, and gave notice to the class about the distribution of any remainder and the recipients. *Id.* at 94, 97–99.

Fourth, Petitioner and *amicus curiae*'s First Amendment argument does not apply here. Petitioner concedes that "this case does not challenge the *cy pres* on First Amendment grounds." Pet. 25. Despite this concession, Petitioner nevertheless proceeds to argue "canons of constitutional avoidance militate for interpreting Rule 23 in a way to limit *cy pres*." *Id.* Petitioner's argument is backwards. Under the doctrine of constitutional avoidance, courts observe a "policy of *avoiding* constitutional decisions until the issues are presented with clarity, precision and certainty." *Rescue Army v. Mun. Court of City of Los Angeles*, 331 U.S. 549, 576 (1947) (emphasis added). Additionally, the use of *cy pres* here does not raise First Amendment issues because class members were not required "to subsidize political organizations or charities . . . which

individual class members may not support or approve" as Petitioner appears to contend. Pet. 24. Class members were not forced to pay anything, and could have received a payment under the settlement fund had they submitted a claim. The use of *cy pres* here was only for unclaimed remainder funds, and the district court found that non-claimant class members will benefit from the *cy pres* distribution. Further, class members received direct notice of the potential for *cy pres* remainder distribution and the identity of the *cy pres* recipients, and had an opportunity to opt out of the settlement.

Fifth, Petitioner's contention that limiting class counsel's ability to get paid through the use of *cy pres* results in tangible benefits to class members is misplaced. Petitioner again overlooks that each class member here received direct notice and had the opportunity to make a claim for a cash payment for a refund of membership fees paid. The parties employed *cy pres* only to distribute any remaining funds. The district court and Ninth Circuit found that the use of *cy pres* here satisfied well-established standards. There was no finding of *cy pres* abuse. To the extent the series of district court opinions on which Petitioner relies found that use of *cy pres* in those cases did not satisfy the settled standards, such findings were specific to the unique circumstances of those cases.

Sixth, because there is no circuit split as established in Section I. above, Petitioner's argument regarding forum shopping in the Ninth Circuit has no merit.

III. This Case Is the Wrong Vehicle to Address *Cy Pres* Issues.

Petitioner fails to articulate any question actually presented by this run-of-the-mill case that employed use of *cy pres* to distribute remaining settlement funds. Petitioner's assertion that "[t]he question presented in this case is similar to that presented in *Gaos*," namely, "[w]hether, or in what circumstances, a *cy pres* award that provides no direct relief or benefit to class members [is] fair, reasonable, and adequate," is simply not true. Pet. i–ii. *Gaos* involved a *cy pres*-only settlement with no direct relief to class members. The settlement here provides substantial and direct relief to every class member in the form of a $20 credit and the opportunity to claim an additional cash payment from the settlement fund for a refund of fees paid for the membership programs. Pet. App. 5. Indeed, Petitioner himself will receive a $121.55 cash payment and a $20 credit. Resp. Provide Commerce's App. 66; Pet. App. 95–96. Unlike both *Gaos* and *Marek*, the *cy pres* awards in this case will only be made to distribute unclaimed cash settlement funds remaining after direct notice to each class member—notice which Petitioner did not challenge. The questions raised in *Gaos* and *Marek* are simply not present here.

To the contrary, this case represents perhaps one of the most prevalent and widely approved scenarios for using the *cy pres* mechanism: distribution of unclaimed funds. As the Ninth Circuit aptly noted in its opinion below:

> The availability of *cy pres* as a mechanism to distribute unclaimed funds rests on the premise that class action settlements will sometimes have just that—unclaimed funds. A settlement is not fatally flawed solely because class members did not deplete the entirety of the settlement fund. If it were, *cy pres* would not exist.

Pet. App. 21.

Petitioner's two proposed alternative distribution methods are not as appropriate as use of *cy pres* here. An additional distribution to claimants would overcompensate them at the expense of non-claimant class members, and would not provide any benefit to silent class members. A distribution to silent class members is also not appropriate because doing so would eliminate the requirement that to receive a refund, class members had to affirm that they had neither intended to enroll in the program nor used any program benefits. This was a hotly contested case. Provide Commerce contended: (i) the terms of the offer and plaintiffs' enrollment in the membership programs were adequately disclosed; and (ii) plaintiffs entered into valid electronic contracts with Regent Group for the membership programs that authorized Provide Commerce to disclose billing and payment information to Regent Group upon Regent Group's request. *Id.* at 55, 70, 83–84. As such, the claim form requirement under the settlement agreement cannot be disregarded in favor of an automatic distribution to class members. *Fager v. CenturyLink Comm'ns, LLC*, 854 F.3d 1167,

1176 (10th Cir. 2016) ("On appeal Ziegler asserts that class members should not have to submit a claim form to receive compensation, but he did not raise this argument below. In any event, it makes perfect sense to require class members to submit a claim form evidencing their entitlement to compensation."); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 593 (N.D. Ill. 2011) ("[T]he claims process is a negotiated facet of this settlement, which, as the Court explained above, is fair as a whole. The Court may not make unilateral modifications or alterations to the proposed settlement, such as the substitution of a claims process for a direct payout.") (internal citation and quotation marks omitted). In any event, such a distribution is infeasible in light of the amount remaining per class member ($3,000,000/1,300,000 class members = $2.30) and the third-party claims administration and postage costs that will significantly erode such a small distribution.

While the Petition raises a myriad of hypothetical *cy pres* issues, almost none of petitioner's generalized policy concerns are actually present in this case as established in Section II. above. To the extent Petitioner claims that settlements with a voucher or coupon component may "bamboozle" a district court into "crediting the coupons as being worth their face value," and lead the court to "award exaggerated fees," the Ninth Circuit already vacated and remanded the attorneys' fee award here for recalculation "in a manner that treats the $20 credits as coupons under CAFA." *Id.* at 20.

Although Petitioner strives mightily to re-cast this case as a direct replacement for *Gaos*, he cannot do so.

The settlement here incorporates *cy pres* only as a mechanism to distribute unclaimed funds. This case is simply not the appropriate vehicle for review of *cy pres* generally or *cy pres*-only settlements specifically.

IV. The Ninth Circuit's Decision on the *Cy Pres* Issue Is Correct on the Merits.

Certiorari is unwarranted because the Ninth Circuit's decision was correct. The district court acted within its discretion in approving the use of *cy pres* and the particular recipients here.

Use of *cy pres* as a mechanism to distribute unclaimed funds is acceptable when it is "guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members." *Nachshin*, 663 F.3d at 1039 (citing *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990)). In compliance with these guidelines, the proposed *cy pres* distribution in this case represents a fair and reasonable effort to address the class's claims and to indirectly benefit the silent class members. *See Six Mexican Workers*, 904 F.2d at 1305 (finding *cy pres* allows for "distribution of unclaimed funds to indirectly benefit the entire class").

Below, Petitioner raised a geographic challenge to the *cy pres* recipients. Pet. App. 22–23. But this challenge ignores the fact that "[i]t is not the location of the recipient which is key. . . ." *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 36. One of the issues presented in *Lupron* was whether Dana Farber/Harvard

Cancer Center was an appropriate *cy pres* recipient given it is located in "Boston while the injuries are to a national class." *Id.* In concluding it was an appropriate recipient, the First Circuit noted the *cy pres* fund "will have benefits well beyond Boston." *Id.*; *see also Perkins v. Am. Nat. Ins. Co.*, No. 05-CV-100 (CDL), 2012 WL 2839788, at *5 (M.D. Ga. July 10, 2012) (approving *cy pres* recipient whose "home is within the jurisdiction of this Court" since "it has the capability of awarding grants . . . on a national scale").

Here, as in *Lupron*, the proposed recipients will have an effect far beyond the greater San Diego metropolitan area. The district court found that all three recipients' students and alumni have a nationwide presence. Pet. App. 46–48. Further, "[t]he Internet has no geographic boundaries." *Cyberspace, Comm'ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999); *accord Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997) ("'[C]yberspace'—[is] located in no particular geographical location but [is] available to anyone, anywhere in the world, with access to the Internet."). The education provided regarding internet privacy or data security will therefore have benefits nationwide and beyond. *See Lane*, 696 F.3d at 821 (finding distribution of funds to *cy pres* recipients with a nexus to the lawsuit "will benefit absent class members"); *Nachshin*, 663 F.3d at 1041. Indeed, *Nachshin* suggested that, where all class members use the internet and their claims arise from a purportedly unlawful online advertising campaign, the parties could select "beneficiaries from any number of non-profit organizations

that work to protect internet users from fraud, predation, and other forms of online malfeasance." *Id.* That is because an internet presence focuses less on the physical locus, given that users can be anywhere.

As such, San Diego-based universities can just as easily advance the interest of online actions of the type involved here as any other academic institution. The parties here selected precisely such recipients. The district court did not abuse its discretion in rejecting Petitioner's geographic challenge below.

The district court likewise did not abuse its discretion in finding that the alumni status of three of the numerous attorneys in this case to one of the three *cy pres* recipients did not impermissibly taint the selection process.

The mere fact that a couple of attorneys *out of the more than 20* that appeared in or worked on this case are alumni of one of the three schools selected as *cy pres* recipients is not improper. There is no assertion, much less evidence, that counsel for the parties have a "significant" connection or leadership role, ongoing or past, with the University of San Diego School of Law. Nor is there evidence counsel will somehow personally or professionally benefit from the distribution. *Cf. In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 WL 4542669, at *5 (E.D. Pa. Oct. 3, 2008) (declining to award funds to two of three *cy pres* recipients where "an attorney formerly associated with this case currently serves in a lead role at" one of the recipients and one of class counsel's former partners founded the

other proposed recipient). Further, as the district court found, it is not particularly surprising that there is a tenuous alumni connection between a couple of the attorneys for the parties and one of the three proposed *cy pres* beneficiaries. Pet. App. 43–44. Provide Commerce is headquartered in San Diego. This case was filed in San Diego, and counsel and their law firms are located in San Diego. *Id*. The district court found that "[t]here is a rational connection between the chosen recipients and the nature of the settlement. Furthermore, simply by virtue of it being a law school, USD Law School may be in the best position to develop and research the legal issues associated with internet privacy and security underlying [p]laintiffs' claims." *Id*.

Petitioner did not cite to a single case below in which a court declared a *cy pres* distribution unenforceable merely because counsel's *alma mater* was a *cy pres* recipient. Although Petitioner relied on *Nachshin* below, his reliance is misplaced. In *Nachshin*, the court expressed concern that an appearance of impropriety may arise when "judges and outside entities deal[ ] in the distribution and solicitation of settlement money." 663 F.3d at 1039. That is not the case here as the parties selected the *cy pres* recipients as part of the arm's-length, hard fought settlement negotiations presided, not the court. *Lane*, 696 F.3d at 821 ("[S]ettling parties [need not] select a *cy pres* recipient that the court or class members would find ideal."); *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

Also, Petitioner did not present any evidence—because there is none—that counsel would receive any

benefit as a result of the *cy pres* distribution to USD Law School.

The district court also did not abuse its discretion in rejecting Petitioner's two proposed alternative distribution methods. Petitioner's proposal to distribute funds to the claimants would result in "overcompensating claimant class members at the expense of absent class members." *Lupron*, 677 F.3d at 35. Here, there is no *cy pres* distribution until after cash payments to class members who timely completed a valid claim form. The claim process allows class members to claim a cash payment up to the full amount of monthly membership fees charged and not previously recouped. Courts have repeatedly held that redistribution to class members is not applicable where class members have been fully compensated for their losses. *See In re Universal Serv. Fund Telephone Billing Pracs. Litig.*, No. 02-MD-1468-JWL, 2013 WL 2476587, at *2 (D. Kan. June 7, 2013) (noting that "each of the pertinent cases rejects the distribution of unclaimed funds to participating class members in favor of *cy pres* distribution when class members have already received full compensation for their injuries"); *Baby Prod.*, 708 F.3d at 176 ("[W]here all class members submitting claims have already been fully compensated for their damages by prior distributions . . . additional individual distributions would overcompensate claimant class members at the expense of absent class members.") (internal alterations and citation omitted); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 32 (explaining that ALI "was motivated by a concern that few

settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery") (citations and quotation marks omitted).

Petitioner's proposal to distribute the funds to non-claimant class members is also not appropriate under the circumstances of this case. A direct distribution would not account for class members that were satisfied with their enrollment or those that chose not to make a claim because of brand loyalty or based on philosophical differences with the litigation. Such a distribution would also violate the terms of the settlement agreement, which required a claim form containing affirmations that the claimant had neither intended to enroll in the program nor used any program benefits. *Fager*, 854 F.3d at 1176 ("[I]t makes perfect sense to require class members to submit a claim form evidencing their entitlement to compensation."); *Schulte*, 805 F. Supp. 2d at 593 ("The Court may not make unilateral modifications or alterations to the proposed settlement, such as the substitution of a claims process for a direct payout."). Direct distribution is also infeasible as $3 million divided by approximately 1.3 million class members equals $2.30 per absent class member. Less postage and significant third party claims administration costs for the distribution, non-claimant class members would receive at best a miniscule amount. *Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 34 (holding *cy pres* awards are permissible where "[d]istribution of all funds to the class can be infeasible, for example, when class members cannot be

identified, when the class changes constantly, or when class members' individual damages—although substantial in the aggregate—are too small to justify the expense of sending recovery to individuals"); *Baby Prod.*, 708 F.3d at 169–73 (recognizing that *cy pres* awards are appropriate where the "amounts involved are too small to make individual distributions economically viable"—for instance, where "the cost of distributing individually to *all* class members exceeds the amount to be distributed" and noting general agreement among circuit courts that "*cy pres* distributions are most appropriate where further individual distributions are economically infeasible") (emphasis added).

The district court's approval of the parties' use of *cy pres* to distribute unclaimed funds in this case met the standards for final settlement approval in the Ninth Circuit, which, as established above in Section I., is in accord with other circuits, and consistent with cases within and outside the Ninth Circuit. The district court's decision was correct on the merits, and as such, further review is unwarranted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 31, 2019

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
ANTHONY J. BATTAGLIA, JUDGE PRESIDING

IN RE: EASYSAVER REWARDS LITIGATION THIS DOCUMENT RELATES TO ALL ACTIONS.	CASE NO. 09CV2094-AJB SAN DIEGO, CALIFORNIA JANUARY 28, 2013 2:06 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * *

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ALSO PRESENT:

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SENIOR VICE PRESIDENT AND GENERAL
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[3] **SAN DIEGO, CALIFORNIA;**
MONDAY, JANUARY 28, 2013; 1:51 P.M.

DEPUTY CLERK: ITEM NUMBER ONE ON CALENDAR, 09CV2094, IN RE EASYSAVER REWARDS LITIGATION, ON FOR MOTION HEARING AND FAIRNESS HEARING.

THE COURT: GOOD AFTERNOON TO ALL. AND LET'S HAVE THE PLAINTIFFS MAKE THEIR APPEARANCES FOR THE RECORD.

MR. PATTERSON: GOOD AFTERNOON, YOUR HONOR. JIM PATTERSON ON BEHALF OF THE PLAINTIFFS.

MS. ANDERSON: JENNIE LEE ANDERSON ON BEHALF OF THE PLAINTIFFS, YOUR HONOR.

MR. STECKLER: BRUCE STECKLER ON BEHALF OF THE PLAINTIFFS, YOUR HONOR.

MR. SBAITI: MAZIN SABAITI [sic] ON BEHALF OF THE PLAINTIFFS, YOUR HONOR.

MR. KHOURY: ISAM KHOURY ON BEHALF OF THE PLAINTIFFS.

