

In the Supreme Court of the United States

BRIAN PERRYMAN,

Petitioner,

v.

JOSUE ROMERO; DEANNA HUNT; KIMBERLY KENYON; GINA BAILEY;
ALISSA HERBST; GRANT JENKINS; BRADLEY BERENTSON; JENNIFER
LAWLER; DANIEL COX; JONATHAN WALTER; CHRISTOPHER DICKEY;
PROVIDE COMMERCE, INC.; REGENT GROUP, INC.;
ENCORE MARKETING INTERNATIONAL, INC.,

Respondents.

**APPLICATION FOR EXTENSION OF TIME TO
FILE A PETITION FOR A WRIT OF CERTIORARI**

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Rule 29.6 Statement

1. 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, Inc. FTD Companies, Inc. has issued stock that is publicly traded. Liberty Interactive Corporation, which also has issued stock that is publicly traded, owns 37.5% of the stock issued by FTD Companies, Inc. There are no other business entities that own more than 10% of the stock issued by FTD Companies, Inc.

2. Encore Marketing International, Inc., is a wholly-owned subsidiary of Regent Group, Inc. No publicly-traded corporation owns more than 10% of the stock issued by Regent Group, Inc.

**TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE
FOR THE NINTH CIRCUIT:**

Pursuant to Supreme Court Rules 13.5, 22, and 30, Petitioner respectfully requests a 42-day extension of time, up to and including February 13, 2019, to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review that court's decision in *In re: EasySaver Rewards Litigation*, 906 F.3d 747 (9th Cir. 2018) (attached as Exhibit A).

Petitioner intends to file a petition seeking review of this judgment under Supreme Court Rule 12. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The Ninth Circuit issued its judgment on October 3, 2018. The time to file a petition for a writ of certiorari will expire without an extension on January 2, 2019. This application is timely because it has been filed more than ten days prior to the date on which the time for filing the petition is to expire.

1. This case presents a substantial and important question of federal law: whether a class-action settlement that provides millions of dollars to *cy pres* recipients when it is “technically feasible” to distribute that money to class members is “fair, reasonable, and adequate” under Federal Rule of Civil Procedure 23(e). Below, the Ninth Circuit held, following *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), *cert. denied*, *Marek v. Lane*, 571 U.S. 1003 (2013), that because the \$3 to \$9 million, once divvied up among all 1.3 million class members, would be “*de minimis*,” the *cy pres* was not problematic, though the class would receive only \$225,000 in cash refunds and largely worthless coupons, and the class attorneys were requesting \$8.7 million for themselves. Moreover, though it was a national class, the Ninth Circuit

upheld the distribution of the *cy pres* solely to three San Diego-area schools, including the *alma mater* of several of the attorneys, to endow chairs in the name of a San Diego-based defendant. In so doing, the Ninth Circuit reaffirmed a circuit split with the Third, Fifth, Seventh, and Eighth Circuits. See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011); *Pearson v. NBTY, Inc.*, 778 F.3d 772 (7th Cir. 2014); *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015). This circuit split and the Ninth Circuit's standard for *cy pres* are already under review in this Court in the pending case of *Frank v. Gaos*, No. 17-961, where this decision was discussed in briefing and in oral argument.

2. In order to minimize the burden on this Court, petitioner sought to extend the time to file a petition for panel rehearing in *EasySaver* in the Ninth Circuit pending the resolution of *Frank v. Gaos*, as a GVR order in response to a petition for *certiorari* would be extremely likely. Respondents opposed the motion, and the Ninth Circuit denied the request in an order on November 21, 2018. That order is attached as Exhibit B.

3. Theodore H. Frank is counsel of record for Petitioner in this case. He presented oral argument in the Supreme Court in *Frank v. Gaos* on October 31, 2018. On November 6, 2018, this Court issued an order in *Frank* requesting additional supplemental briefing to be filed November 30, 2018, and December 21, 2018. He is also an attorney for the appellant in *Evangelista v. Duggan*, No. H044087, in the Sixth Appellate District of the California Court of Appeal, where a reply brief is due

December 10, 2018. He is also an attorney for the appellant in the Second Circuit appeal *In re Petrobras Securities Litigation*, No. 18-2708, where an opening brief is due December 18, 2018. He is also an attorney for the appellant in the D.C. Circuit appeal *Competitive Enterprise Institute v. FCC*, No. 18-1281, where an opening brief is due January 14, 2019. He is also counsel of record for the appellant in the Ninth Circuit in *Farrell v. Bank of America, N.A.*, where an opening brief is due January 25, 2019. He is also presenting oral argument in the Ninth Circuit on February 7, 2019, on behalf of the appellant in the appeal *In re Ion Batteries Antitrust Litigation*, No. 17-17367. All of these commitments, in conjunction with the holiday season, will limit counsel's availability to work on this matter between today and January 2, 2019.

Accordingly, petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 42 days, up to and including February 13, 2019.

December 7, 2018

Respectfully submitted,

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