Theodore H. Frank (SBN 196332)
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street NW 7th Floor
Washington, DC 20005
Voice: 202-331-2263
Email: ted.frank@cei.org

Attorneys for Objector Adam E. Schulman

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In Re Anthem, Inc. Data Breach Litigation

ADAM E. SCHULMAN,

Objector.

Case No. 15-md-02617-LHK

SUPPLEMENTAL OBJECTION OF ADAM E. SCHULMAN TO SETTLING PARTIES' INTERPRETATION OF THE SETTLEMENT

Date: February 1, 2018
Time: 1:30 p.m.
Courtroom: 8, 4th floor
Judge: The Honorable Lucy H. Koh

Objector Schulman files this supplemental objection in response to the settling parties' recently announced proposed allocation of settlement proceeds. At the February 1, 2018 fairness hearing and in plaintiffs' filing late in the evening of January 31, 2018 (Dkt. 960-3), it was for the first time revealed that the parties intend to allocate at least $3.3 million to the two *cy pres* recipients.

Schulman's objection was predicated on the belief that *any* reduction in the fee award would return to the gross fund and would be used to extend class members' credit monitoring services from that reversion. Objection (Dkt. 924) 1-2. Indeed, this belief arose from the best reading of the Settlement Agreement itself. Section 7.1, titled "Residue of Settlement Fund" states in full:

> No portion of the Settlement Fund shall revert or be repaid to Defendants after the Effective Date. ***Any residual funds remaining in the Settlement Fund*** after all the payments, expenses, and costs identified in Sections 1.2, 3.10, 4.6, 5.3, 6.4, 10.3, 11.2, and 12.2 have been paid or reserved for ***shall be used to extend the Credit Services beyond the original termination date for as long as possible, but in no instance for less than one month.*** To the extent the residual funds are insufficient to extend the Credit Services by at least one month or there are residual funds remaining once Credit Services have been extended, such remaining funds shall be subject to a cy pres distribution to the Center for Education and Research in Information Assurance Security at Purdue University and the Electronic Frontier Foundation, to be divided equally between them.

Imposing a two-year limitation on the credit monitoring extension, as the parties have done, is textually incompatible with Section 7.1, which requires the credit monitoring services to be extended for "as long as possible," that is, as long the funds can purchase another additional full month of services. While it is true that Section 4.8 states that "the Settlement Administrator shall use the remaining funds to pay Experian to extend Credit Services in one month increments, for up to two additional years," the prefatory clause of Section 4.8 subordinates itself to Section 7.1. Section 4.8 expressly states that it must be read "in accordance with Section 7.1 below." And again, Section 7.1 is incompatible with a two-year cap, by declaring unequivocally that the credit extension shall be for "as long as possible." Instead, the parties are using Section 4.8 to limit Section 7.1, rather than Section 7.1 to limit Section 4.8.

To the extent that it is the settlement is somewhat ambiguous, Schulman's reading should be preferred for multiple reasons. First, any ambiguity should also be construed in favor of Schulman and other absent class members because they did not draft the agreement, the settling parties did. *Stetson v. Grissom*, 821 F.3d 1157, 1164 (9th Cir. 2016) (applying "the general principle of *contra proferentem*" against class counsel as drafter of the settlement agreement and in favor of the objecting class member).

Second, ambiguities should not be interpreted in a way that violates public policy, in this case by producing a settlement that fails to satisfy Rule 23(e). *See Restatement (Second) of Contracts* § 207 (1981) (ambiguous contracts are to be read consistently with the public interest); *Tamosaitis v. URS Inc.*, 781 F.3d 468, 483-84 (9th Cir. 2015) (following Restatement). If Section 7.1 of the settlement means what it says, then there is no premature resort to *cy pres*, no quasi-reversion problem, and no concomitant Rule 23(e) violation. But if, contrary to the text, Section 4.8 is permitted to take primacy over 7.1, then this Court would be stuck approving an unfair settlement.

Contrary to Rule 23(e), plaintiffs' interpretation would entail that any fee reduction would not directly benefit the class (rather the funds would flow to the third-parties hand-picked by plaintiffs). But as the Ninth Circuit has explained, there's "no apparent reason the class should not benefit from the excess allotted for fees." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011). Segregating fees from class relief "deprives the class of that full potential benefit if class counsel negotiates too much for its fess." *Id.* And it has the further self-serving effect of protecting class counsel by deterring scrutiny of the fee request. *See Pearson*, 772 F.3d at 786 (calling it a "gimmick for defeating objectors"). A court and potential objectors have less incentive to scrutinize a request because any reversion benefits only the third-parties that are already earmarked to receive millions of dollars. Fee segregation is at its worst when it reverts funds to defendants, but it's not much better when it reverts funds to favored third-parties. *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014).