THE COURT: ALL RIGHT. AND THEN FOR THE DEFENSE.

MR. RHODES: GOOD AFTERNOON, YOUR HONOR. MICHAEL RHODES OF COOLEY, ON BEHALF OF THE DEFENDANT. WITH ME IS MY PARTNER, MICHELLE DOOLIN, LEO NORTON.

AND THEN AT COUNSEL TABLE WITH US IS BLAKE BILSTAD. HE IS THE SENIOR VICE PRESIDENT AND GENERAL COUNSEL OF PROVIDE-COMMERCE.

THE COURT: OKAY. THANK YOU. AND THEN – YES, SIR.

MR. CHERRY: GOOD AFTERNOON, YOUR HONOR. MYRON CHERRY AND JACIE ZOLNA ON BEHALF OF THE REGENT GROUP AND EASY-SAVER.

[4] **THE COURT:** OKAY. THANK YOU.

MR SCHULMAN: ADAM SCHULMAN ON BEHALF OF BRIAN PERRYMAN.

THE COURT: THANKS, MR. SCHULMAN. AND I THINK THAT PROBABLY WRAPS IT UP.

SO WE'VE GOT THE PENDING MOTION FOR APPROVAL OF THE FINAL SETTLEMENT, THE ATTORNEY FEES, COSTS, AND INCENTIVE AWARDS, THE OBJECTIONS, OBVIOUSLY, TO ALL OF THE ABOVE TO DEAL WITH.

AND FROM THE PLAINTIFFS' STANDPOINT, YOU FOLKS HAVE ANY COMMENTS YOU WOULD LIKE TO ADDRESS TO ANY OF THE CRITICAL ISSUES, ANY OF THE RECENT PLEADINGS OR ANYTHING ELSE?

MR. PATTERSON, YOU CAN GO AHEAD.

MR. PATTERSON: JIM PATTERSON ON BEHALF OF THE PLAINTIFFS. JUST REAL BRIEFLY, YOUR HONOR. I WILL ADDRESS JUST A COUPLE MAJOR POINTS AND THEN JUST BRING YOU UP TO SPEED ON A COUPLE OF THE OTHER POINTS. MS. ANDERSON WILL ADDRESS ANY OF THE COURT'S CONCERNS THAT MIGHT HAVE COME UP WITH RESPECT TO THE OBJECTION FILED BY MR. PERRYMAN.

THE COURT: OKAY.

MR. PATTERSON: SO JUST QUICKLY TO BRING YOU UP TO SPEED. THE SETTLEMENT HAS BEEN WIDELY ACCEPTED BY THE CLASS. WE SENT DIRECT NOTICE TO 1.3 MILLION CLASS MEMBERS. AS OF TODAY, THERE ARE 39 OPT-OUTS OUT OF 1.3 MILLION AND CHANGE. THERE WAS ONE OBJECTION FILED, OF COURSE, BY MR. PERRYMAN.

[5] IN ADDITION TO THAT, WE DID RECEIVE ONE ADDITIONAL LETTER FROM A CLASS MEMBER THAT PURPORTED TO BE AN OBJECTION. AND THAT HAS BEEN PRESENTED TO THE COURT, ALONG WITH THE MOST RECENT FILINGS.

NOTHING ELSE HAS HAPPENED, SINCE PRELIMINARY APPROVAL, THAT SHOULD CHANGE THE COURT'S POSITION. AND WE BELIEVE THAT THE CLASS CERTAINLY SHOULD RECEIVE FINAL APPROVAL, AND WE SHOULD MOVE FORWARD WITH THE BENEFITS.

JUST QUICKLY, I WANTED TO GO THROUGH THE BENEFITS THAT ARE GOING TO BE PROVIDED.

THE COURT: SURE.

MR. PATTERSON: WE ARE GOING TO MAKE FULL CASH REFUNDS TO ANY OF THE CLASS MEMBERS THAT SUBMITTED A CLAIM. IN ORDER TO SUBMIT A CLAIM, ALL THEY HAD TO DO WAS ATTEST THAT THEY DIDN'T INTEND TO SIGN UP FOR THE PROGRAM, AND THEN PROVIDE UPDATED CONTACT INFORMATION, JUST TO BE SURE WE WOULD KNOW WHERE TO SEND THE MONEY. EVERYBODY WHO DID THAT WILL RECEIVE A FULL REFUND OF ALL OF THE FEES THAT THEY HAD PAID TO THE DEFENDANTS, THAT WEREN'T PREVIOUSLY REFUNDED.

IN ADDITION TO THAT, ALL 1.3 MILLION CLASS MEMBERS WILL BE DIRECTLY SENT A $20 MERCHANDISE CREDIT THAT IS GOOD AT THE PROVIDE-COMMERCE WEBSITES, INCLUDING PROFLOWERS AND THE OTHERS THAT ARE MENTIONED IN THE SETTLEMENT AGREEMENT.

THERE WAS NO CLAIMS REQUIRED FOR THAT. THAT IS A DIRECT BENEFIT THAT IS BEING PROVIDED. THE CREDIT IS AS GOOD [6] AS CASH WITH RESPECT TO THE ABILITY TO USE IT ON THE WEBSITE. IT'S GOOD FOR – FOR EXAMPLE, YOU CAN USE IT – IF THERE IS A DISCOUNTED ITEM FOR SALE THAT IS

DISCOUNTED ON THE WEBSITE, THEN YOU GET TO APPLY THE $20 TO THAT DISCOUNTED PRICE.

THE IMPORTANT THING TO US, WHEN WE NEGOTIATED THAT $20 BENEFIT, WAS THAT THE CLASS MEMBERS WOULD HAVE A REAL ABILITY TO GO TO THESE WEBSITES AND OBTAIN SOMETHING FOR FREE WITHOUT SPENDING ANY ADDITIONAL MONEY THAT WOULD BE PAID TO THE DEFENDANTS. AND SO WHAT WE DID WHEN WE NEGOTIATED THIS, WE WERE VERY CAREFUL TO REVIEW THE WEBSITES AND ENSURE THAT THERE WERE A NUMBER OF DIFFERENT PRODUCTS THAT WERE AVAILABLE FOR $20 OR LESS. AND WE BELIEVE THAT THAT DISTINGUISHES IT FROM A COUPON IN THE SENSE THAT YOU DON'T HAVE TO SPEND YOUR OWN MONEY. IT'S NOT A DISCOUNT IF YOU DON'T WANT IT TO BE.

NOW, OBVIOUSLY, PEOPLE WOULD OBVIOUSLY HAVE THE OPTION OF BUYING A MORE EXPENSIVE PRODUCT, IN WHICH CASE THEY WOULD SAVE $20 OFF WHATEVER THE PURCHASE PRICE IS OF THE LARGER ITEM.

IN ADDITION TO THE MERCHANDISE CREDITS AND THE CASH BENEFITS TO THE CLASS MEMBERS, IF EVERYTHING IS APPROVED AS IT'S BEING PRESENTED TO THE COURT, THERE WOULD BE AN ESTIMATED – I THINK IT'S A LITTLE MORE THAN $3 MILLION THAT WOULD BE

PROVIDED TO THE THREE CY PRES RECIPIENTS THAT WE HAVE PROPOSED. SO APPROXIMATELY $1 MILLION EACH WOULD BE PROVIDED TO THE THREE CY PRES.

[7] THIS WAS A NEGOTIATED POINT OF THE SETTLEMENT. THE GENERAL IDEA WAS IN ORDER TO GET A DEAL, WE AGREED THAT THE CY PRES BENEFICIARIES WOULD BE NEUTRAL IN THE SENSE THAT THEY COULD BE – THE IDEA WOULD BE THAT THERE WOULD BE INSTITUTIONS THAT WOULD USE THE MONEY IN A WAY THAT WOULD BENEFIT THE CLASS AND CONSUMERS IN GENERAL, BUT IT WOULD BE MORE OF AN OBJECTIVE GROUP. SO THAT IS HOW WE CAME UP WITH THE THREE ACADEMIC INSTITUTIONS, UNIVERSITIES THAT WOULD RECEIVE THE MONEY.

AND IF YOUR HONOR APPROVES THE DEAL AND THOSE CY PRES BENEFICIARIES, THEY WILL RECEIVE APPROXIMATELY A MILLION EACH, THE MONEY IS EARMARKED TO BE USED TO FUND A CHAIR ON PRIVACY AND CONSUMER-PROTECTION-TYPE ISSUES. WE BELIEVE THAT PROVIDES A GENERAL BENEFIT TO CONSUMERS ACROSS THE COUNTRY.

A COUPLE OF QUICK REASONS WHY: ONE, YOU KNOW, THESE PARTICULAR UNIVERSITIES TAKE STUDENTS FROM ALL OVER THE COUNTRY, OBVIOUSLY. AND THEN THE IDEA IS THAT THEY WILL BE LEARNING ABOUT PRIVACY AND

CONSUMER PROTECTION ISSUES: THAT THEY WILL THEN CARRY THOSE ON INTO THE WORKPLACE TO THE EXTENT THEY ARE DEALING IN ONLINE COMMERCE. CERTAINLY, THAT IS THE BENEFIT THAT WOULD ULTIMATELY FLOW FROM THEIR USING THESE SKILLS. IT WOULD BENEFIT CONSUMERS IN GENERAL AND HAVE SOME BENEFIT TO THE CLASS, AS WELL, WHICH IS THE WAY WE SET IT UP.

THE COURT: WAS THERE ANY THOUGHT GIVEN, INITIALLY, TO DIVERSIFYING GEOGRAPHICALLY THE SCHOOLS, OR WERE THESE SCHOOLS PICKED FOR A PARTICULAR INTEREST IN PRIVACY OR A SET [8] MECHANISM WITH WHICH TO USE THE FUNDS FOR THAT TYPE OF A CURRICULUM PROGRAM, WHATEVER?

MR. PATTERSON: THE SCHOOLS THAT WOULD GET THE MONEY WOULD HAVE EITHER ALREADY IN PLACE SOME SORT OF A PRIVACY-TYPE CURRICULUM OR THE ABILITY TO ESTABLISH ONE. THERE WASN'T REALLY A RHYME OR REASON AS TO WHY GEOGRAPHICALLY WE CHOSE SAN DIEGO. I SUPPOSE MY BEST RESPONSE WOULD BE PROVIDE-COMMERCE IS A SAN DIEGO COMPANY. THEY ARE ONE OF THE PRIMARY DEFENDANTS, OBVIOUSLY. THE TRANSACTIONS THAT THESE PEOPLE – OR THE CLASS MEMBERS ENTERED INTO WERE COMPLETED IN SAN DIEGO. AND THAT KIND OF ADDRESSES THE GEOGRAPHIC CONNECTION TO SAN DIEGO.

BUT WE OBVIOUSLY DIDN'T WANT TO SPLIT THE MONEY UP TOO THINLY, SUCH THAT YOU COULDN'T REALLY MAKE A DIFFERENCE IN ESTABLISHING A PROGRAM THAT WOULD HAVE ANY REAL IMPACT. IF YOU SENT A WHOLE BUNCH OF SCHOOLS A SMALL AMOUNT OF MONEY, THE REALITY IS THEY WOULDN'T BE ABLE TO DO ANYTHING WITH IT.

THE COURT: RIGHT.

MR. PATTERSON: IN ADDITION TO THE CY PRES, WE FEEL LIKE WE HAVE DONE A GREAT JOB OF DISCOURAGING WHAT WE CONSIDER TO BE THE ILL-GOTTEN GAINS FROM SOME OF THESE PRACTICES. CERTAINLY, THE DEFENSE WOULD – THEY MAY DISAGREE WITH THE CHARACTERIZATION. BUT FROM OUR STANDPOINT, THIS IS A BIG BENEFIT, FROM A POLICY STANDPOINT, THE CLASS MEMBERS AND TO SOCIETY, IN GENERAL, THAT THEY NOT BE ALLOWED TO KEEP ALL OF THE BENEFITS OF THIS PRACTICE.

[9] AND THEN LAST, WE CERTAINLY FEEL THAT WE HAD A HAND IN STOPPING THE PRACTICE. OUR UNDERSTANDING IS THAT THE DEFENDANTS STOPPED OR PUT AN END TO THESE PARTICULAR PROGRAMS SOON AFTER WE FILED THE LAWSUITS. I DON'T KNOW FOR CERTAIN BUT I BELIEVE THAT THE TWO DEFENDANTS ARE NO LONGER DOING BUSINESS IN

THESE TYPES OF PRACTICES. SO WE FEEL LIKE THAT IS AN ADDITIONAL BENEFIT THAT HAS BEEN PROVIDED BOTH TO THE CLASS AND TO SOCIETY.

SO WE CERTAINLY FEEL THAT THE BENEFITS ARE IN LINE WITH WHAT SHOULD BE FINALLY APPROVED, AND THAT SHOULD GO TO THE CLASS.

THE NEXT REQUEST ON OUR MOTION IS, OBVIOUSLY, FOR ATTORNEYS' FEES. WE FEEL LIKE WE'VE DONE A GOOD JOB. WE HAVE LITIGATED THIS CASE TIRELESSLY FOR OVER THREE AND HALF YEARS. WE HAVE BEEN THROUGH NUMEROUS ENE CONFERENCES WITH JUDGE GALLO. I'M SURE HE CAN ATTEST TO THE LEVEL OF EFFORT THAT WAS PUT INTO THIS BY BOTH SIDES, FRANKLY, BUT CERTAINLY BY THE PLAINTIFFS.

THIS ISN'T A CASE THAT WE FILED AND QUICKLY TRIED TO RESOLVE SO WE COULD MOVE ON TO OTHER CASES. WE DID HAVE A MEDIATION EARLIER, AND THAT DIDN'T RESULT IN A SETTLEMENT. THAT WAS WITH MAGISTRATE PAPAS. WE CONTINUED TO LITIGATE THE CASE AND, ULTIMATELY, IT WAS RESOLVED WITH THE HELP OF JUDGE INFANTE, AND WITH HIS BLESSING. HE HAS SUBMITTED A DECLARATION SUPPORTING THE DEAL.

SO WE THINK THAT OUR FEES ARE JUSTIFIED, WHETHER OR [10] NOT THE COURT ULTIMATELY USES THE PERCENTAGE OF THE BENEFITS OR THE LODESTAR ANALYSIS. WITH RESPECT TO THE PERCENTAGE OF THE BENEFITS, THE CASH THAT WAS PROVIDED IN THE DEAL WAS $12.5 MILLION. IN ADDITION TO THAT, THERE IS 1.3 MILLION $20 MERCHANDISE CREDITS THAT ARE BEING DIRECTLY PROVIDED TO THE CLASS MEMBERS. THE BENEFITS THAT ARE AVAILABLE FROM THOSE MERCHANDISE CREDITS ARE APPROXIMATELY $26 MILLION. PLUS, THE CASH IS A TOTAL OF 38-AND-A-HALF-MILLION DOLLARS. WE BELIEVE THAT THE COURT SHOULD RECOGNIZE THE VALUE OF THOSE MERCHANDISE CREDITS. ANY CLASS MEMBER THAT CHOOSES TO UTILIZE THAT CREDIT WILL GET A $20 BENEFIT. SO THE REAL BENEFIT TO THE CLASS MEMBER IS $20 PER CREDIT.

THE NINTH CIRCUIT STANDARD IS THAT THE COURT SHOULD AWARD FEES. IF YOU ARE GOING TO DO IT BASED ON A PERCENTAGE OF THE BENEFITS, YOU SHOULD BASE IT ON THE BENEFITS THAT ARE BEING MADE AVAILABLE. AND WE THINK THAT IT'S CLEAR THAT THAT SHOULD BE 38-AND-A-HALF-MILLION DOLLARS.

