THEODORE H. FRANK (SBN 196332)
ADAM E. SCHULMAN (*pro hac vice*) (DC Bar No. 1001606)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: (703) 203-3848
Email: tfrank@gmail.com

Attorneys for Class Member Brian Perryman

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re EasySaver Rewards Litigation

Brian Perryman,
Objector.

Case No. 3:09-cv-2094-BAS (WVG)

OPPOSITION OF BRIAN PERRYMAN TO PLAINTIFFS' RENEWED MOTION FOR ATTORNEYS' FEES

Judge: Honorable Cynthia Bashant
Courtroom: 4B
Date: TBD
Time: TBD

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Introduction and Summary of the Argument

Reading plaintiffs' renewed fee papers, one gets the impression that plaintiffs are submitting a run-of-the-mill fee request after securing a $12.5 million class settlement benefit. Indeed, plaintiffs reference a $12.5 million cash fund **eight times** in their memorandum in support of fees. Yet they admitted just last month that the $12.5 million figure is mirage; class counsel now only "hopes to secured an estimated $10.5 million of the $12.5 million cash fund." Joint Status Report, Dkt. 355 at 5. This reality has direct consequences for the settlement. Specifically, because the cash fund will not be fully funded, the entire settlement, by its own terms, is "null and void *ab initio*." Settlement Agreement and Release, Dkt. 248-3, ¶¶ 2.1(f), 3.12. Either (1) the settling parties are aware that the settlement is null and void and are concealing it from the Court or (2) the settling parties are ignorant of basic predicates of the settlement they negotiated. Either scenario reflects poorly. As for plaintiffs' fee motion, without a settlement and attendant class benefit, class counsel have no entitlement to *any* fee award.

What is more, even if the settlement were still valid, class counsel's recent actions here and in bankruptcy court have demonstrated that they are inadequate stewards for the class. By proposing to use all available insurance proceeds to fund the settlement's cash fund and by proposing to draw a more-than-full lodestar award from this fund, class counsel have evinced a concern with safeguarding their own fee award at the expense of the 99.8% of class members who did not file cash claims. Although nothing in the settlement demands it, class counsel proposes to leave these nearly 1.3 million class members holding an empty bag as unsecured

creditors in Provide Commerce's bankruptcy proceeding. Class counsel's breach of fiduciary duty warrants disqualifying them from any fee award.

Providing yet another reason for denying their fee request outright, class counsel, in violation of Fed. R. Civ. P. 54 and 23(h), fails to state the specific amount of fees that they request. If the Court ultimately does reach the question of what fee to award, Perryman has already explained at length why class counsel should not receive more than fraction of their proclaimed lodestar that represents a fair proportion of the settlement's recovery and in no event should receive any multiple of their lodestar. Dkt. 343 at 11-13, 16-20. Perryman will not repeat those arguments here but incorporates them by reference in the event that the Court determines that class counsel is entitled to some fee.

"Cases are better decided on reality than on fiction." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013) (internal quotation omitted). Plaintiffs can make believe that they've created a $12.5 million benefit for the class, but the reality is the settlement has now dissolved itself and class counsel's reimagining of it serves only their self-interest. Class counsel have earned no fee.

I. Because the settlement, by its own terms, is *void ab initio*, there is no basis for any fee award to class counsel.

In the settling parties' joint status report filed in late October, they revealed for the first time that only $10.5 million of the $12.5 million stipulated settlement cash fund will actually be funded, with the $2 million shortfall turning into an unsecured bankruptcy claim from which the class representatives project to receive basically nothing (if the class claim is even accepted by the bankruptcy court). Dkt. 355 at 5; *see also* Easysaver Class Representatives' Motion For Leave to File Class Proof of Claim, *In re GUE Liquidation Cos., Inc.*, No. 19-11240 (LSS), Dkt. 758 (Bankr. D. Del. Oct. 4, 2019). Although the settling parties proceed as if this reality does

not matter, under the settlement agreement approved by this Court and affirmed by the Ninth Circuit, there are consequences for "less than full funding" of the settlement's cash fund. Settlement Agreement ¶ 2.1(f). Those consequences are unequivocally described: "If the total amount of $12.5 million is not contributed to the Gross Cash Fund…, then the Settlement Agreement shall be null and void *ab initio*, the Final Order and Judgment shall be vacated by its own terms…, and the Parties shall revert to their respective positions in the Action." *Id.* Settlement ¶ 3.12 reiterates what is to occur if the cash fund is not fully funded: "if the total amount of $12.5 million is not contributed to the Gross Cash Fund as addressed in Sections 2.1 and 2.1(f) of this Settlement Agreement, then this Settlement Agreement will be null and void *ab initio*." "In that event…the Final Order and Judgment and all of its provisions, as applicable, will be vacated by its own terms." *Id.*[1]