More significantly still, plaintiffs' reading of the agreement would call for premature resort to *cy pres* in violation of the "last resort" rule, a basic tenet that requires distributions to class members

take priority over distributions to *cy pres* whenever such distributions are feasible. "[A] *cy pres* distribution…is permissible *only* when it is not feasible to make further distributions to class members…except where an additional distribution would provide a windfall to class members with *liquidated*-damages claims that were 100 percent satisfied by the initial distribution." *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *accord Pearson*, 772 F.3d at 784 (denying "validity" of *cy pres* award where it was feasible to remit more money to actual class members); *Am. Law Institute Principles of Aggregation Litig.* §3.07(b). This rule follows from the precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). In a pre-*ALI Principles* case, the Ninth Circuit implied the same rule. *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (rejecting *cy pres* as an inadequate substitute for individual damages); *but see In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 742 (9th Cir. 2017), *pet. for cert. pending* No. 17-961 (permitting *cy pres* distribution even where there were possible alternative structures that could have distributed that money to class members); *Fraley v. Batman*, 638 Fed. Appx. 594 (9th Cir. 2016) (same). In sum, a "*cy pres* award is not appropriate" where "the settlement is distributable to the class members." *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 578 (S.D. Cal. 2016). While *Google Referrer* creates a circuit split in *permitting* a district court to approve abusive *cy pres* distributions, it does not require a district court to accede to them in evaluating a settlement.

The result of the parties' misinterpretation of the settlement is the difference between a *cy pres* remainder of a few hundred thousand dollars and a *cy pres* remainder of several million dollars, more if the out-of-pocket fund is not exhausted and if fees are reduced significantly. The fact that the parties' interpretation would violate a cardinal rule of *cy pres* usage is a reason to prefer Schulman's interpretation. By interpreting the settlement in the manner Schulman suggests, the Court could also allay (to some extent at least), its continuing concern about the lack of benefit class members will derive from the common fund. Dkt. 972 at 5 (observing that "only approximately 45% of the…settlement fund would remain to benefit the class"). If the settling parties' interpretation prevails, only $33 million of the $115 million gross fund, plus whatever of the $15

million out-of-pocket costs fund is claimed, will be used for the direct benefit of class members. Dkt. 960-3. The "economic reality" of that allocation presents a fairness problem itself. *See, e.g., Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015). Class members must remain the "foremost beneficiaries" of the settlement. *In re Baby Products Antitrust Litigation.*, 708 F.3d 163, 179 (3d Cir. 2013).

Finally, at the fairness hearing, the Court raised the issue that alteration of the *cy pres* allocation would require expensive re-notification of the class. In these circumstances, however, any renotification could be accomplished by inexpensive website update and a reopening of the claims process. Unlike a material amendment to the settlement that demands renoticing the class,[1] simply clarifying that the existing agreement will be interpreted in its most reasonable, logical, and lawful manner does not ordinarily require renotification at all. But here, Schulman agrees that corrective website notice and a reopening of the claims process is appropriate because the original notice itself was ambiguous about how long the monitoring would be extended, alternatively stating "up to four years in total," "for as many full months as possible" and "[until] there is not enough money to extend Credit Monitoring Services by at least one month." Notice ¶ 19. Reopening the claims period would allow any individuals dissuaded (by the original notice) from claiming credit monitoring to make that decision under an accurate view of the settlement, and regularly occurs when claims rates are below what the court expected or to remedy defects in notice. *E.g., Edwards v. Nat'l Milk Producers Fed'n,* 2017 WL 3623734, at *2 (N.D. Cal. Jun. 26, 2017); *In re Auction Houses Antitrust Litig.*, 2004 WL 3670993, at *2 (S.D.N.Y. Nov. 17, 2004).

The class can be spared the expense of anything resembling another $23 million notice program. Individual notice necessary for Rule 23(c) certification notice or Rule 23(e) settlement notice is not necessary in these circumstances for discretionary Rule 23(d) corrective notice. Again, ordering the settling parties to comply with the settlement by shifting money from *cy pres* to absent class members is not an amendment to the settlement but merely the best interpretation of the

[1] *E.g. In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 n.10 (3d Cir. 2013)

settlement. Moreover, it is an interpretation that *prevents* "a material adverse effect" on the rights of any class members. *See Keepseagle v. Vilsack*, 102 F. Supp. 3d 306, 313 (D.D.C. 2015) (determining that supplemental notice to the class is only warranted where an amendment would hinder or adversely affect class). Absent class members suffer no disadvantage if the funds are distributed for direct class benefit instead of third-party benefit.

CONCLUSION

This Court should construe the settlement in a way that keeps it consonant with the best interpretation of Rule 23(e). This Court should order the parties to adhere to that construction in their administration of the settlement.

Dated: February 5, 2018

Respectfully submitted,

/s/ Theodore H. Frank
Theodore H. Frank (SBN 196332)
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street NW, 7th Floor
Washington, DC 20005
Email: ted.frank@cei.org
Voice: 202-331-2263

Attorneys for Objector Adam Schulman

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing motion using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 5th day of February, 2018.

/s/ Theodore H. Frank
Theodore H. Frank