IF THE COURT WERE INCLINED TO APPLY A DISCOUNT TO THE MERCHANDISE CREDITS, WE THINK THE COURT SHOULD LOOK AT SIMILAR CASES THAT WE HAVE SUBMITTED TO THE

COURT; NAMELY, THE *FERNANDEZ V. THE VICTORIA'S SECRET* CASE, AND THE *YOUNG V. POLO* CASE. AND IN EACH OF THOSE CASES, THE COURT APPLIED A SLIGHT DISCOUNT TO THE FACE VALUE OF THE BENEFITS.

I WOULD POINT OUT THAT I BELIEVE BOTH OF THEM WERE CLAIMS – PURE CLAIMS CASES. YOU ACTUALLY HAD TO MAKE A CLAIM [11] TO GET THE MERCHANDISE CERTIFICATE. HERE, YOU DON'T HAVE TO DO THAT. BUT IN THE *VICTORIA'S SECRET* CASE, WHICH WAS THE LATER CASE, THE COURT DID APPLY A 15 PERCENT DISCOUNT TO THE FACE VALUE OF THOSE CARDS. WHILE WE DON'T THINK THAT THAT IS NECESSARY IN THIS CASE, IF THIS COURT WERE TO FOLLOW THAT PRECEDENT, WE WOULD STILL BE FAR UNDER WHAT IS APPROPRIATE IN THE NINTH CIRCUIT FOR AWARDING A PERCENTAGE OF THE BENEFITS.

I WOULD TAKE IT ONE STEP FURTHER AND SAY THAT AT THE ENTIRE OTHER END OF SPECTRUM, IF THE COURT WERE INCLINED TO APPLY A DISCOUNT OF EVEN 50 PERCENT OF THE FACE VALUE, WHICH WE BELIEVE IS ENTIRELY IMPROPER, GIVEN THE VALUE OF THESE THINGS – BUT IF THE COURT DID DO THAT, OUR REQUESTED FEES WOULD STILL ONLY AMOUNT TO 33 PERCENT OF TOTAL. AND THAT'S LESS THAN THE COURT AWARDED IN THE *VICTORIA'S SECRET* CASE THAT I REFERENCED EARLIER. AND IT'S WITHIN THE COURT'S DISCRETION.

IT'S CERTAINLY ON THE HIGH SIDE OF WHAT WOULD BE AWARDED, BUT DEFINITELY WITHIN THE COURT'S DISCRETION.

AS TO THE LODESTAR, WE SUBMITTED OUR LODESTAR. IT'S CURRENTLY AROUND $4.3 MILLION. THE REQUESTED MULTIPLIER, WHEN THIS IS FINISHED, WILL BE LESS THAN TWO, IF THE COURT WERE TO STICK TO THE LODESTAR ANALYSIS OR USE IT AS THE CROSSCHECK.

WE WOULD POINT OUT THAT WITH RESPECT TO THE LODESTAR, THERE ARE STATUTES THAT WE HAVE ALLEGED THAT ALLOW FOR FEE-SHIFTING: NAMELY, THE ELECTRONIC FUNDS TRANSFER ACT CLAIM AND THE CLRA CLAIM BOTH ALLOW FOR FEES TO BE SHIFTED AND [12] AWARDED. SO UNDER EITHER OF THOSE CLAIMS, THE COURT COULD AWARD FEES DIRECTLY BASED ON LODESTAR, EVEN THOUGH THAT IS NOT OUR PREFERENCE.

WE WOULD POINT OUT TO THE EXTENT THE COURT IS CONSIDERING EITHER AN UPWARD MULTIPLIER WITH RESPECT TO THE LODESTAR, OR AWARDING A HIGHER PERCENTAGE OF THE BENEFITS, THE COURT HAS THE ABILITY AND THE DISCRETION TO LOOK AT CERTAIN FACTORS. AND ONE OF THOSE FACTORS IS RISK. THIS WAS AN ENORMOUSLY RISKY CASE. WHEN WE FILED THIS CASE, THERE WERE VERY FEW REPORTED DECISIONS. ACTUALLY, THIS CASE WAS ONE OF THE FIRST REPORTED DECISIONS

DEALING WITH THE SIMILAR-TYPE PRACTICES – ONLINE PRACTICES OF TRANSFERRING CUSTOMER BILLING INFORMATION. THEY CERTAINLY HAVE NOT ALL GONE THE PLAINTIFFS' WAY. THIS IS ONE OF A HANDFUL THAT HAS.

ON THE FLIP SIDE, THERE IS A BUNCH OF CASES THAT HAVE NOT. I'M SURE THE COURT IS AWARE OF THOSE, BUT WE'RE HAPPY TO POINT THEM OUT IF NEED BE. ONE CASE I WOULD POINT OUT IS THE *WEBLOYALTY* CASE THAT WAS DECIDED BY JUDGE HUFF. I AM THE COUNSEL OF RECORD IN THAT CASE. AND JUDGE HUFF GRANTED A MOTION TO DISMISS A SIMILAR-TYPE PRACTICE. THAT CASE IS CURRENTLY PENDING BEFORE THE NINTH CIRCUIT. ALLISON GODDARD, FROM MY OFFICE, ARGUED THAT HEARING A COUPLE WEEKS AGO, AND WE EXPECT A RULING ON THAT.

SO WHEN WE FILED THIS CASE, THERE WAS AN ENORMOUS RISK. IT WASN'T A SLAM DUNK. WE HAD A LOT OF HURDLES TO [13] OVERCOME TO GET TO THE POINT WHERE WE COULD RESOLVE THE CASE. IT WAS THREE AND A HALF YEARS. THERE IS SUBSTANTIAL DISCOVERY THAT IS WELL DOCUMENTED.

WE BELIEVE THE RESULTS ARE EXCELLENT, AND I CHALLENGE ANYBODY TO COME UP WITH A SETTLEMENT IN THIS AREA, CHALLENGING SIMILAR-TYPE PRACTICES AND MAKING THE SAME CLAIMS, THAT WAS BETTER

THAN OURS. WE THINK IT'S THE BEST ONE YOU WILL SEE OUT THERE.

AND THEN LAST BUT NOT LEAST, WE DO BELIEVE WE'VE STOPPED THE PRACTICE. AND WHILE WE HAVEN'T PRESENTED THAT TO THE COURT WITH AN ASSIGNED DOLLAR VALUE, WE THINK IT'S A FACTOR THAT THE COURT CAN AND SHOULD CONSIDER IF YOU ARE GOING TO DEPART UPWARD OR DOWNWARD IN AWARDING A LODESTAR PERCENTAGE OF BENEFITS.

WE THINK THE ENHANCEMENTS SHOULD BE APPROVED. THEY WERE NEGOTIATED ARM'S LENGTH WITH THE HELP OF JUDGE INFANTE. OUR PLAINTIFFS WERE HEAVILY INVOLVED IN THIS CASE. THE TWO INITIAL PLAINTIFFS APPEARED AT A NUMBER OF ENE CONFERENCES. JUDGE GALLO RUNS A VERY TIGHT SHIP. HE REQUIRES THE NAMED PLAINTIFFS TO BE AT THESE CONFERENCES. AND IN MOST CASES THEY WERE, IN FACT, THERE.

THE COURT: THAT'S FOR ROMERO AND BAILEY?

MR. PATTERSON: THAT'S FOR ROMERO AND BAILEY. THAT'S RIGHT. THEY WERE THE FIRST ORIGINAL PLAINTIFFS. THEY WERE DEPOSED. THEY WERE GRUELING DEPOSITIONS, TO SAY THE LEAST. [14] DEFENSE COUNSEL DID AN EXCELLENT JOB AND DID THEIR JOB IN KIND OF RAKING THEM OVER THE GOALS [sic]. AND THEY STUCK WITH THE CASE FOR A NUMBER

OF YEARS, AT THE RISK OF BEING LIABLE FOR A JUDGMENT OR COSTS IN A LINE OF CASES THAT WAS SOMEWHAT UNCERTAIN.

AND THEN THE OTHER PLAINTIFFS THAT WE REQUESTED THE MIDDLE AWARD FOR ARE BERENTSON, JENKINS, COX AND LAWLER. THEY DID PARTICIPATE IN THE CASE. THEY WERE DEPOSED. THEY SUBMITTED FOR DEPOSITIONS AND RESPONDED TO DISCOVERY AND TOOK ALL THE SAME RISKS THAT ROMERO AND BAILEY DID.

AND THEN FINALLY WALTERS AND DICKEY. WE REQUESTED A SMALLER ENHANCEMENT FOR THEM. THEY WERE ACTUALLY SET TO BE DEPOSED AND THEY WERE WILLING TO BE DEPOSED, BUT THEIR DEPOSITIONS WERE TAKEN OFF CALENDAR WHEN WE GOT SERIOUS ABOUT SETTLEMENT. BUT THEY DID PARTICIPATE IN DISCOVERY, IN PROVIDING A LOT OF INFORMATION, AND CERTAINLY TOOK THE SAME RISKS AS EVERYBODY ELSE THAT THE CASE WOULDN'T HAVE SETTLED, AND THAT THEY MIGHT HAVE BEEN SUBJECTED TO FURTHER LITIGATION AND, POTENTIALLY, COSTS AND JUDGMENT.

I WILL CLOSE WITH JUST ONE ADDITIONAL POINT, AND THIS GOES BACK TO THE *WEBLOYALTY* CASE THAT I MENTIONED EARLIER. WE CERTAINLY DON'T THINK THERE SHOULD BE

ANY MODIFICATIONS TO THE DEAL. WE THINK IT'S A GREAT DEAL. TO THE EXTENT THAT THE COURT HAS ANY DIFFERENT IDEAS OR SOME MIGHT DEVELOP THROUGHOUT THE DAY, WE WOULD ASK THE COURT TO KEEP IN MIND THAT THERE IS [15] THAT *WEBLOYALTY* CASE OUT THERE. THE NINTH CIRCUIT COULD ISSUE A RULING IN THAT CASE AT ANY TIME. IT COULD HAVE A DRAMATIC IMPACT ON THIS PARTICULAR CASE AND THE SETTLEMENT. IF THE COURT WERE TO MAKE ANY MATERIAL MODIFICATIONS THAT REQUIRED THE DEFENSE TO SIGN OFF ON THEM, YOU'D POTENTIALLY PROVIDE THEM WITH A FREE OUT-OF-THE-DEAL, AND THEY MIGHT HAVE THE BENEFIT OF SEEING WHAT THE NINTH CIRCUIT IS ULTIMATELY GOING TO SAY IN *WEBLOYALTY* IN DECIDING WHETHER OR NOT THEY WOULD LIKE TO PROCEED.

THE COURT: OKAY. WELL, THANK YOU.

FROM THE DEFENSE STANDPOINT, SIR, WHAT WOULD YOU LIKE TO ADD?

MR. RHODES: GOOD AFTERNOON, YOUR HONOR. MICHAEL RHODES WITH COOLEY. I WOULD LIKE TO GIVE YOU A LITTLE BIT OF A DIFFERENT PERSPECTIVE ON SOME OF THE POINTS THAT YOU'VE RAISED, TO HELP YOU UNDERSTAND SOME OF THE UNDERLYING RATIONALES, IF I MIGHT. YOU ASKED ABOUT

THE LOCATION OF THE CY PRES RECIPIENTS. LET ME TAKE THAT ONE HEAD-ON.

YOU'LL KNOW THAT THE STATE OF THE ART RIGHT NOW IN THE NINTH CIRCUIT IS THE *LANE V. FACEBOOK* CASE. THIS CASE WAS A CREATIVE SETTLEMENT THAT I ACTUALLY HANDLED, IN WHICH WE SET UP A FOUNDATION TO THEN PROVIDE CY PRES DISTRIBUTIONS. AND THE COURT SAID THAT WAS FINE, GIVEN THAT THERE WAS A DRIVING NEXUS, IN LINE WITH THE *KELLOG* DECISION, BETWEEN THE RECIPIENTS AND THE PURPOSES OF THE CASE.

[16] THERE WAS A REASON, AND I DON'T FAULT MR. PATTERSON FOR NOT ADDRESSING IT DIRECTLY WITH YOU. IT WAS ACTUALLY NEGOTIATED THROUGH MR. STECKLER AND ME DIRECTLY. ONE OF THE REASONS WE PICKED SAN DIEGO – ASIDE FROM WHAT MR. PATTERSON SAID – WHICH IS THAT THE LOCALE OF THIS CASE WAS SAN DIEGO, THE COMPANY IS BASED HERE, THERE WAS PRIVITY OF CONTRACT HERE – WAS THE FACT THAT I DO A LOT OF WORK IN THIS SPACE. AND TO THE EXTENT YOU ARE LOOKING FOR RECIPIENTS OF THIS AMOUNT OF MONEY, A LOT OF THE PEOPLE THAT YOU WOULD OTHERWISE GIVE THE MONEY TO ARE ALREADY FUNDED, IN A SENSE.

AND SO WHAT WE THOUGHT WAS WE COULD ADD THREE NEW ACTORS. THREE NEW VOICES TO THE CHORUS, SO TO SPEAK, TO ACT

AS WATCHDOGS OF THESE TYPES OF INTERESTS IN SAN DIEGO, BY ENDOWING CHAIRS AND RESEARCH IN THESE THREE LOCAL INSTITUTIONS. TO A LARGE DEGREE, THEY WEREN'T ALREADY DOING THAT WORK. AND WE THOUGHT THIS WOULD BE A WAY TO GET MORE ACTORS INTO THE FIELD, PROVIDE FUNDING. AND AS MR. PATTERSON SAID, PROVIDE FUNDING IN A SIGNIFICANT AMOUNT SUCH THAT THE INTEREST BEING ADVOCATED BY THE CLASS COULD BE ADDRESSED THAT WAY.

SO THAT WAS ONE OF THE REASONS WHY WE PICKED THE GEOGRAPHY WE DID, BECAUSE THE MONEY HISTORICALLY HAS GONE TO PLACES LIKE STANFORD AND CAL AND HARVARD AND SO FORTH. AND WE THOUGHT WE WERE TRYING TO BE A LITTLE BIT DIFFERENT ON THAT.

THE COURT: OKAY.

MR. RHODES: LET ME TAKE A STEP BACK AND TALK TO YOU [17] A LITTLE BIT ABOUT THE PROCESS. THE PROCESS OF A CLASS ACTION SETTLEMENT OFTEN WILL REVEAL ITS SOUNDNESS, ITS FAIRNESS, REASONABILITY AND ADEQUACY. AND HERE WE HAVE A PROCESS THAT WAS TORTURED, FRANKLY. WE HAVE A CASE THAT STARTS OUT. AS YOU SAW WE WENT THROUGH ROUNDS AND ROUNDS OF PLEADINGS. INDEED, THE CURRENT COMPLAINT – I BELIEVE IT'S THE FOURTH AMENDED

COMPLAINT – WE'VE NEVER ANSWERED IT. WE'VE FILED A MOTION TO DISMISS IT.

WE'VE BEEN THROUGH MULTIPLE ROUNDS OF PLEADING MOTIONS, MULTIPLE ROUNDS OF DISCOVERY. BUT MORE FUNDAMENTALLY, FROM THE VERY BEGINNING, WE'VE HAD A SETTLEMENT DIALOGUE. WE HAVE VERY EXPERIENCED COUNSEL ON BOTH SIDES. WE KNOW EACH OTHER QUITE WELL. AND BECAUSE OF THAT, WE WERE ABLE TO PUT ASIDE A LOT OF THE POSTURING THAT YOU GET IN TOO MANY OF THESE CASES, AND WE TRIED TO HAVE AN HONEST AND OPEN DIALOGUE ABOUT THE CASE.

