No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *et al*.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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PETITIONERS' SUPPLEMENTAL BRIEF

As Supreme Court Rule 25.6 permits, petitioners submit this supplemental brief to discuss an intervening decision not available in time to be included in a brief. Petitioners and respondents disagree about the meaning and effect of the Ninth Circuit's approach to *cy pres*. *E.g.,* Pet. Reply Br. 11–12, 20–21. *In re EasySaver Rewards Litig.*, -- F.3d --, 2018 WL 4763174 (9th Cir. Oct. 3, 2018), demonstrates that the Ninth Circuit's permissive approach to *cy pres* has exactly the pernicious effects petitioners predicted.

EasySaver involves the settlement of a 2009 class action against Provide Commerce, Inc., an online business that sells flowers, chocolates, fruit baskets, and similar items. Plaintiffs alleged Provide and affiliated co-defendants fraudulently enrolled 1.3 million class members without consent into a membership rewards program that charged class members' credit cards a monthly membership fee, bilking consumers for tens of millions of dollars. Provide ceased the business practice when Congress outlawed it in 2010. Restore Online Shoppers' Confidence Act, Pub. L. No. 111-345, 124 Stat. 3618, codified at 15 U.S.C. §§ 8401 *ff*.

Before the district court heard a pending motion to dismiss and before the plaintiffs filed any class certification motions, the case settled. The settlement created a $12.5 million fund. Class members who sought refunds after filling out a two-page claim form under penalty of perjury would be entitled to *pro rata* relief up to the amount of their credit-card charges. In addition, each class member would receive a direct distribution of a $20 credit that could be used on Provide's websites. Any residual unclaimed money would go to *cy pres*: three San Diego area universities.

In exchange, class members released all claims to actual, statutory, and punitive damages.

The class attorneys requested $8.9 million in fees and costs, the vast majority of the $12.5 million fund. Class member Brian Perryman, represented by the Center for Class Action Fairness, objected that the settlement was designed to create the illusion of relief to maximize disproportionate attorneys' fees at the expense of the class:

- because the $20 credits expired in a year; could not be used in the weeks before Valentine's Day, Mother's Day, and Christmas; and could not be used in conjunction with regularly available 25%-off discounts offered on the site, class members were exceedingly unlikely to redeem them, making their value to the class likely less than $1 million, yet, contrary to 28 U.S.C. § 1712, the parties were asking the court to value them at face value;[1]
- though every class member was known and would already receive a distribution of a coupon, class members could not receive a cash refund without participating in a claims process, involving two pages of small print and a signature under penalty of perjury, seemingly designed to depress the number of refund claims and maximize the *cy pres*, though it would be feasible to pay the money to class members;[2] and
- though the class was a nationwide class, the *cy pres* was going to endow a chair or professorship or seminar series at three San Diego schools

[1] *Compare* Pet. Br. 24–25.

[2] *Compare* Pet. Br. 28–29.

> local to the court, class counsel, and the defendant, one of which was the *alma mater* of several of the attorneys on the case. (Provide Commerce had used *cy pres* in a previous class action settlement, *Cox v. Clarus*, No. 11-cv-0729 (S.D. Cal.), to endow a professorship in the name of one of its brands. Nancy Kim, *ProFlowers Distinguished Professor of Internet Studies*, 51 CAL. W. L. REV. 3 (2014).)[3]

Perryman Objection, *EasySaver*, No. 09-cv-02094, Dkt. 258 (S.D. Cal. Dec. 7, 2012); *id.* Dkt. 310 (S.D. Cal. Jul. 2, 2015).