Without an underlying settlement or judgment, there is no class benefit and thus no basis for any fee award. *See, e.g., Allen v. Bedolla*, 787 F.3d 1218, 1225 (9th Cir. 2015) (vacating fee award upon vacating the settlement); *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1160 (9th Cir. 2013) (same); *In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 231, 232-33 (9th Cir. 2019)(unpublished) (same); *see generally Physician's Surrogacy, Inc. v. German*, 311 F. Supp. 3d 1190 (S.D. Cal. 2018) (noting "the requirement under Rule 54(d)(2) of an independent source of authority for an award of attorneys' fees") (quoting *MRO Communs., Inc. v. AT&T Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999)). In effect, the disintegration of the settlement "renders moot

[1] In their joint status report, the settling parties incorrectly assert that "no amendments to the Settlement or judgement [sic] are necessary." Dkt. 355 at 6. However, if the settling parties do contemplate possibly renegotiating another settlement, that would have to occur in the bankruptcy court because the automatic stay was lifted only for the limited purposes of (1) determining fees to class counsel and (2) pursuing payment from the proceeds of insurance policies. Dkt. 351 at 9-10.

the attorneys' fee issue." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 n.2 (9th Cir. 2012) (citing *Waggoneer v. C&D Pipeline Co.*, 601 F.2d 456, 459 (9th Cir. 1979)).

As the only source of class benefit, the class settlement was the only predicate for an award of attorneys' fees. If the settlement no longer exists, there is no authority for the Court to award any fees to class counsel.

II. Even if the settlement were still operative, class counsel's inadequate representation of the class warrants denying any fee.

Assuming *arguendo* that the settlement remains in effect, class counsel's fee motion should be denied nonetheless because of their breaches of fiduciary duty to the class. Specifically, class counsel's recent conduct in (1) failing, in the bankruptcy proceeding, to zealously advance the interests of the absent class members who are entitled to settlement coupons; (2) proposing to allocate the entirety of the insurance proceeds to the settlement cash fund (from which their fee will be drawn); and (3) continuing to seek an above-lodestar fee, notwithstanding the elimination of any direct relief for 99.8% of the class and the separate $2 million reduction of the cash settlement fund. (Perryman also objects to *cy pres* being considered a class benefit and being prioritized over tangible class benefits. *See Frank v. Gaos*, 139 S. Ct. 1041, 1046-48 (2019) (Thomas, J., dissenting); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014). The Ninth Circuit has held otherwise, and that decision binds this Court, but Perryman preserves the issue for future appeal.)

"In determining what fees are reasonable, a district court may consider a lawyer's misconduct, which affects the value of the lawyer's services." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012). *Rodriguez* instructs courts to apply "equitable principles even more assiduously in common fund class action cases" because of the court's "special duty to protect the interests of the class." *Id.* at 655; *accord Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th

Cir. 1999) (affirming denial of attorneys' fees to a firm that was removed as class counsel due to a conflict of interest, even if the firm's efforts conferred some benefit on the class). In class actions "even the appearance of divided loyalties of counsel" cannot be allowed. *Rodriguez*, 688 F.3d at 655.

Rodriguez involved a conflict of interest that arose out of *ex ante* incentive award agreements between class counsel and the named representatives that decoupled the financial interests of those representatives and the absent class members. *Id.* at 655-57. Here however, the conflict is more direct. Class counsel's fiduciary duty "forbids a lead lawyer from advancing his or her own interests by acting to the detriment of the persons on whose behalf the lead lawyer is empowered to act." American Law Institute, *Principles of the Law of Aggregate Litig.* § 1.05, *cmt.* f (2010). Class counsel must maximize class recovery; they "cannot agree to accept excessive fees and costs to the detriment of class plaintiffs"[2] or sacrifice class recovery for "red-carpet treatment on fees."[3] "[I]t is unfathomable that the class's lawyer would try to sabotage the recovery of some of his clients." *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015). When class counsel is "motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violate[s] its ethical duty to the class." *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship.*, 874 F.3d 692, 694 (11th Cir. 2017).

With these precepts in mind, let's examine what class counsel and plaintiffs did when confronted with the defendant filing for bankruptcy. How did they seek to safeguard the class's rights under settlement they had negotiated? Recall the settlement had two major components:

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[2] *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000).

[3] *In re Dry Max Pampers Litig.*, 724 F.3d at 718 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)).

(1) a $12.5 million cash fund, from which counsel proposed to draw a nearly $9 million attorney award, *cy pres* recipients would obtain roughly $3 million, and 0.2% of the class would be reimbursed roughly $225,000 collectively;[4] and (2) $20 coupons to the ProFlowers websites, the only direct compensation for 99.8% of the class.