SO WE STARTED OFF TALKING INFORMALLY, AND THAT LED UP TO A FORMAL ONE-DAY MEDIATION AT MY OFFICE, WHERE WE HAD 25 PEOPLE IN ATTENDANCE, AT LEAST – LAWYERS, INSURANCE COMPANY REPRESENTATIVES. WE MADE SOME HEADWAY, BUT WE DIDN'T ULTIMATELY GET THERE.

THE NEXT MEANINGFUL STEP, YOUR HONOR, WE ACTUALLY – YOU MAY RECALL THIS. WE WERE IN A DEPOSITION IN MY OFFICE AND THERE WAS A POWER OUTAGE IN SAN DIEGO AND IT SHUT DOWN THE CITY. THAT WAS THE DAY OF THE DEPOSITION. AND A BUNCH OF [18] THESE LAWYERS HAD FLOWN OUT FOR THE DEPOSITION. AND I FORGET WHY, BUT WE WERE

ACTUALLY ON THE PHONE WITH THE COURT FOR SOME REASON. AND I FORGET WHAT IT WAS. AND WE WERE TALKING TO JUDGE GALLO AND THE LINE WENT BLANK, AND WE SAT THERE IN MY OFFICE WITHOUT THE POWER. AND AS YOU REMEMBER, IT WAS JUST GRIDLOCK. SO I WENT – LITERALLY WENT INTO THE KITCHEN, GRABBED A BUNCH OF COLD BEERS, AND WE WENT OUT ON MY PATIO FOR THE BETTER PART OF THREE, FOUR HOURS, AND WE STARTED HAVING ANOTHER ONE OF THESE SETTLEMENT DIALOGUES.

FROM THERE WHAT HAPPENED WAS WE REPORTED TO JUDGE GALLO ON THOSE TWO SEMINAL EVENTS, AND THEN WE WENT OFF AND SPENT LITERALLY DAYS WITH JUDGE GALLO. INDEED, IN THE RECORD IT IS NOT REFLECTED, BUT I WILL ADVISE THE COURT THERE WAS A POINT IN TIME WHEN I WAS PERSONALLY CALLING JUDGE GALLO ESSENTIALLY EVERY FRIDAY OR EVERY OTHER FRIDAY IN THE MORNING, AT 8:30 – AND I THINK A COUPLE OF MY COLLEAGUES HAD TO COVER FOR ME WHEN I WAS TRAVELING OR SOMETHING – TO REPORT ON WHERE WE WERE THAT WEEK WITH REGARD TO SETTLEMENT. AND THE REASON FOR THAT WAS THERE WAS A PRIMARY DIALOGUE GOING ON THIS WAY, PLAINTIFFS TO DEFENDANTS. THERE WAS MY CO-COUNSEL, MR. CHERRY AND HIS ASSOCIATES. WE WERE NEGOTIATING BETWEEN OURSELVES BECAUSE WE HAD

INDEMNITY DISCUSSIONS TO BE HAD. AND THEN WE HAD DISCUSSIONS WITH OUR OWN CARRIERS, OF WHICH THERE WERE THREE GROUPS.

SO IT WAS HERDING CATS. SO THIS WENT ON AND ON AND [19] ON. AND WE WERE CONSTANTLY NEGOTIATING. ULTIMATELY, OUT OF THIS PROCESS, IT DISTILLED A PRIMARY RELATIONSHIP WITH MR. STECKLER AND I, WHERE WE DECIDED WE WERE GOING TO BE THE LEADS FOR BOTH SIDES, AND WE HAD CONSTANT, ONGOING DIALOGUE.

AND AS WE STARTED TO GET A LITTLE BIT CLOSER TO FLUSHING OUT THE WAY WE MIGHT BE ABLE TO DO A SETTLEMENT, AND AS WE WERE NEGOTIATING WITH DEFENSE COUNSEL AND OUR CARRIERS TO CIRCLE UP THE FUNDS, WE ULTIMATELY CALLED UP JUDGE INFANTE, WHO I HAVE DONE A LOT OF WORK WITH, AND WE WERE ABLE TO SPEND THE BETTER PART OF A DAY AND BANG OUT THE AGREEMENT.

SO I WANTED YOU TO UNDERSTAND THAT BECAUSE WE HAVE SPENT A LOT OF TIME AND ENERGY LITIGATING THE CASE, AT THE SAME TIME FOR THE BETTER PART OF A YEAR OR TWO ENGAGED IN AN ONGOING SETTLEMENT DISCUSSION SUPERVISED BY THE COURT, THROUGH THE AUSPICES OF JUDGE GALLO – AND YOU KNOW WHAT KIND OF A SHIP, AS MR. PATTERSON

SAYS, HE RUNS – SUPERVISED BY MEDIATOR INFANTE, AND OF COURSE, JUDGE PAPAS.

THAT PROCESS IN AND OF ITSELF SHOULD BE A COMFORT TO THE COURT IN TERMS OF THE FAIRNESS, THE REASONABLENESS, AND THE ADEQUACY OF THE SETTLEMENT.

LET ME ADDRESS THE SUBSTANCE, IF I MAY.

THE COURT: SURE.

MR. RHODES: THERE ARE SEVERAL TRANCHES THAT ARE SET UP IN THE DEAL. IN TERMS OF THE CLAIM FORM, THERE IS ACTUALLY SOME MADNESS TO WHAT WE WERE TRYING TO DO HERE. IF YOU TAKE A [20] STEP BACK, THE THEORY OF THE CASE WAS THAT WHEN YOU WERE COMPLETED WITH YOUR PURCHASE WITH MY CLIENT ONLINE, THERE WAS SOME POP-UP, IF YOU WILL, THAT INVITED YOU TO JOIN WHAT IS CALLED A LOYALTY PROGRAM OR A BENEFITS PROGRAM. THAT WAS ADMINISTERED BY CHERRY'S CLIENT. WE WERE THE PROVIDER OF THE PROFLOWERS AND THE OTHER WEBSITE SERVICES BY WHICH YOU ACTUALLY BOUGHT SOMETHING.

THE THEORY OF THE CASE, IN ESSENCE, WAS THAT WHAT THE CUSTOMER SAW AT THAT MOMENT WASN'T ADEQUATE. IT WAS MISLEADING, IT WAS INCOMPLETE. THEY HAD A NUMBER OF THEORIES, BUT THE BASIC GIST OF IT WAS YOU GOT HOODWINKED INTO JOINING

THE PROGRAM, AND THEN YOUR CREDIT CARD STARTED GETTING CHARGED MONTH AFTER MONTH AFTER MONTH.

SO WHEN MR. STECKLER AND I WERE SITTING DOWN TRYING TO FIGURE OUT HOW DO WE IDENTIFY THE PEOPLE THAT SHOULD GET MONEY, WE SAID WHAT ACTUALLY HAPPENED DURING THE PROGRAM. AND THERE WERE ESSENTIALLY THREE BUCKETS.

THERE WAS A GROUP OF PEOPLE WHO SAW, THAT FIRST MONTH, A CHARGE, AND THEY SAID WHAT'S THIS? AND THEY CALLED EITHER US OR MR. CHERRY'S CLIENT OR PERHAPS THE CREDIT CARD COMPANY, AND A DISCUSSION TOOK PLACE. AND IN MANY INSTANCES THEY GOT FULL REFUNDS OR PARTIAL REFUNDS, BUT THEY WERE ABLE TO KIND OF HANDLE IT THEMSELVES. THEY OBJECTED TO THE PROGRAM, THEY WERE ABLE TO GET OUT, AND THEY DIDN'T LOSE ANY MONEY.

THERE WAS ANOTHER GROUP OF PEOPLE THAT GOT INTO THE [21] PROGRAM AND LOOKED AT THE MATERIALS THAT MR. CHERRY'S CLIENT PROVIDED AND THEY LIKED THE PROGRAM AND THEY TOOK ADVANTAGE OF IT. THEY DID RENT THE CAR AND GET THE 20 PERCENT OFF. THEY DID TAKE THE TRIPS THAT THEY WERE ADVERTISED TO TAKE.

PART OF THE PROBLEM WAS WE DIDN'T REALLY HAVE A GOOD RECORD BASIS TO FIGURE

OUT WHO THOSE FOLKS WERE. SO WHAT MR. STECKLER AND I DECIDED TO DO WAS TO SAY WHAT IS REALLY AT ISSUE HERE ARE PEOPLE WHO PROBABLY DIDN'T PAY ATTENTION AND DIDN'T KNOW THAT THEY GOTTEN ENROLLED. AND IF YOU CREDIT THE PLAINTIFFS' THEORY, THEY WERE ENROLLED UNWITTINGLY. SO THEY DIDN'T GET A REFUND, AND THEY DIDN'T TAKE ADVANTAGE OF THE PROGRAM. SO WHAT WE SAID IS WE'LL MAKE A PILE OF MONEY AVAILABLE TO THOSE PEOPLE IF THEY JUST COME TO COURT AND SAY I DIDN'T KNOW AND I WANT MY MONEY BACK. THAT IS REALLY ALL THEY HAD TO DO.

NOW, AS MR. PATTERSON SAID, WE SENT OUT NOTICES. AND IF YOU LOOK AT THE GARDEN CITY GROUP DECLARATIONS, THEY PROVIDE THE LOGISTICS. AND THERE WAS ONE OBJECTOR, AND WE HAVE HIM HERE TODAY. AND THAT OBJECTOR COMPLAINS ABOUT THE DEAL AND THE UNFAIRNESS OF IT AND HOW BURDENSOME IT IS. AND YET LOOK WHAT HAPPENED. THAT OBJECTOR SUBMITTED A FORM AND WILL GET A FULL REFUND. SO SOMETHING WORKED, RIGHT?

THE THING WE WERE TRYING TO SOLVE IS TO IDENTIFY THE PEOPLE IN THE CLASS WHO CLAIMED TO HAVE UNWITTINGLY ENROLLED, AND WE GIVE THEM THE OPPORTUNITY TO GET 100 CENTS ON THE [22] DOLLAR. AND MR.

PERRYMAN WILL GET HIS HUNDRED CENTS OF HIS $122 AND CHANGE. OKAY. SO FAR SO GOOD.

AND THEN WE SAID ALL RIGHT. ANOTHER THEORY OF THIS CASE WAS THAT WHEN YOU ANSWERED THAT POP-UP AND WENT INTO THAT SECONDARY PROGRAM, YOU WERE PROMISED A $15 GIFT – CARD, CREDIT OR WHATEVER YOU WANT TO CALL IT. SO WE SAID WE'LL PUSH OUT TO EVERY MEMBER OF THE CLASS – THEY DON'T HAVE TO DO ANYTHING. WE'LL PUSH OUT A $20 CREDIT TO THEM. AND THE REASON WE PICKED $20 IS YOU CAN ACTUALLY GO ONTO THESE WEBSITES AND BUY SOMETHING FOR $20. AND I KNOW THE COURT IS FAMILIAR WITH THESE CASES, BUT IF YOU LOOK AT A LOT OF THE COUPON CASES, THE DEVIL IN THAT DETAIL IS TYPICALLY YOU GET $50 OFF ON A $500 ITEM. YOU HAVE TO BUY SOMETHING FAIRLY SIGNIFICANT AND YOU JUST GET A DISCOUNT. WE'RE NOT TRYING TO DO THAT HERE.

AND WITH ALL DUE RESPECT TO MR. PERRYMAN, HE IS FLAT-OUT WRONG. HE IS JUST ABSOLUTELY DEAD WRONG WHEN HE CALLS IT A COUPON. IT'S A VOUCHER. YOU DON'T HAVE TO DO ANYTHING TO GET IT, AND IT'S JUST AS GOOD AS CASH ON THE WEBSITE.

NOW, THEY COMPLAIN ABOUT THE BLACKOUT DATES. YOU WILL NOTICE THERE IS ALL THESE DATES. IN FACT, I THINK IT WAS YOU AND ME THAT HAD A FAIRLY HEALTHY AND ROBUST

DISCUSSION ABOUT THOSE BLACKOUT DATES. AGAIN, TO GIVE THE COURT THE CONTEXT, THERE IS A REASON FOR THOSE DATES. THE REASON IS IF YOU ARE IN THE FLOWERS BUSINESS, FULFILLMENT AT SOME OF THESE HOLIDAYS IS VERY, VERY TOUGH.

[23] SO ONE OF THE THINGS WE NEGOTIATED ON – AND WE WERE VERY FRANK WITH THEM ABOUT – WAS IT'S GOING TO MAKE IT VERY TOUGH ON US TO NOT BE ABLE TO PROGNOSTICATE ADDITIONAL FULFILLMENT PRESSURE ON OUR DISTRIBUTION SYSTEM IF WE GIVE OUT ALL THESE CREDITS. SO WHAT WE DID WAS WE SAID CAN WE CARVE OUT SOME OF THE MAJOR HOLIDAYS. AND JUDGE INFANTE SPENT HOURS WITH THE TWO OF US, NEGOTIATING OVER THAT, BECAUSE IT'S PART OF OUR BUSINESS.

NOW, THE COURT CAN SAY WELL, I DON'T KNOW WHY I WOULD AGREE TO THAT, BUT THE REALITY IS THERE IS A BUSINESS REASON UNDERLYING THAT PRINCIPLE IN THE SETTLEMENT. IT IS NOT, AGAIN – YOU KNOW, WHEN YOU SIT IN THE BLEACHERS, SOMETIMES YOU HAVE A DIFFERENT VIEW OF THE WORLD. BUT THAT IS THE REASON WHY WE HAVE THOSE BLACKOUT DATES IN THERE.

THE COURT: AND THE NEGOTIATION YOU HAVE BEEN TALKING ABOUT WAS WITH YOU AND MS. ANDERSON?

MR. RHODES: YES, YES.

THE COURT: OKAY. JUST SO THE RECORD IS CLEAR.

MR. RHODES: YES. WHEN I SAY "HER," I APOLOGIZE. YES, THAT'S WHO I'M TALKING ABOUT. BUT THE REASON I REMEMBER IT WAS WE ACTUALLY HAD A ROBUST DISCUSSION, I THINK IT'S FAIR TO SAY.

MR. STECKLER: VERY ROBUST, YOUR HONOR.

THE COURT: SHE IS SMILING.

MR. RHODES: WE ARE ALL SMILING TODAY, YOUR HONOR. [24] BY THE WAY, YOU KNOW, AS AN ASIDE – A COMIC ASIDE – WHEN YOU TAKE THE PLAINTIFF'S DEPOSITION DURING THE CASE, THE PLAINTIFF TELLS YOU, AS A DEFENSE LAWYER, YOU DIDN'T LAY A HAND ON THEM. NOW, OF COURSE, WE ROUGHED HER UP. WE DRAGGED HER OVER THE COALS. I FOUND THAT AMUSING.

MR. PATTERSON TALKED ABOUT THE PRACTICE STOPPING. IT DID STOP. AND IT HAS NOT BEEN REINTRODUCED. AND I THINK MR. CHERRY CAN SPEAK ABOUT THE CURRENT STATE OF HIS CLIENT'S BUSINESSES. WE ARE NOT IN THIS BUSINESS ANYMORE AND WE HAVEN'T BEEN.