At the fairness hearing, the parties disclosed that only 3000 class members had jumped through the hoops of the settlement's claims process, providing the class with only $225,000 in cash, leaving over $12.2 million residual in the settlement fund for *cy pres* and fees. *EasySaver*, 2018 WL 4763174 at *2. The district court nevertheless approved the settlement and the $8.9 million Rule 23(h) request in full, holding that the Class Action Fairness Act's restrictions on "coupons" did not apply to the "credits" and that the *cy pres* was permissible. *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013). The Ninth Circuit vacated and remanded to reconsider the question of the definition of "coupon." *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015). The district court, on reassignment to a new judge, once again held that the Class Action Fairness Act's restrictions on "coupons" did not apply to the "credits." *In re EasySaver Rewards Litig.*, 2016 WL 4191048 (S.D. Cal. Aug. 9, 2016).

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[3] *Compare* Pet. Br. 30–34 & n.3.

On the second appeal, the Ninth Circuit recognized that non-cash instruments that expired and had multiple restrictions on their use were "coupons," and struck the fee award for recalculation. *EasySaver,* 2018 WL 4763174 at *3–*8.

Depending on the amount the fees will be reduced, between $3 and $9 million will remain in the settlement fund and divert to the *cy pres* award. The court acknowledged that it would be "technically feasible" to distribute that money to the class members. *EasySaver*, 2018 WL 4763174, at *8. Each of the 1.3 million class members was known (because the defendants necessarily possessed credit card records for them), and there was already a scheduled distribution to every single class member of coupons, thus the class members' distribution could be augmented up to $7 per class member. Nevertheless, the court approved the settlement and *cy pres* as fair because it found such amounts "*de minimis*" under *Lane v. Facebook*, 696 F.3d 811, 821 (9th Cir. 2012).

Similarly, *Lane* and the district court's "broad discretionary power" permitted the national class's money to go to class counsel's *alma mater* to promote the defendant's name in the defendant's and the judge's local community. *Id.* at *9 (quotation and citation omitted).

Thus, contrary to Google's claims (Br. 34), the Ninth Circuit's lenient approach to *cy pres* permits distributions even when feasible, and when "involving known class members" and "much larger settlement funds per class member." Nor does the Ninth Circuit approach confine *cy pres* to cases in which "actual injury is modest and intangible." Google Br. 31–32. *EasySaver* also discredits Gaos's claim (Br. 1) that "*cy pres* distributions are rare." *EasySaver* is a disturbing example of how *cy pres* creates the incentive for a district court to

decide to favor local attorneys and local charities over a national class, "an invitation for wild corruption of the judicial process." Pet. Br. 37–39. Finally, that separate judges in the *EasySaver* district court *twice* signed off on valuing difficult-to-redeem coupons at full face value even in the face of a Congressional prohibition against doing so and adversary presentation from a sophisticated objector exemplifies petitioners' concern (Pet. Reply Br. 6–7) that district courts will not "reliably police the day-to-day interests of absent class members" in the absence of bright-line rules.

In *EasySaver*, the Ninth Circuit's permissive approach allowed the settling parties to use illusory *cy pres* that benefited Provide to camouflage a $225,000 settlement as a $12.5 million settlement—even after the parties had demonstrated the use of other gimmicks (*i.e.*, coupons with absurd restrictions) to exaggerate settlement relief. The result is an unfair wealth transfer of millions of dollars from injured consumers to attorneys that makes a mockery of Rule 23. *Compare* Pet. Reply Br. 11–12. If the Ninth Circuit does not stay the mandate, on remand, *EasySaver* plaintiffs are sure to argue that the lodestar incurred in defending the coupon settlement twice on appeal—which Google suggests (Br. 55–56) as a solution to petitioners' concerns—permits the district court to once again award the full $8.9 million request, and receive forty times what the class actually received. 2018 WL 4763174 at *7. At a minimum, *Google Referrer* would treat the *cy pres* as equivalent to cash and award attorneys over $3.3 million, or over fourteen times what the class actually received. Only petitioners' proposed proportionality rule (Br. 39) can correct the Ninth Circuit's misinterpretation of Rule 23(e) and prevent and deter such abuses.

Respectfully submitted,

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OCTOBER 23, 2018