First, plaintiffs filed three limited objections to debtors' motion for permission to sell its assets free and clear under 11 U.S.C. § 363(f). *In re GUE Liquidation Cos., Inc.*, No. 19-11240 (LSS), Dkt. 152 (Bankr. D. Del. Jun. 19, 2019); *In re GUE Liquidation Cos., Inc.*, No. 19-11240 (LSS), Dkt. 513 (Bankr. D. Del. Aug. 6, 2019); *In re GUE Liquidation Cos., Inc.*, No. 19-11240 (LSS), Dkt. 534 (Bankr. D. Del. Aug. 7, 2019). These objections' exclusive concern was ensuring that the insurance policies, proceeds and claims covering Provide's liability in this litigation would not be conveyed along with the sale of assets. After obtaining assurances that the insurance policies would not be transferred and proceeds and rights against the would still be available for payment toward the *EasySaver* settlement, plaintiffs had no further objection. So, for example, plaintiffs did not object to the fact that the asset purchaser was not assuming the liability for the *EasySaver* settlement coupons even though they were assuming "all Liabilities of Sellers with respect to Groupon coupons and gift certificates related to the Acquired Business and all Liabilities for any unredeemed refund amounts issued to customers of the Acquired Business, in each case that are Current Liabilities or ProFlowers Current Liabilities." *In re GUE Liquidation Cos., Inc.*, No. 19-11240 (LSS), Dkt. 499-1 at 23 (Bankr. D. Del. Aug. 1, 2019).[5] Contemporaneously, plaintiffs filed for and obtained a lifting of the

[4] Administrative expenses account for the remainder.

[5] Proceeds from a settlement of alleged fraud claims are normally nondischargeable debts under 11 U.S.C. § 523(a)(2). *Archer v. Warner*, 538 U.S. 314 (2003). Even if FTD's use of asset sales and liquidation preclude going after the debt post-bankruptcy, it is unclear why class

automatic bankruptcy stay for the limited purpose of seeking fees in this Court and pursuing payment of the insurance proceeds. *In re GUE Liquidation Cos., Inc.*, No. 19-11240 (LSS), Dkts. 514, 660.

Just last month, the plaintiffs unveiled what is in essence a newly conceived plan of allocation for the (theoretically) available $10.5 million in insurance proceeds. Dkt. 355. They propose to use 100% of this insurance recovery to cover 84% of the $12.5 million cash settlement fund. Dkt. 355 at 5. They propose to use none of the insurance proceeds to compensate the 1.3 million class members who were entitled to $20 coupons under the settlement. Instead, these coupons, with a face value of $26 million, were included in the class representatives' class proof of claim in the bankruptcy court, and will likely not result in a "material distribution." *Id.* at 6.[6] As far as Perryman can tell, plaintiffs intend to consummate their reimagined settlement without giving any further notice or opportunity to object to absent class members.

Perryman anticipates that plaintiffs will defend themselves by asserting that the insurance funds "were earmarked for the Settlement's cash fund." Dkt. 355 at 5. But while that funding structure might be consistent with the terms of settlement, nothing in the settlement requires that the insurance proceeds be devoted solely to the cash fund.[7] And their fiduciary

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counsel did not protect the class's claims to at least provide a higher priority in the queue of unsecured debts.

[6] It's not even clear how or if the class representatives would make an effort to conduct a class distribution in the unlikely event of any payment on the unsecured claim.

[7] There does exist the constraint, explained in Section I above, that underfunding of the cash fund renders the settlement null and void. But again, the argument in this section is premised on the assumption that the Court has concluded the settlement is still operative.

duty obligates the plaintiffs and counsel to advocate for the best interest of the entire class, not for a favored subset of the class, and certainly not for themselves. Yet now they propose to use the entirety of the insurance proceeds to fund the wellspring of their attorneys' fee, while leaving 99.8% of the class with nothing—especially appalling when *cy pres* designed to benefit a soon-to-be liquidated defendant with a named chair is being prioritized over class benefits. That is not zealously advocating the class's interest. And it's not "protect[ing]…the interests of Class Members." Dkt. 356-1 at 27.

One might then at least hope that plaintiffs could recognize the substantial degree to which their settlement's supposed value has been undercut by the defendant's bankruptcy, and that they would modify their hefty fee request accordingly. After all, the cash fund itself has been reduced by $2 million, so keeping the fee request at or near the same level as before would only cut into the purported indirect class benefit of higher educational internet privacy research. But plaintiffs' fee motion displays no real moderation, requesting a lodestar of $5.7 million and a positive (but undetermined) multiplier on top of that. The base lodestar still constitutes an increase of 32% or $1.4 million over class counsel's inflated $4.3 million calculation at the time of initial settlement approval. What plaintiffs refer to as a "substantial reduction" to their base lodestar in their renewed fee motion is in reality only a 10% cut. Amazingly, plaintiffs have not even shaved off from their fee request the 16% diminution that the settlement's cash fund will sustain even if plaintiffs can even obtain the $10.5 million they hope.