OBVIOUSLY, WHEN YOU GET SUED AND YOU GET TO SPEND THREE AND HALF YEARS IN LITIGATION, IT'S LESS THAN OPTIMAL. SO TO THE EXTENT THE COURT WANTS TO FACTOR THAT INTO THE ANALYSIS, I CREDIT MR. PATTERSON'S REMARK. AND I WOULD AT LEAST STATE FOR THE RECORD THAT I THINK THEY CAN LEGITIMATELY TAKE SOME CREDIT FOR THE FACT THAT THAT PRACTICE HAS STOPPED.

IT WAS ON ITS WAY OUT ANYWAY, BUT IN THE INTEREST OF FULL DISCLOSURE I WOULD GIVE THEM SOME CREDIT FOR THAT.

THE COURT: THEY HASTENED IT OUT THE DOOR.

MR. RHODES: YES. ONE OF THE OBJECTIONS IS THAT IN THE ATTORNEYS' FEES CONTEXT, MR. PERRYMAN'S COUNSEL STATES THAT THERE IS A FREE RIDING PROVISION, WHICH IS A FREE SAILING PROVISION, WHICH IS THAT WE TIED OUR HANDS AND ARE MUTE TO TALK IN FRONT OF THE COURT. NOT SO. AND I WANTED TO POINT OUT TO THE COURT THE RECORD. IF YOU LOOK AT THE ACTUAL AGREEMENT – I [25] WILL DIG IT UP HERE, YOUR HONOR. THIS IS PAGE SIX OF THE SETTLEMENT AGREEMENT, SECTION 2.1C. IT STATES EXPLICITLY THAT THE ISSUE OF ATTORNEYS' FEES AND COSTS AND ENHANCED AWARDS IS UP TO THE COURT'S DISCRETION, BASED ON THE SUBMISSION OF PAPERS FROM PLAINTIFFS'

COUNSEL. BUT CONTRARY TO WHAT THE OBJECTOR IS ARGUING, EVERY DOLLAR THAT DOESN'T GO TO THEM GOES TO THE CLASS.

THERE IS NO REVERSION TO MY CLIENT. SO I DON'T KNOW WHAT HE IS TALKING ABOUT WHEN HE SAYS THERE IS A FREE SAILING PROVISION. FREE SAILING MEANS THAT IT'S BASICALLY FEES OR NOTHING. BUT HERE, IT'S A CONTAINED FUND FROM WHICH THE EXPENSES OF THE ADMINISTRATION OF THE SETTLEMENT COME OFF THE TOP. AND WHATEVER FEES THEY GET, THEY GET. AND IF THEY DON'T GET A DOLLAR THEY ASK FOR, IT GOES BACK TO THE CLASS. SO THAT COMPLIES WITH THE CURRENT STATE OF THE LAW, AND PARTICULARLY THINGS LIKE *BLUETOOTH*, THAT CASE.

I THINK THAT'S ALL THE POINTS I WANTED TO MAKE, YOUR HONOR. AND, OBVIOUSLY WE ARE HAPPY TO ENTERTAIN QUESTIONS IF YOU HAVE ANY ADDITIONAL ONES.

THE COURT: SURE.

MR. CHERRY, DID YOU WANT TO SAY ANYTHING ON BEHALF OF YOUR CLIENT?

MR. CHERRY: THANK YOU, YOUR HONOR.

I WOULD LIKE TO POINT OUT THAT THE SETTLEMENT IS IN A SENSE CONTRARY TO A LOT OF LAW THAT HAS HAPPENED IN THIS [26] DISTRICT AND AROUND THE COUNTRY. SO IF YOU

HAD TO PICK A SERIES OF CASES, THE SETTLEMENT CREDITS, THE MINORITY OF THOSE CASES AS OPPOSED TO THE MAJORITY – IF WE WERE TO FOLLOW THE MAJORITY RULES, THE SETTLEMENT WOULD NOT HAVE BEEN ENTERED INTO ON THE BASIS THAT BOTH PROFLOWERS AND OUR CLIENT RIGOROUSLY DISAGREED ABOUT THE MERITS OF THE WEBSITE. AND I POINT THAT OUT ONLY TO SAY THAT IN ROUGH TERMS THIS SETTLEMENT IS CLOSE TO 40 PERCENT OF POTENTIAL DAMAGES, WITH MOST OF THE CASE LAW AGAINST IT.

NOBODY, EVEN THE OBJECTORS, CRITICIZES THE SETTLEMENT. SO MR. PERRYMAN APPROVES THE SETTLEMENT. NOW, WHY IS THAT IMPORTANT? WELL, THAT'S IMPORTANT BECAUSE HIS ONLY OBJECTION IS KIND OF WHAT'S FOR DESSERT. IN OTHER WORDS, HE SAYS HE DOESN'T LIKE THE DISTRIBUTIONS TO THE CY PRES PEOPLE, AND HE CRITICIZES THE ATTORNEYS' FEES, WHICH BOTH PROFLOWERS AND I ARE NOT GOING TO TAKE A POSITION ON. WE DON'T OBJECT TO IT.

BUT THE DECIDING FACTOR ON WHAT YOU DO WITH RESPECT TO THE CY PRES DOCTORATE IS REALLY LIKE DESSERT. IT'S THE PRODUCT OF NEGOTIATIONS THAT HAPPEN IN CONNECTION WITH IT. SO IF YOU ARE GOING TO AGREE TO TAKE THE BENEFITS OF THE MENU ITSELF, WHICH HE DOESN'T OBJECT TO, IT SEEMS TO ME WHILE AN OBJECTION CAN BE

MADE AND SAY I WOULD RATHER GIVE IT TO THIS GUY VERSUS THAT GUY, THAT IS NOT A VERY SUBSTANTIAL ANALYSIS. THIS WAS ALL DONE IN THE HEAT OF NEGOTIATIONS. AND FOR SOMEONE [27] TO COME IN AND SAY I COULD HAVE DONE BETTER, OR I HAVE A DIFFERENT CHOICE, DOESN'T SEEM TO ME TO BE WELL SAID.

IT'S ALREADY BEEN POINTED OUT, YOUR HONOR, THAT ESSENTIALLY NO ONE DISAGREES WITH THIS SETTLEMENT FROM THE CLASS. THERE WERE 39 OPT-OUTS. SO ON ALL ISSUES THERE IS COMPLETE AGREEMENT. AND I WOULD SAY, YOUR HONOR, THAT THIS IS A SETTLEMENT WHICH IS BENEFICIAL TO THE CLASS, IT WAS NEGOTIATED AT ARM'S LENGTH, AND
IS REALLY THE PRODUCT OF A SETTLEMENT BECAUSE NOT EVERYBODY GOT WHAT THEY WANTED, AND PARTIES PARTICIPATED IN PROVIDING THINGS THAT THEY DID NOT THINK THEY OUGHT TO UNDER THE LAW. THANK YOU.

THE COURT: THANK YOU.

MR. RHODES: YOUR HONOR, MAY I JUST ADD ONE MORE POINT?

THE COURT: SURE.

MR. RHODES: I KNOW I AM SPEAKING OUT OF TURN, BUT I APOLOGIZE. AS I ALLUDED TO IN MY REMARKS, ONE OF THE COMPLEX-

ITIES OF THIS PARTICULAR DEAL WAS THE ORBIT OF THE INSURANCE COMPANIES AROUND US. WE HAVE A TOWER OF THREE DIFFERENT CARRIERS. AND THERE WAS A COMPLEXITY BECAUSE SOME OF THOSE CARRIERS WERE COMMON TO BOTH MR. CHERRY'S CLIENT AND MINE. AND THERE WERE SOME VERY ODD COVERAGE POSITIONS BEING TAKEN. IT TOOK US AN EXTENSIVE AMOUNT OF WORK. IN FACT, WE HAD TO HIRE MR. PAUL HILDING, WHO THE COURT MAY KNOW, TO REPRESENT OUR INTERESTS IN ACTUAL LITIGATION AGAINST SOME OF [28] THESE CARRIERS. WE FINALLY GOT EVERYTHING CIRCLED UP. AND IF THE COURT HAS ANY HESITATION ABOUT THE SETTLEMENT, THE ONE THING I WANT THE COURT TO BE THINKING ABOUT IS FRAGILITY OF THE MONEY THAT WE CIRCLED UP.

IT'S REFLECTED, ACTUALLY, IN THE AGREEMENT ITSELF, IN SECTION 2.1F, WHERE IT MAKES IT EXPLICIT THAT THE FUNDING IS CONDITIONED UPON US BEING ABLE TO GET THE INSURANCE COMPANIES TO ACTUALLY GIVE US THE MONEY. WE HAVE THAT MONEY CIRCLED UP TODAY. IT TOOK US AN AWFUL LOT OF TIME AND, FRANKLY, A LOT OF MONEY AND ACTUAL LITIGATION AGAINST THEM TO GET THAT MONEY CIRCLED UP.

AND ONE OF THE TRAGEDIES OF THE SYSTEM THAT WE HAVE – AND I DO CLASS ACTIONS FOR A LIVING, AS DOES MR. PATTERSON – IS THAT

WHEN A SOLE OBJECTOR COMES FORWARD TO ADVANCE A POLITICAL AND PHILOSOPHICAL AGENDA AND CHALLENGE A SETTLEMENT, THE REALITY IS IF THEY APPEAL, AS THEY DID IN THE *LANE V. FACEBOOK* CASE THAT I NEGOTIATED IN THE SPRING OF 2009, WHICH HAS YET TO BE FUNDED, A $9.5 MILLION DEAL, WE RISK – WE RISK GETTING THEM MONEY FROM THE CARRIER. BECAUSE A LOT OF INTERVENING ACTIONS CAN TAKE PLACE.

SO I WOULD JUST HOPE THE COURT WOULD EXPRESS A VIEWPOINT TO THE OBJECTOR, IF THE COURT FINDS THAT THE OBJECTION IS NOT WELL TAKEN, THAT WHAT AMOUNTS TO A SINGLE OBJECTOR, WHO GETS 100 CENTS ON HIS DOLLAR, ENDS UP HOLDING THE REST OF US HOSTAGE AND RISKS MY CLIENT HAVING TO WAIT TO SEE [29] WHETHER THE CARRIERS PAY THE MONEY IN TWO OR THREE YEARS AFTER THEY APPEAL. THANK YOU.

THE COURT: WELL, THANK YOU FOR THAT.

SO MR. SCHULMAN, WOULD YOU LIKE TO MAKE COMMENTS ON BEHALF OF THE OBJECTOR?

MR SCHULMAN: YES. THANK YOU, YOUR HONOR.

THERE ARE SEVERAL POINTS I WOULD LIKE TO TOUCH ON, BUT IF THE COURT HAS ANY

PRESSING AREAS IT WOULD LIKE ME TO ADDRESS, I WOULD BE GLAD TO BEGIN THERE.

THE COURT: NO. I WOULD SAY GO AHEAD WITH YOUR ANTICIPATED REMARKS.

MR SCHULMAN: SURE. WELL, THEN, WHAT I WOULD LIKE TO DO IS START TO ADDRESS THE PARTIES' RESPONSES TO US, BUT FEEL WELCOME TO DIVERT ME AT ANY TIME ON ISSUES OR QUESTIONS YOU MAY HAVE.

THE COURT: OKAY.

MR SCHULMAN: PRIMARILY, THERE ARE A FEW MATTERS RAISED IN THE PLAINTIFFS' RESPONSE, TO WHICH OUR TWO SUPPLEMENTAL DECLARATIONS WERE ADDRESSED. WE FILED THOSE LAST FRIDAY. BUT UNLESS YOUR HONOR IS PLANNING TO STRIKE MR. PERRYMAN'S OBJECTION AS MADE WITHOUT STANDING, OR TO GRANT THE ILLEGAL APPEAL BOND REQUEST THAT WASN'T PROPERLY NOTICED UNDER RULE 7, I'LL PROCEED DIRECTLY TO THE SUBSTANTIVE CRITIQUES OF THE OBJECTIONS.

THE COURT: LET'S GO TO THE SUBSTANCE.

[30] **MR SCHULMAN:** SOUNDS GOOD. BUT TO KEEP THE COURT FULLY ADVISED, I DO WANT TO NOTE THAT WE DID SERVE CO-LEAD CLASS COUNSEL LAST WEEK WITH NOTICE OF A RULE 11(C)(2) MOTION FOR SANCTION, WHICH

GIVES THEM THREE WEEKS TO WITHDRAW THEIR FILING ENTIRELY, OR WE INTEND TO FILE A MOTION FOR SANCTIONS AT THAT TIME.

BUT ON TO THE SUBSTANTIVE ARGUMENTS. LET ME BEGIN WITH THE BASIC STRUCTURE OF MR. PERRYMAN'S OBJECTION. BOILED DOWN ALL THE WAY, THERE ARE TWO CENTRAL OBJECTIONS. FIRST, THE SETTLING PARTIES, IN CONTRAVENTION OF THE CLASS ACTION FAIRNESS ACT, ARE ATTEMPTING TO HAVE THIS COURT VALUE THE COUPON PORTION OF THE SETTLEMENT AT MORE THAN $26 MILLION. HOWEVER, IF THIS COURT PROPERLY VALUES THE COUPONS AT ZERO UNTIL THEIR REDEMPTION, THE ATTORNEYS' AWARD IS OVER 71 PERCENT OF THE SETTLEMENT PROCEEDS AND THE SETTLEMENT IS DISPROPORTIONATE AND UNFAIR UNDER THE NINTH CIRCUIT DECISIONS IN *BLUETOOTH* AND *DENNIS*. THIS SHORTCOMING, HOWEVER, CAN BE REMEDIED BY DEFERRING A PORTION OF THE ATTORNEY FEE AWARD PENDING THE COUPON REDEMPTION PROCESS.

THE SETTLING PARTIES RETORT THAT THIS ISN'T A COUPON SETTLEMENT UNDER CAFA. AND THEIR MAIN ARGUMENT SEEMS TO BE THAT THE MERCHANDISE CODES CAN BE USED TO PURCHASE ENTIRE ITEMS UNDER $20, AND BECAUSE OF THIS AREN'T COUPONS.

THE PLAINTIFFS CITE TO THE UNPUBLISHED DECISION IN *CLRB HANSON INDUSTRIES V. WEISS*, WHICH HELD THAT FORGIVENESS OF [31] INDEBTEDNESS WAS NOT A COUPON. BUT THAT DECISION HAS NO BEARING HERE WHERE THE MERCHANDISE CODES ONLY ACQUIRE EFFECT UPON A FUTURE PURCHASE. THE FACT THAT THE CODES COULD BE USED TO PURCHASE A WHOLE PRODUCT DOES NOT MAKE THEM ANY LESS OF A COUPON.

CAFA'S LEGISLATIVE HISTORY, AS DISCUSSED IN *FLEURY V. RICHEMONT*, EXPLICITLY REFUTED THAT ARGUMENT. THE LEGISLATIVE HISTORY CITES EXAMPLES, INCLUDING A FREE CRIB REPAIR KIT, FREE SPRINGWATER, FREE GOLF CLUBS AND FREE GOLF BALLS. AND THE CITATION TO THAT LEGISLATIVE HISTORY IS SENATE REPORT 109-14, 2005.

THE WHOLE PRODUCT ARGUMENT WAS ALSO REJECTED IN JUDGE WOOD'S *SYNFUEL* DECISION OUT OF THE SEVENTH CIRCUIT, WHICH IS REPORTED AT 463 F3D 646. THERE, THE COURT HELD THAT PREPAID SHIPPING ENVELOPES SHOULD BE CONSIDERED COUPONS UNDER CAFA.

