

1 THEODORE H. FRANK (SBN 196332)

2 Email: tfrank@gmail.com

3 1718 M Street NW

4 No. 236

5 Washington, DC 20036

6 Voice: (703) 203-3848

7 *In pro per*

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 In Re Online DVD Rental Antitrust Litigation

Case No. 4:09-md-2029 PJH

12 **OBJECTION TO PROPOSED CY PRES**
13 **DISTRIBUTION**

14 Hon. Phyllis J. Hamilton

15 _____
16 Theodore H. Frank,
17 *Objector.*

Date: July 6, 2015
Time: 9:00 a.m.
Courtroom: 3, 3rd Floor

18 **CLASS ACTION**

1 Class member and objector Theodore H. Frank objects to proposed order (Docket 659-1) as a
2 violation of class members' rights on multiple grounds.

3 **First**, under Section 3.07 of the American Law Institute's *Principles of the Law of Aggregate*
4 *Litigation*, there should be no *cy pres* unless further distributions to the class are not viable. *In re*
5 *BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *cf. Nachshin v. AOL, LLC*, 663 F.3d 1034,
6 1039 n.2 (9th Cir. 2011) (endorsing § 3.07). With over \$1.42 million available, it would be possible and
7 costless to distribute \$2.19 gift cards to the 651,017 claiming class members with email addresses.
8 (Having successfully persuaded the Ninth Circuit that the Wal-Mart gift cards are indistinguishable from
9 cash, the settling parties are judicially estopped from arguing that such a distribution is not feasible.)
10 Even if, for some reason, it would be objectionable to distribute \$2.19 gift cards, there is no reason the
11 parties could not select 115,000 class members with emails randomly in a lottery to distribute additional
12 \$12.32 gift cards. Shay Levie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-*
13 *Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011). There should be no *cy pres* given the ease of
14 further distributions to the class.

15 **Second**, even if *cy pres* were permissible here, the recipients proposed by class counsel do not
16 meet Ninth Circuit standards of being the "next best." *Nachshin*, 663 F.3d at 1036 (rejecting proposed *cy*
17 *pres* recipients as unrelated); *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (same). "Not just
18 any worthy recipient can qualify as an appropriate *cy pres* beneficiary." *Dennis*, 697 F.3d at 865. A *cy*
19 *pres* distribution must "target the plaintiff class." *Id.* at 866. As in *Dennis*, "The *cy pres* awards in the
20 settlement here are likewise divorced from the concerns embodied" in the antitrust laws in the underlying
21 litigation. *Id.* A more appropriate *cy pres* designee would be the non-profit International Center for Law
22 & Economics, which does extensive work on behalf on consumers in the antitrust and competition law
23 arenas. *See* Exhibit A.

24 **Third**, if there is such extensive *cy pres* of \$1.4 million, there should be a proportionate reduction
25 in the attorney fees. Class counsel was awarded \$8.5 million under Rule 23(h) by representing that the
26 class would be paid \$14.4 million in cash and gift cards. This was already well in excess of the Ninth
27 Circuit's 25% benchmark. If, in fact, the class will receive less than \$13 million, less than 90% of what
28 the court and class was told, the Rule 23(h) award should be reduced proportionally to reflect that.

1 *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (Posner, J.) (*cy pres* should not count towards
2 attorneys' fees); *In re Baby Products, Inc.*, 708 F.3d 163, 178 (3d Cir. 2013) ("Class members are not
3 indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not
4 be either."); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F.Supp.2d 1040,
5 1077 (S.D. Tex. 2012) ("The class benefit conferred by *cy pres* payments is indirect and attenuated. That
6 makes it inappropriate to value *cy pres* on a dollar-for-dollar basis.").

7 **Fourth**, I object to the class making additional payments to the settlement administrator. The
8 reason it is difficult to make payments to 76,008 claiming class members (and why over a quarter of the
9 checks to claiming class members have gone uncashed) is because the settlement website was
10 incompetently designed to prevent class members from notifying anyone of a change of address. *See*
11 <https://onlinedvclass.com> (providing no option to electronically notify of a change of address). The
12 settlement administrator has already charged an exorbitant \$4.3 million in this case to distribute under
13 \$13 million, despite objections about an artificially expensive claims process, and should not be getting a
14 penny more. (In comparison, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS (N.D. Cal. 2013), had
15 notice and settlement administration expenses of \$2.55 million for a much larger class.) If the claims
16 administrator refuses to perform additional work without payment, then that should be the expense of the
17 class counsel that so poorly negotiated an overpriced service, rather than the class, that bears the burden.

18 For the above reasons, plaintiffs' proposed order should be rejected without the proposed
19 modifications.

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21 Dated: June 9, 2016

Respectfully submitted,

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23 /s/ Theodore H. Frank

Theodore H. Frank (SBN 196332)
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, DC 20036
Ted.Frank@cei.org
(202) 331-2263

CERTIFICATE OF SERVICE

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I hereby certify that on this day I served true and correct copies upon counsel of record via the ECF system.

(s) Theodore Frank
Theodore Frank