If it was not previously clear, it is now: plaintiffs and class counsel have abandoned any rigorous advocacy of class interests in pursuit of their self-serving and unrelenting quest for attorneys' fees. In their own words, they are "facing the very real risk they will not ultimately

obtain some or all their fees regardless of whatever this Court awards due to Defendant Provide Commerce's pending bankruptcy." Dkt. 356-1 at 22.

From all appearances, every action that plaintiffs have taken in response to defendant's bankruptcy has been fixated on the goal of preserving class counsel's seven-digit expected fee. Nothing else matters. It doesn't matter that more than 99% of class members, who were purportedly so thrilled to receive $20 coupons, are left with valueless unsecured claims in bankruptcy. It doesn't matter that the underfunding of the cash settlement fund will reduce the "national dialogue on improving internet privacy and data security practices."[8] It doesn't matter that the settlement itself doesn't even exist.

"There may be two things in life that are certain, but in class-action settlements, there is but one: attorney fees." *Page v. Pension Ben. Guar. Corp.*, 213 F. Supp. 3d 200, 201 (D.D.C. 2016). Here, however, plaintiffs have now bent that principle beyond the point of acceptability. If the Court reaches the substance of plaintiffs' motion, it should deny any fee as a consequence of their faithless representation of the class.

III. Plaintiffs' fee motion violates Rule 54 by failing to state the amount sought or a fair estimate of it.

Fed. R. Civ. P. 54(d)(2)(iii)(B) requires that fee motions "state the amount sought or provide a fair estimate of it." *Accord Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 676 (9th Cir. 2017). The motion papers must be "sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees (or a fair estimate)." Advisory Committee Notes on 1993 Amendments to Rule 54.

[8] *In re EasySaver Rewards Litig.*, 906 F.3d 747, 762 (9th Cir. 2018).

Notwithstanding this rudimentary threshold, neither plaintiffs' renewed fee motion, nor their memorandum in support of that motion, contains a discernible request for a specific amount of attorneys' fees. The motion itself announces that plaintiffs' counsel "seeks attorney fees based on lodestar and a multiplier, if the Court deems it appropriate" without specifying a requested sum. Dkt. 356 at 2. Plaintiffs' memorandum provides no additional clarity. It asks that the Court "apply a lodestar of $5,696,506" and "award whatever multiplier the Court deems appropriate." Dkt. 356-1 at 16. Plaintiffs profess that "[a]ll of the applicable factors support the requested multiplier." *Id.* at 23. But that is not even a testable assertion when there is no specifically requested multiplier. All we know is that plaintiffs think the multiplier should be "small" (*Id.* at 15 n.1, 28) and "positive" (Proposed Order at 3). Because plaintiffs supply neither the amount they seek, nor a fair estimate of that amount, they fall short of Rule 54's standard.[9]

Effectively, class counsel is seeking an improper failsafe fee award—their proclaimed lodestar adjusted however the Court deems reasonable. They've now had multiple bites at the apple and repeatedly refuse to make a request for a proportionate amount of fees. Plaintiffs' contravention of Rule 54 is an additional independent reason to deny any fee award.[10]

[9] Arguably, plaintiffs also fail to satisfy Fed. R. Civ. P. 7(b)(1)(C) which requires motions to "state the relief sought." *See generally* 5 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1192.

[10] If the Court ultimately does reach the question of what fee to award, Perryman has already explained at length why class counsel should receive only a fraction of their lodestar and certainly no multiple of it. Dkt. 343 at 16-20.

Conclusion

For the foregoing reasons, the Court should deny plaintiffs' renewed motion for fees. If the Court awards any fee, it should not be above the Ninth Circuit's 25% benchmark of the $10.5 million actually recovered to avoid impermissible disproportion between attorney recovery and depressed class recovery. Dkt. 343 at 11-13, 16-20. If unsecured claims result in additional material recovery, plaintiffs can supplement their fee request.

Dated: November 25, 2019

Respectfully submitted,

/s/ Adam E. Schulman
Theodore H. Frank (SBN 196332)
Adam E. Schulman (*pro hac vice*)
Hamilton Lincoln Law Institute
Center for Class Action Fairness
1629 K Street NW, Suite 300
Washington, DC 20006
tfrank@gmail.com
shuyande24@gmail.com
(703) 203-3848

Attorneys for
Objector Brian Perryman

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically served the foregoing on all CM/ECF participating attorneys at their registered email addresses, thus effectuating electronic service under S.D. Cal. L. Civ. R. 5.4(d).

DATED this 25th day of November, 2019.

(s) Adam E. Schulman