THE DEFENDANTS' SECOND SUGGESTION IS THAT THE EXISTENCE OF A SEPARATE CASH FUND UNDER THE SETTLEMENT MEANS THAT CAFA COUPON RESTRICTIONS DO NOT APPLY.

THE PRECISE TEXT OF CAFA CONTEMPLATES AND REJECTS THIS ARGUMENT. IF YOU LOOK AT 28 U.S.C. 1712(A), IN RELEVANT PART, IT READS: THE PORTION OF ANY ATTORNEY'S FEE AWARD TO CLASS COUNSEL THAT IS ATTRIBUTABLE TO THE AWARD OF THE COUPONS SHALL BE BASED ON THE VALUE TO CLASS MEMBERS OF THE COUPONS THAT ARE REDEEMED.

THE AWARD IS PORTIONED; THAT IS TO SAY, CAFA ITSELF [32] HAS DETERMINED THAT IT IS STILL A COUPON SETTLEMENT EVEN WHEN THERE IS ANOTHER NON-COUPON PORTION OF THE FEE ATTRIBUTABLE TO MONETARY RELIEF.

IN THIS CASE, CAFA PERMITS APPLYING THE PERCENTAGE METHOD, WHICH IS FAVORED BY THE NINTH CIRCUIT, TO THE NON-COUPON $12.5 MILLION CASH FUND, WHICH WOULD EQUATE TO JUST OVER $3 MILLION BASED UPON THE 25 PERCENT BENCHMARK, BUT IT DOES NOT PERMIT AN ADDITIONAL 25 PERCENT FEE BASED ON THE FACE VALUE OF THE COUPONS OR BASED ON 85 PERCENT OF THE COUPONS OR BASED ON ANY PERCENTAGE THAT YOU'D LIKE. INSTEAD, IT REQUIRES THAT THE AWARD SHALL BE BASED ON THE VALUE TO CLASS MEMBERS OF THE COUPONS THAT ARE REDEEMED.

LASTLY, THE DEFENDANTS IMPLY THAT MR. PERRYMAN BELIEVES COUPON SETTLEMENTS

ARE, PER SE, UNFAIR. THAT'S NOT CORRECT. WHILE HE DOES BELIEVE THEY REQUIRE HEIGHTENED SCRUTINY – AND IN THIS CASE THE PARTIES HAVE DONE NOTHING TO DISPEL THE FEARS THAT THE COUPONS HAVE NO REAL VALUE TO CLASS MEMBERS, DUE IN PART TO THEIR BLACKOUT DATES, AND IN GREATER PART TO THE FACT THAT THEY ARE DUPLICATIVE OF PROMOTIONAL OFFERS ALREADY AVAILABLE, SUBMITTED IN EXHIBITS TO MR. PERRYMAN'S INITIAL DECLARATION.

BUT THAT IS NOT THE CRUX OF MR. PERRYMAN'S OBJECTION TO THE COUPON PORTION. THE CRUX IS SIMPLY THAT CAFA PROHIBITS THE COURT FROM TAKING 85 PERCENT OF THE FACE VALUE OF THE COUPONS TO BE THEIR VALUE FOR PURPOSES OF AWARDING FEES.

[33] AND DEFENDANTS CAN'T TODAY ADVANCE THE ARGUMENT THAT THE COUPONS AREN'T COUPONS BECAUSE THEY HAVE BEEN NAMED SOMETHING ELSE IN THIS CASE: MERCHANDISE CREDITS. WELL, WE THOROUGHLY BRIEFED WHY THAT ARGUMENT IS INCORRECT IN MR. PERRYMAN'S INITIAL OBJECTION.

WE WOULD LIKE TO SAY THAT EVEN IF THIS COURT WERE TO DECLINE TO APPLY CAFA, THE RESULT WOULDN'T CHANGE. WE SUBMIT THAT JUDGE CARTER'S OPINION IN *ACOSTA V. TRANSUNION* IS A MODEL ROADMAP FOR AN

OPINION REJECTING THIS TYPE OF SETTLEMENT. THAT IS AT 243 FRD 377.

IT INVOLVED THE SAME TRI-PARTE RELIEF STRUCTURE PRESENT HERE AND WAS BRIEFED THOROUGHLY IN THE OBJECTION. YET NEITHER SETTLING PARTY EVEN ATTEMPTED TO DISTINGUISH IT IN THEIR FINAL APPROVAL PAPERS.

THAT BRINGS ME TO MY CLIENT'S SECOND CARDINAL OBJECTION, THE IMPERMISSIBLE USE OF CY PRES. THE RECIPIENTS ARE IMPROPER IN THAT SAN DIEGO SCHOOL OF LAW IS THE ALMA MATER OF VARIOUS COUNSEL IN THIS CASE, THUS CREATING A CONFLICT OF INTEREST.

MR. PERRYMAN'S CONCERN IS NOT ALLAYED BY THE DECLARATION SUBMITTED THAT THE RECIPIENTS WERE NOT IN FACT CHOSEN ON THIS BASIS BECAUSE THE MERE APPEARANCE OF IMPROPRIETY IS ENOUGH TO MAKE THE CY PRES AWARD IMPROPER. YOU CAN TELL IN *NACHSHIN* THAT THE NINTH CIRCUIT IS VERY SENSITIVE TO THIS CONCERN.

[34] IN HIS OBJECTION, MR. PERRYMAN CITED AUTHORITIES, INCLUDING THE *SCHWARTZ* CASE, WHICH SPECIFICALLY RECOGNIZED THE PROBLEM WITH CY PRES DONATIONS TO THE ALMA MATER OF PARTICIPANTS IN THE PROCEEDINGS. AND MANY OF THOSE AUTHORITIES WERE ALSO CITED BY THE NINTH CIRCUIT IN

NACHSHIN CASE, THE LIPTAK ARTICLE FROM THE *NEW YORK TIMES* AND A COUPLE OF OTHER SECONDARY SOURCES.

THE PARTIES HAVE CITED NO CASES WHICH THEY CLAIM PERMITS SUCH A THIRD-PARTY DISTRIBUTION. MOREOVER, THE CY PRES AWARDS TO LOCAL INSTITUTIONS FAIL TO APPROXIMATE THE NATIONWIDE SCOPE OF THE CLASS. THE NINTH CIRCUIT, SINCE BACK IN *SIX MEXICAN WORKERS*, HAS SAID THAT THIS IS IMPROPER.

LANE V. FACEBOOK, MENTIONED BY DEFENDANTS' COUNSEL, HAS NOTHING TO SAY ABOUT GEOGRAPHIC APPROXIMATION. THAT WASN'T AN OBJECTION THERE. THE INSTITUTION THAT WAS BEING ESTABLISHED WAS A NATIONWIDE INSTITUTION THAT SERVED THE ENTIRE SCOPE OF THE CLASS.

BUT THE PLAINTIFFS ARGUE THAT THE CENTRALIZATION IN SAN DIEGO IS OKAY BECAUSE, QUOTE, THE RECIPIENTS, WHILE LOCAL TO THIS COURT, ENGAGE IN A NATIONWIDE ACADEMIC DIALOGUE AND PLACE STUDENTS FROM ACROSS THE COUNTRY.

BUT THAT IS NOT PRECISELY CORRECT. IF YOU LOOK AT EXHIBIT F TO MR. NORTON'S FINAL APPROVAL DECLARATION, IT SHOWS THAT 92.5 PERCENT OF SAN DIEGO STATE UNDERGRADUATE ENROLLEES ARE FROM IN STATE. I BELIEVE UCSD – CHECKED ONLINE – IS A [35]

SIMILAR PERCENTAGE. AND CERTAINLY THE NUMBER OF FACULTY AND EMPLOYEES OF THOSE INSTITUTIONS WHO LIVE IN THE STATE IS NEAR IF NOT 100 PERCENT.

BUT EVEN IF THE STUDENT AND EMPLOYEE GEOGRAPHIC MAKEUP WERE MORE BALANCED, IT WOULD DO NOTHING TO DISTINGUISH THIS AWARD FROM ONE OF THE LOCAL UNIVERSITIES THAT THE SEVENTH AND EIGHTH CIRCUIT REJECTED IN *AIRLINE TICKET COMMISSION* AND *HOUCK*. BOTH CASES WERE SPECIFICALLY FOLLOWED BY THE NINTH CIRCUIT IN *NACHSHIN*. FOR EXAMPLE, THE CY PRES PROPOSED IN *HOUCK* WAS TO, QUOTE, RESEARCH PROJECTS IN THE AREA OF CLASS ACTIONS AND PARTICULARLY ANTITRUST LAW, RESEARCH THAT THEORETICALLY WOULD HAVE HAD A NATIONWIDE BENEFIT. BUT THAT DIDN'T PREVENT THE SEVENTH CIRCUIT FROM REVERSING ON ACCOUNT OF THE CONCENTRATION TO SCHOOLS LOCAL TO CHICAGO.

THE DEFENDANTS POINT OUT SOME LANGUAGE IN THE FIRST CIRCUIT'S *LUPRON* CASE, WHICH RUNS COUNTER TO THESE HOLDINGS. BUT IN NACHSHIN THE NINTH CIRCUIT HAD CLEARLY PLANTED ITS FLAG WITH THE SEVENTH AND EIGHTH CIRCUIT'S DECISIONS.

ALSO, A CLOSER LOOK AT *LUPRON* REVELS [sic] THAT THE FIRST CIRCUIT WAS PRIMED TO REVERSE IN VIRTUE OF THE SETTLEMENT'S

USE OF CY PRES, BUT ULTIMATELY AFFIRMED ONLY BECAUSE THE OBJECTORS HAD WAIVED ANY CHALLENGE TO THE UNDERLYING SETTLEMENT AGREEMENT. MR. PERRYMAN, OF COURSE, HAS MADE NO SUCH WAIVER IN THIS CASE.

LUPRON, IN FACT, AFFIRMATIVELY SUPPORTS [36] MR. PERRYMAN'S THIRD ARGUMENT AGAINST THE CY PRES. IT CITES THE ALI PRINCIPLES FOR THE PROPOSITION THAT CY PRES SHOULD NOT BE USED AT ALL WHEN DISTRIBUTIONS TO THE CLASS ARE FEASIBLE AND THE CLASS HASN'T BEEN FULLY COMPENSATED.

MR. PERRYMAN'S OBJECTION IS NOT THAT THE USE OF CY PRES IS LESS THAN PERFECT – OR AS MR. CHERRY SAID, THAT MR. PERRYMAN IS JUST ASKING WHAT'S FOR DESSERT. IT'S THAT THE USE OF CY PRES IS IMPERMISSIBLE ENTIRELY WHERE CLASS MEMBERS HAVE NOT RECEIVED FULL, LEGAL MEASURE OF COMPENSATION AND IT IS FEASIBLE TO DO SO. ADEQUATE REPRESENTATIVES MAY NOT PREFER CY PRES RECIPIENTS TO ABSENT CLASS MEMBERS.

THE DEFENDANTS ADVANCE THE CONCERN THAT THE FUND WAS ESTABLISHED TO BENEFIT ALL CLASS MEMBERS, NOT JUST THOSE WHO HAVE MADE CLAIMS. IN HIS OBJECTION, MR. PERRYMAN ADDRESSED THIS AND NOTED THAT IF THIS WAS A CONCERN THE PARTIES

COULD HAVE OPTED FOR THE OTHER TWO MECHANISMS DESCRIBED AT PAGE 13 OF HIS OBJECTION, EITHER A SUPPLEMENTAL OUTREACH PROGRAM TO THE CLASS OR RANDOM SAMPLING OF THE CLASS AND MAKING PAYOUTS ON A LOTTERY BASIS.

GIVEN NOW WE KNOW THERE IS A POT OF $3 MILLION OF UNCLAIMED MONEY AVAILABLE – MORE, IF THE COURT PROPERLY RESTRICTS THE ATTORNEY FEE AWARD TO 25 PERCENT OF THE $12.5 MILLION DOLLAR FUND – ALL ALTERNATIVES WOULD BE FEASIBLE.

IN THIS CIRCUIT, CY PRES MUST REMAIN A LAST RESORT, TO BE USED ONLY WHEN THE FUND IS, QUOTE/UNQUOTE, [37] NONDISTRIBUTABLE. AND IN THIS SETTLEMENT IT HAS NOT BEEN EMPLOYED THAT WAY.

THE CY PRES SHORTCOMINGS CANNOT BE REMEDIED BY THE COURT ITSELF, SO THE SETTLEMENT MUST BE REJECTED FOR THAT REASON AND THE PARTIES MUST REVISE IT.

AND FINALLY, I WOULD LIKE TO TOUCH UPON ONE ESSENTIAL MATTER NEGLECTED BY BOTH SETTLING PARTIES IN THEIR FINAL SUBMISSIONS, AND THAT IS THE NUMBER OF CLASS MEMBERS WHO HAVE SUBMITTED CASH CLAIMS AND THE AGGREGATE VALUE OF THOSE CLAIMS.

THE DEADLINE PASSED OVER A MONTH AGO AND THE PLAINTIFFS SUBMITTED TWO DECLARATIONS FROM THE CLAIMS ADMINISTRATOR, WHICH WERE ABLE TO DETAIL, AMONG OTHER THINGS, THE SUM VALUE OF MR. PERRYMAN'S CLAIM. YET CONSPICUOUSLY ABSENT FROM THOSE TWO DECLARATIONS WERE THE TOTAL NUMBER OF CLAIMS AND THE VALUE OF THOSE CLAIMS.

THE COURT SHOULD DRAW AN ADVERSE INFERENCE THAT THE NUMBER OF CLAIMS IS EXTREMELY LOW FROM THE FAILURE OF THE SETTLING PARTIES TO ANNOUNCE IT. WE DID GET SOME INSIGHT FROM MR. PATTERSON TODAY THAT THERE IS $3 MILLION LEFT OVER. A ROUGH BACK-SOLVING WOULD SEEM TO SHOW THAT THEN THERE HAS BEEN LESS THAN A – DEDUCTING THE NOTICE AND ADMINISTRATION COSTS THERE HAS BEEN LESS THAN A MILLION DOLLARS CLAIMED, WHICH WOULD MEAN THAT YOU COULD SEE A 16-TO-1 DISPROPORTION BETWEEN THE AMOUNT OF MONEY – POSSIBLY GREATER THAN THAT – BETWEEN THE AMOUNT OF MONEY CLAIMED IN THE ATTORNEY FEES OF THE CLASS.

[38] AND THAT'S INFORMATION THAT THIS COURT NEEDS TO INTELLIGENTLY APPROVE THE SETTLEMENT. THE SETTLEMENT CAN'T BE INTELLIGENTLY APPROVED UNTIL THE COURT REQUIRES THE PARTIES TO SUBMIT THOSE FIGURES ONTO THE RECORD.

AND *BLUETOOTH* WAS QUITE CLEAR THAT THE LOWER COURT MUST VALUE THE SETTLEMENT RELIEF WHEN APPROVING IT. AND THAT'S EVEN IF IT'S APPLYING THE LODESTAR METHOD. *BLUETOOTH* REQUIRED THAT THE COURT VALUE THE RELIEF AS SORT OF A PERCENTAGE OF THE RECOVERY CROSS-CHECK IN EFFECT.

AND PERRY HAS CITED TO NUMEROUS COURTS POST *BLUETOOTH*, THAT HAVE TAKEN CARE TO SCRUTINIZE THE AMOUNTS CLAIMED. A PARTICULARLY GOOD EXAMPLE WAS JUDGE KOH'S DECISION REJECTING THE *FERRINGTON V. MCAFEE* SETTLEMENT IN THE NORTHERN DISTRICT OF CALIFORNIA. AND EVEN AFTER THAT, *DENNIS* HAS FURTHER CLARIFIED THAT IT IS NOT ENOUGH FOR THE PARTIES TO SAY JUST TRUST US. BUT THAT IS EXACTLY WHAT IS OCCURRING HERE WITH THE CLAIMS RATE. AND I URGE YOUR HONOR TO APPLY THE UTMOST SECURITY.

I WOULD BE HAPPY TO ANSWER ANY QUESTIONS THAT YOUR HONOR HAS.

THE COURT: I DON'T HAVE ANY AT THE MOMENT, BUT THANK YOU.

NOW, MS. ANDERSON, I HEARD YOU WERE GOING TO ADDRESS THE OBJECTIONS. DO YOU WANT TO SPEAK NEXT?

MS. ANDERSON: I WOULD LIKE TO SPEAK BUT MR. RHODES [39] HAS ASKED TO INTERJECT A COUPLE OF COMMENTS.

THE COURT: OKAY. WHATEVER MAKES EVERYBODY HAPPY. GO AHEAD.

MR. RHODES: THANK YOU, YOUR HONOR.

LET ME TAKE UP THE GEOGRAPHIC ISSUE, JUST BRIEFLY. I WOULD NOTE FOR THE RECORD THAT THE MAJORITY OF THE CLASS MEMBERS WERE LOCATED IN CALIFORNIA. SO THERE IS A LOCUS, IF YOU WILL, IN CALIFORNIA TO THE UNDERLYING ACTS. BUT THERE IS NO ARGUMENT MADE BY MR. PERRYMAN AS TO WHY, INTRINSICALLY THE CY PRES RECIPIENTS ARE WRONG, BEYOND THE SPECIOUS, AND I THINK OFFENSIVE CONTENTION THAT BECAUSE ONE OF MY PARTNERS WENT TO THAT LAW SCHOOL – AND I THINK MR. PATTERSON HAS, AS WELL – THAT IT IS OFF THE TABLE.

I WOULD POINT OUT, FOR THE RECORD, THIS IS THE MOST RECENT NINTH CIRCUIT ARTICULATION OF THE ISSUE. I KNOW THIS CASE WELL SINCE I ARGUED IT. THIS IS THE *LANE* CASE, AT 696 F3D 811. THE COURT STATES THERE THAT THE OBJECTOR IN THAT CASE WAS UPSET THAT WHEN WE CREATED, IN THAT CONTEXT, A NEW FOUNDATION TO RECEIVE THE MONEY AND THAT PLAINTIFFS' COUNSEL AND MYSELF WERE TO SERVE ON AN ADVISORY

BOARD TO ENSURE THAT THE COURT'S DIRECTIVES WERE ACTUALLY FULFILLED, THE OBJECTOR IN THAT CASE SAID WELL, YOU CAN'T HAVE FACEBOOK'S HAND IN THE COOKIE JAR BECAUSE MR. RHODES IS ONE OF FACEBOOK'S LEAD LAWYERS, HE NEGOTIATED THE DEAL, AND IT WOULD BE INAPPROPRIATE FOR HIM TO HAVE ANY ROLE IN THAT. AND THEN THEY WENT ON TO SAY THAT ONE [40] OF THE THREE DIRECTORS OF THE NEW FOUNDATION WAS GOING TO BE DESIGNATED BY FACEBOOK. AND THAT TOO WOULD MEAN THAT THE FOUNDATION WOULD BE AN INAPPROPRIATE RECEIVER OF THESE FUNDS.

AND THE COURT JUST REJECTED THAT AND MADE THE NOT SURPRISING COMMENT THAT, QUOTE, THAT FACEBOOK RETAINED AND WILL USE ITS SAY IN HOW CY PRES FUNDS WILL BE DISTRIBUTED SO AS TO ENSURE THAT THE FUNDS WILL NOT BE USED IN A WAY THAT HARMS FACEBOOK IS THE UNREMARKABLE RESULT OF THE PARTIES' GIVE-AND-TAKE NEGOTIATIONS. AND THE DISTRICT COURT PROPERLY DECLINED TO UNDERMINE THOSE NEGOTIATIONS BY SECOND-GUESSING THE PARTIES' DECISION AS PART OF THE FAIRNESS REVIEW OVER THE SETTLEMENT AGREEMENT.

THAT'S AT PAGE 821, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

MR. RHODES: SO THAT IS THE NINTH CIRCUIT'S PRONOUNCEMENT: THE EXACT SAME OBJECTION MADE, AND IT WAS OVERRULED.

THE OTHER THING I WANT TO POINT OUT IS THAT COUNSEL CONFLATES THESE VOUCHERS WITH COUPONS AS IF TO SAY THAT THE SYLLOGISM IS IF IT'S A COUPON, THE SETTLEMENT IS DEAD. BUT THE POINT IS THAT UNDER STATUTE – THIS IS 28 U.S.C. 1712(E) THAT, OF COURSE, IS NOT THE CASE.

THIS IS QUOTING THE *TRUE* CASE, 749 F SUPP SECOND AT PAGE 1070, QUOTE, A DISTRICT COURT'S INQUIRY DOES NOT END WITH A DETERMINATION THAT A PROPOSED SETTLEMENT IS A COUPON [41] SETTLEMENT.

WE SUBMIT THAT IT'S NOT A COUPON SETTLEMENT, FOR THE REASONS GIVEN IN THE RECORD. BUT EVEN IF THAT WERE THE CASE, THAT IS ONLY THE BEGINNING OF THE ANALYSIS.

AND HERE, DESPITE MR. PERRYMAN'S OBJECTION AND DESPITE THE FACT THAT HE WILL PARTICIPATE AS A FULL 100 PERCENT CLAIMANT UNDER THE AGREEMENT, HE HAS CERTAINLY NOT MADE ANY CASE FOR WHY – EVEN IF YOU DEEM THE VOUCHER A COUPON – GIVEN THE TOTALITY OF THE OTHER RELIEF MADE AVAILABLE AND THE TOTALITY OF THE CIRCUMSTANCES PRESENTED, THE

SETTLEMENT IS NOT FAIR, REASONABLE AND ADEQUATE. THANK YOU, YOUR HONOR.

THE COURT: OKAY. THANK YOU. AND THEN, MS. ANDERSON.

MS. ANDERSON: THANK YOU, YOUR HONOR. I WILL BEGIN WITH A COUPLE COMMENTS ABOUT THE CY PRES, TO DOVETAIL WITH WHAT MR. RHODES HAD TO SAY. I THINK IT'S IMPORTANT TO NOTE THAT MR. PERRY (SIC) HAS FAILED TO EXPLAIN HOW FUNDS GOING TO ANOTHER GEOGRAPHIC AREA WOULD BE MORE BENEFICIAL TO HIM OR WHY FUNDS GOING TO THE CURRENTLY PROPOSED RECIPIENTS WOULD HARM HIM.

THIS IS NOT A CASE WHERE THERE ARE SERVICES ON THE GROUND, FOOD BEING DISTRIBUTED STATE BY STATE, SERVICES BEING DISTRIBUTED STATE BY STATE. THIS IS AN INTERNET CASE. CALIFORNIA. HE PURCHASED A PRODUCT FROM A SAN DIEGO COMPANY, BUT A COMPANY THAT CONDUCTS BUSINESS, VIA THE INTERNET, [42] NATIONWIDE. CALIFORNIA INSTITUTIONS, INCLUDING THE ONES THAT ARE PROPOSED, ARE PART OF THE NATIONWIDE ACADEMIC DIALOGUE, AND CALIFORNIA NOTABLY IS ALSO THE HEART OF INTERNET RESEARCH, INNOVATION AND POLICY. SO QUITE ARGUABLY A BETTER PLACE TO HAVE NATIONAL IMPACT THAN PERHAPS OTHER STATES.

BUT, MOREOVER, A CY PRES IS NOT JUST TO BE ADJUSTED BECAUSE THE CHOSEN RECIPIENTS ARE NOT WHO THE OBJECTOR WOULD HAVE CHOSEN, BUT RATHER WHETHER IT MEETS THE STANDARD OF BEING SUFFICIENTLY TETHERED TO THE CLAIMS IN THE CASE. AND HERE IT DOES.

AS MY COLLEAGUE HAS DESCRIBED – MR. PATTERSON DESCRIBED THAT THIS IS EARMARKED FOR PROJECTS AIMED AT EDUCATION OF INTERNET PRIVACY AND SECURITY. THAT IS DIRECTLY LINKED TO THE CLAIMS IN THIS CASE. THE CASES THAT HAVE BEEN CITED BY MR. PERRYMAN ARE DISTINGUISHABLE IN THIS EFFECT, EVEN THE ONES HE REITERATED TODAY, SUCH AS *AIRLINE TICKET* AND *SCHWARTZ*. THE COURT FOUND IN BOTH OF THOSE THAT THE RECIPIENTS AND EVEN THE GOALS THAT WERE SET HAD NO CONNECTION TO THE STATUTES THAT WERE BEING BROKEN. IN *AIRLINE TICKET* THEY FOUND THERE WAS NO CONNECTION TO GIVING A LAW SCHOOL MONEY WHEN THE ISSUE WAS OVERCHARGES BY TRAVEL AGENTS.

AND IN *SCHWARTZ*, AGAIN, THEY FOUND THAT THERE WAS NO ARTICULATED CONNECTION BETWEEN THE RECIPIENTS AND THE GOALS OF THE ANTITRUST STATUTES AT ISSUE IN THAT CASE.

HERE, THE STATUTES AT ISSUE ARE CONSUMER PROTECTION [43] AND SPECIFICALLY ELECTRONIC TRANSFER AND PRIVACY AND SECURITY ISSUES THAT ARE BEING DIRECTLY ADDRESSED SPECIFICALLY BY THE SPECIFIC AND NARROW AREAS OF STUDY THAT THE CY PRES WILL FUND.

AND IT BEARS NOTING, ALSO, THAT IN HIS PAPERS MR. PERRYMAN CITES THE *WELLS FARGO* CASE, BUT, IN FACT, IF YOU LOOK AT *WELLS FARGO*, THE CASE REJECTED COUNSEL'S NOTION THAT CY PRES SHOULD GO TO THE BAR ASSOCIATION OF SAN FRANCISCO AND, INSTEAD, ACCEPTED AND APPROVED THAT THE CY PRES, INSTEAD, GO TO THE STANFORD LAW SCHOOL'S SECURITIES CLEARINGHOUSE BECAUSE THAT WAS A SECURITIES CASE AND THAT WOULD ADDRESS THE CONCERNS OF THE CLASS. AND THIS DOES THE SAME THING.

AS FAR AS ALTERNATE MEANS, OTHER WAYS TO USE THE MONEY WOULD BE CONCERNED, I THINK IT'S IMPORTANT TO REMEMBER WHAT THE PURPOSE IS BEHIND A CY PRES. HERE, MR. RHODES HAD SAID THAT MONEY THAT DOESN'T GO TO ATTORNEYS' FEES WILL GO TO THE CLASS. AND THAT'S TRUE, BUT I WANT TO REMIND YOUR HONOR THAT THAT IS TO THE CY PRES. NOTHING IN THE ATTORNEYS' FEES REQUEST WILL REDUCE THE AMOUNT OF CASH THAT IS PAID TO PEOPLE WHO FILED A CLAIM.

AND EVERYBODY WILL STILL RECEIVE THEIR $20 VOUCHER. BUT IT WILL ONLY AFFECT THE AMOUNT OF MONEY THAT GOES TO THE CY PRES. THERE IS A SIGNIFICANT AMOUNT OF MONEY GOING TO CY PRES. CURRENTLY, UNDER THE PROPOSED PLAN, ALMOST A MILLION DOLLARS PER INSTITUTION.

THE ALTERNATIVES FOR DISTRIBUTION OF THAT BOTH HAVE THE EXACT PROBLEMS THAT CY PRES ARE MEANT TO ADDRESS. ONE [44] SUGGESTED OPTION IS THAT CLASS MEMBERS WHO HAVE MADE THIS CLAIM AND ATTEST THAT THEY DID NOT ENROLL, THAT THEY GET AN UPWARD ADJUSTMENT. BUT THAT WOULD TRULY BE A HUGE WINDFALL IN THIS CASE.

THE OTHER ALTERNATIVE IS TO ATTEMPT TO DISTRIBUTE THIS MONEY TO ONE – $3 MILLION TO 1.3 MILLION CLASS MEMBERS, BUT THE ADMINISTRATIVE COSTS WOULD DWARF ANY MEANINGFUL VALUE THAT THAT WOULD RENDER. AND, MOREOVER, THAT DOESN'T ADDRESS THE CONCERN THAT MANY CLASS MEMBERS SIGNED UP WANTING TO SIGN UP, AND DID USE THE BENEFITS.

SO WE REALLY FEEL THAT THE CY PRES IS APPROPRIATE, BOTH IN RECIPIENTS AND IN THE AMOUNT AS FAR AS DISTRIBUTION OF FUNDS ARE CONCERNED.

AS FAR AS MR. PERRYMAN'S COUNSEL'S COMMENTS ON THE FEES, I HAVE A FEW

THINGS TO SAY ABOUT THAT. THIS TRULY IS NOT A COUPON SETTLEMENT. AND WE CAN ALSO CITE LEGISLATIVE HISTORY. IN THE VERY SAME CASE HE CITED, THE *FLEURY* CASE, WHICH IS AT 2008 WESTLAW 3287154 AT 2 – IT'S CITED ALSO IN OUR PAPERS – IT TALKS ABOUT THE LEGISLATIVE HISTORY. AND WHILE THE STATUTE DOESN'T DEFINE COUPON, THE LEGISLATIVE HISTORY DISCUSSES COUPON AS A DISCOUNT ON A PRODUCT OR SERVICE OFFERED BY THE DEFENDANT.

THIS IS NOT A DISCOUNT. THIS IS AN OPPORTUNITY FOR PEOPLE TO CLAIM A PRODUCT FROM ONE OF FOUR DIFFERENT WEBSITES THAT VARY FROM FLOWERS TO FOOD ITEMS TO NON-PERISHABLE ITEMS; FOR INSTANCE, THE REDENVELOPE.COM WEBSITE.

[45] ADDITIONALLY, THIS IS VERY CLOSELY CONNECTED TO THE CLAIMS, AS HAS BEEN DISCUSSED TODAY. EVERY SINGLE CLASS MEMBER ASKED FOR A COUPON. NOW THEY ARE GETTING NOT JUST A COUPON, BUT A LARGER VOUCHER THAT IS FULLY TRANSFERABLE, AND THEY CAN PURCHASE SOMETHING FREE AND CLEAR WITH.

THE $20 VALUE, WHICH IS RELEVANT TO THIS COURT WHEN ASSESSING THE VALUE OF SETTLEMENT OVERALL, IS INDEED VALID. CONTRARY TO WHAT MR. PERRYMAN HAS SAID, IT CAN BE USED IN CONNECTION WITH

MARKDOWNS, DISCOUNTS, ETC. AND IT CAN BE USED FOR A WHOLE PRODUCT. SO WE THINK THAT THAT IS A VALID MEASUREMENT AND THAT THE VALUE OF THE SETTLEMENT SHOULD BE $38 MILLION. OF COURSE, THEN, THE FEE IS CLEARLY NOT DISPROPORTIONATE BECAUSE IT FALLS WITHIN THE NINTH CIRCUIT'S 25 PERCENT BENCHMARK.

SO WE BELIEVE CAFA RESTRICTIONS ARE COMPLETELY INAPPLICABLE HERE. HOWEVER, EVEN IF CAFA RESTRICTIONS DID APPLY, IT IS CLEAR UNDER CAFA THAT THE COURT CAN ALSO CHOOSE TO ALLOCATE FEES USING THE LODESTAR MULTIPLIER MODEL. BECAUSE HERE, PLAINTIFFS' CLAIMS ARISE FROM STATUTES THAT HAVE ATTORNEYS' FEES IN THEM. AS MR. PATTERSON POINTED OUT, BOTH THE CLRA AND THE EFTA.

NOTABLY, MR. PERRYMAN MAKES NO OBJECTION WITH RESPECT TO THE HOURS SPENT ON THE CASE OR THE HOURLY RATES, BOTH OF WHICH ARE REASONABLE. AND FOR THE REASONS SET FORTH IN THE PAPERS AND REITERATED BY MR. PATTERSON, A TWO TIMES MULTIPLIER [46] IS EXTREMELY REASONABLE.

SO THAT, TOO, IS AN OPTION FOR THE COURT, TO GO THE LODESTAR ROUTE, EVEN IF THERE ARE CONCERNS ABOUT THE NATURE OF THE VOUCHERS.

DO YOU HAVE ANY ADDITIONAL COMMENTS, YOUR HONOR?

THE COURT: SURE. ONE OF THE THINGS THAT MR. SCHULMAN POINTED OUT, THOUGH, WAS THE TOTAL NUMBER OF CLAIMS AND THE VALUE. SHOULD I JUST SUPPOSE THAT BECAUSE THERE IS 3 MILLION FOR THE CY PRES BENEFICIARIES, I'LL CALL THEM, THAT THAT MEANS NINE MILLION IN CLAIMS HAVE COME IN, OR DO WE HAVE THOSE NUMBERS?

MS. ANDERSON: WE DO HAVE THOSE NUMBERS.

MR. PATTERSON: YOUR HONOR, WE MADE A DECISION TO KEEP THE CLAIMS PROCESS OPEN, AND IT'S STILL BEEN OPEN. THE ADMINISTRATOR HAS BEEN ACCEPTING CLAIMS AS THEY COME IN. IT'S NOT SOMETHING WE ARE TRYING TO HIDE FROM THE COURT. THE CLAIMS RATE IS LOW. I MEAN, 3,000 PEOPLE HAVE MADE CLAIMS. YOU CAN DEDUCE, FROM THE NUMBERS THAT WE HAVE SUGGESTED WOULD BE DISTRIBUTED TO THE CY PRES RECIPIENTS, WHAT THE APPROXIMATE VALUE OF THOSE CLAIMS ARE. THE ADMINISTRATOR HAS THE EXACT NUMBERS AND KNOWS EXACTLY. ULTIMATELY, WE'LL KNOW EXACTLY HOW MUCH IS GOING TO BE DISTRIBUTED OUT. BUT HERE IS THE THING. IF THE MONEY IS NOT CLAIMED, IT'S GOING TO ROLL INTO THE CY

PRES. THAT'S THE WHOLE POINT OF THE CY PRES.

THE COURT: RIGHT.

[47] **MR. PATTERSON:** I THINK YOU CAN CERTAINLY CONSIDER AND TAKE A LOOK AT THE FACT THAT IN ORDER TO ACTUALLY GET THE REFUND, ALL YOU HAD TO DO WAS SUBMIT AN ONLINE CLAIM FORM. WE MADE IT AS SIMPLE AS POSSIBLE FOR THESE PEOPLE TO MAKE A CLAIM. THE ONLY ATTESTATION THEY HAD TO MAKE WAS THAT THEY DIDN'T INTEND TO SIGN UP. SO WE FEEL LIKE WE DID THE BEST WE COULD, AND THE NEXT BEST THING IS THE CY PRES ROLLOVER.

THE COURT: AND WE KNOW MR. PERRYMAN'S 122 BUCKS, BUT OF THESE 3,000 CLAIMS, WHAT IS THE VALUE OF THOSE AT THE PRESENT?

MR. PATTERSON: I THINK IT'S GOING TO BE APPROXIMATELY $225,000 IN CASH REFUNDS – FULL REFUND TO THE 3,000 OR SO PEOPLE WHO ASSERTED A CLAIM.

THE COURT: OKAY. ALL RIGHT. SO ANYTHING ELSE ON THE PLAINTIFFS' SIDE OF THE TABLE, OR THE DEFENSE?

I IMAGINE, MR. SCHULMAN, YOU HAVE SOME FINAL COMMENTS TO REPLY. I WILL GIVE YOU THE LAST CHANCE HERE.

MR SCHULMAN: SURE. THANK YOU, YOUR HONOR. I WILL JUST REPLY TO A FEW OF THE COMMENTS MADE BY MS. ANDERSON, THE FIRST BEING THAT SHE SAID THAT IT WOULD BE A WINDFALL IF YOU WERE TO – IF THEY WERE TO AUGMENT UPWARD THE AMOUNT OF EACH CLAIMANT. AND I THINK THAT IS COMPLETELY INCORRECT, AND IT'S BELIED BY THE – IF YOU LOOK AT THE COMPLAINT ASKING FOR STATUTORY DAMAGES, PUNITIVE DAMAGES, A TON OF MEASURES BEYOND JUST ONE-TO-ONE RESTITUTION. THAT IS NOT TO SAY THAT THE [48] SETTLEMENT NEEDS TO BE ADEQUATE TO DO THAT, BUT IT IS TO SAY THAT YOU CAN'T PREFER A CY PRES RECIPIENT BEFORE HAVING SATISFIED THE FULL LEGAL MEASURE. THAT IS THE ALI PRINCIPLES WHICH WERE ADOPTED BY *NACHSHIN'S* COURT.

THE SECOND IS THE LODESTAR MULTIPLIER METHOD. I THINK PROBABLY THE BEST CASE TO LOOK AT WHY YOU DON'T WANT TO APPLY USING THAT METHOD IS THE *SOBEL V. HERTZ* CASE OUT OF THE DISTRICT OF NEVADA, WHICH I BELIEVE WE CITE IN THE OBJECTION.

THE COURT: IT IS CITED.

MR SCHULMAN: I REFER YOU TO THAT. MS. ANDERSON ALSO MENTIONS THAT CY PRES IS WELL RELATED TO THE CAUSE OF ACTION. AND WE DIDN'T CHALLENGE IT ON THIS GROUND, BUT, ACTUALLY, WE THINK THAT ONE

PROBLEM WITH AWARDING THE MONEY TO A UNIVERSITY IS EVEN THOUGH IT'S EARMARKED FOR ESTABLISHING A CHAIR FOR INTERNET PRIVACY, THAT MONEY MAY HAVE ALREADY BEEN IN THE PIPES FOR DOING THAT SO THAT THEY WILL JUST SHIFT, YOU KNOW, THE GENERAL FUND ALLOCATION AROUND. WHEREAS IF YOU WERE ACTUALLY GIVING IT TO A NATIONWIDE ORGANIZATION, WHICH *NACHSHIN* RECOMMENDED, THEN YOU WOULDN'T HAVE THAT PROBLEM OF TAKING MONEY – OR FUNGIBILITY. IT'S ALSO A PROBLEM THAT IS REFERRED TO IN THE *DENNIS V. KELLOGG* DECISION.

AND THANK YOU FOR YOUR TIME, YOUR HONOR.

THE COURT: THANK YOU.

MR. RHODES, YOU HAVE A COMMENT?

MR. RHODES: YES, YOUR HONOR. I JUST WANTED TO [49] RECITE ONE OTHER SECTION OF THE *LANE* CASE, WHICH IS 696 F3D 811, AT PAGE 820 TO 821, WHERE THE NINTH CIRCUIT EXPLAINS THE PURPOSE AND THE BACKGROUND OF CY PRES. THEY STATE THERE, QUOTE, WE DO NOT REQUIRE, AS PART OF THAT DOCTRINE, THAT SETTLING PARTIES SELECT A CY PRES RECIPIENT THAT THE COURT OR CLASS MEMBERS WOULD FIND IDEAL. ON THE CONTRARY, SUCH AN INTRUSION INTO THE PRIVATE PARTIES' NEGOTIATIONS WOULD BE

IMPROPER AND DISRUPTIVE TO THE SETTLEMENT PROCESS.

AND THEN THE NINTH CIRCUIT GOES ON TO EXPLAIN THAT WHEN, QUOTE, DIRECT MONETARY PAYMENTS TO THE CLASS OF REMAINING SETTLEMENT FUNDS WOULD BE INFEASIBLE, GIVEN THAT EACH CLASS MEMBER'S DIRECT RECOVERY WOULD BE DE MINIMIS, CLOSE QUOTE.

THAT IS WHEN A CY PRES STRUCTURE MAKES SENSE. AND I AGREE WITH WHAT MS. ANDRUS SAID IN THAT REGARD HERE, WHICH IS DESPITE THE FACT THAT THE CLAIM RATE IS CURRENTLY LOW, REMEMBER WHAT I SAID ABOUT THE STRUCTURE OF THE CLAIM? WE WERE TRYING TO FIND THOSE PEOPLE IN THE CLASS WHO HAD NOT PREVIOUSLY GOTTEN A REFUND DIRECTLY FROM MY CLIENT OR MR. CHERRY'S CLIENT, BECAUSE THEY HAD COMPLAINED, AND WE WERE TRYING TO EXCLUDE FROM THE CLASS THOSE PEOPLE WHO ACTUALLY AVAILED THEMSELVES OF THE PROGRAM BENEFITS, AND TRYING TO FIND THOSE PEOPLE IN THE CLASS, WITHOUT KNOWING AT THE BEGINNING WHETHER THERE WAS ONE OR 100,000 OF THEM WHO BELIEVE, FOR WHATEVER REASON, THAT THEY WENT INTO THE PROGRAM UNWITTINGLY AND WERE CHARGED A MONTHLY FEE WITHOUT THEIR KNOWLEDGE OR CONSENT.

[50] WE FOUND ONE OF THEM. HIS NAME IS MR. PERRYMAN. HE IS THE ONLY OBJECTOR IN THE CASE. HE WILL GET 100 CENTS ON THE DOLLAR. THAT IS WHO WE WERE TARGETING. SO THE FACT THAT THE CLAIMS RATE IS LOW DOES NOT INDICATE, TO ME, WHAT THE FAIRNESS, REASONABILITY OR ADEQUACY OF THE SETTLEMENT IS WHEN IT'S BACKSTOPPED BY THE FACT THAT WE TOOK A PRIMARY CY PRES STRUCTURE.

AND IN THE *LANE* CASE, REMEMBER, THERE WAS NO ATTEMPT TO GIVE MONEY DIRECTLY TO THE CLASS MEMBERS, SPECIFICALLY FOR THE REASON IT WOULD HAVE BEEN, AS MS. ANDRUS (SIC) ALLUDED TO, ADMINISTRATIVELY FUTILE. AND THAT'S WHY.

HERE, WE DID BOTH THE DIRECT CASH CLAIM METHOD, AND THE CY PRES METHOD, AND THEN WE SAID ON TOP OF THAT WE'RE GOING TO GIVE EVERY SINGLE PERSON IN THE CLASS, WITHOUT DOING ANYTHING, A $20 VOUCHER. THE TOTALITY OF THOSE CIRCUMSTANCES, COUPLED WITH THE CESSATION OF THE PROGRAM, MEANS THAT THIS IS A SETTLEMENT THAT THE COURT SHOULD FIND IS FAIR, REASONABLE AND ADEQUATE. THANK YOU.

THE COURT: WELL, THANK YOU. AND THANK YOU ALL. YOU HAVE GIVEN ME A NUMBER OF THINGS TO THINK ABOUT, IN ADDITION TO THE BRIEFING AND SO FORTH. SO I WILL

TAKE THE MATTER UNDER SUBMISSION AND WILL RENDER A RULING AS SOON AS POSSIBLE, KNOWING THAT TIME IS OF THE ESSENCE WITH APPELLATE COURTS AND OTHER MATTERS IN THE MIX HERE.

I DO WANT TO THANK YOU FOR ALL OF THE EFFORTS AND THE [51] ADVOCACY. SO THE MATTER IS UNDER SUBMISSION, AND WE ARE IN RECESS FOR THE DAY.

MR. RHODES: GOOD AFTERNOON, YOUR HONOR.

MR. PATTERSON: GOOD AFTERNOON, YOUR HONOR. THANK YOU.

MS. ANDERSON: GOOD AFTERNOON, YOUR HONOR.

(PROCEEDINGS CONCLUDED AT 3:17 P.M.)

[Certification Omitted]

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re EasySaver Rewards Litigation	)	Case No. 3:09-cv-02094-AJB (WVG)
	)	**DECLARATION OF JENNIFER M. KEOUGH REGARDING BRIAN PERRYMAN AND AARON MEYER**

JENNIFER M. KEOUGH declares and states as follows:

1. I am Chief Operating Officer of The Garden City Group, Inc. ("GCG"). The following statements are based on my personal knowledge and information provided by other GCG employees working under my supervision and, if called on to do so, I could and would testify competently thereto.

2. As addressed in my Declaration dated January 11, 2013, GCG was selected and engaged in the above-captioned litigation (the "Litigation") to serve as Claims Administrator for the Settlement as described in the Settlement Agreement and Release ("the Settlement Agreement") preliminarily approved by this Court in its Order Granting Preliminary Approval of Class Settlement and Provisional Class Certification, executed June 26, 2012 and the Order extending certain deadlines under the Court's June 26, 2012 Order

(Dkt. Nos 252, 254) (the "Preliminary Approval Orders").

3. I submit this Declaration in order to provide the Court and parties in the above-captioned matter with information relating to Settlement Class Members Brian Perryman and Aaron Meyer.

4. On December 17, 2012, Plaintiffs' Counsel informed GCG that Class Member Brian Perryman filed an Objection to the Proposed Settlement and the Notice of Intent to Appear (Dkt. 258) on December 7, 2012 through his attorney. The objection was not provided to GCG by the Class Member or his personal attorney; Plaintiffs' Counsel provided a copy of the objection to GCG.

5. Based on the records provided to GCG by defendant Regent Group, Inc. dba Encore Marketing International, Inc. ("EMI"), Brian Perryman is a Class Member in the Settlement residing at 5538 10th Street N., Arlington, VA 22205.

6. On November 29, 2012, Brian Perryman filed a timely, valid claim online through the Settlement website, www.membershipprogramsettlement.com (the "Settlement Website," maintained by GCG pursuant to the Preliminary Approval Orders and Paragraph 3.3(a) of the Settlement Agreement).

7. Per Paragraph 2.1(d) of the Settlement Agreement, "Settlement Payments to Class Members" and according to the data provided to GCG by EMI, Mr.

Perryman did not use or request a benefit or service provided through any of the Membership Programs (other than the dollar-off-code for a future Provide Commerce website purchase), was actually enrolled in a Membership Program, was charged both an activation fee and at least one monthly membership fee, and did not receive a complete refund or chargeback of the monthly membership fees he paid. From these parameters and the monthly membership fees paid by Mr. Perryman, his claim is valued at $121.55.

8. Based on claims submitted, and taking into account all fees, costs, and incentive awards to potentially be paid from the Gross Cash Fund, all Authorized Claimants, including Mr. Perryman, will receive a full refund of all monthly charges for which they have not previously received a refund or chargeback.

9. Based on the records provided to GCG by defendant EMI, Aaron Meyer is a Class Member in the Settlement residing at 6474 Glenwood Trace, Zionsville, IN 46077. According to these records, Mr. Meyer never was charged a single monthly membership fee.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 17th day of January, 2013, at Seattle, Washington.

/s/ Jennifer M. Keough
Jennifer M. Keough