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11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF ARIZONA**

14
15 Unknown Plaintiff Identified as Jane V., *et al.*,

16 Plaintiffs,

17 v.

18 Motel 6 Operating LP, a limited partnership,
19 *et al.*,

20 Defendants.
21
22

Case No.: CV-18-0242-PHX-DGC

ARIZONA ATTORNEY GENERAL
AMICUS CURIAE BRIEF

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1 The Arizona Attorney General, having been made aware of this settlement, hereby offers
2 these papers in an effort to aid the court in its settlement-approval analysis.¹

3 INTEREST OF AMICUS CURIAE

4 The Attorney General's interest here arises from two responsibilities. *First*, as Arizona's
5 chief legal officer, the Attorney General has an overarching responsibility to protect Arizona
6 consumers. *Second*, the Attorney General has a responsibility to protect consumer class
7 members under CAFA, which prescribes a role for state Attorneys General in the class action
8 settlement approval process. *See* 28 U.S.C. § 1715 (Westlaw through Pub. L. No. 115-281); *see*
9 *also* S. REP. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action
10 settlements be sent to appropriate state and federal officials," exists "so that they may voice
11 concerns if they believe that the class action settlement is not in the best interest of their
12 citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check
13 against inequitable settlements"; "Notice will also deter collusion between class counsel and
14 defendants to craft settlements that do not benefit the injured parties.").

15 The Attorney General submits this brief to further these interests, speaking for Arizona
16 consumers who will be harmed by the proposed settlement that has obtained a ~\$7.6 million
17 cash payment and yet sends the majority, if not all, of the consumer portion to *cy pres* entities
18 with no direct connection to the class. This brief is a continuation of the Attorney General's
19 ongoing effort to protect consumers from class action settlement abuse, an effort that has
20 produced meaningful settlement improvements.²

23 ¹ The parties do not oppose this filing.

24 ² *See, e.g., Allen v. Similasan Corp.*, No. 13-cv-376, Dkts. 219, 223, 257, 261 (S.D. Cal.) (after
25 Arizona-led coalition filed *amicus* and district court rejected initial settlement, revised deal was
26 reached, increasing class' cash recovery from \$0 to ~\$700,000); *Cowen v. Lenny & Larry's,*
27 *Inc.*, No. 17-cv-01530, Dkts. 94, 110, 117 (N.D. Ill.) (involvement of government officials,
28 including Arizona Attorney General, produced revised settlement that will increase class' cash
recovery from \$350,000 to ~\$900,000).

SUMMARY OF ARGUMENT

The Court should deny preliminary approval of the proposed settlement, which purports to release class members’ claims, and yet is poised to send millions in settlement cash via *cy pres* to third-party organizations that provide no direct class benefit.³

Cy pres class action settlement arrangements have drawn substantial scrutiny because they fail to provide a direct benefit to class members. Justice Thomas noted recently that these arrangements fail to satisfy Rule 23 in three respects: (1) class members’ interests are not adequately represented when named plaintiffs and class counsel obtain no relief for the class, while simultaneously securing benefits for themselves and *cy pres* charities; (2) a settlement releasing class members’ claims is unfair and unreasonable when there is no direct class benefit; and (3) a class action may not be a proper vehicle to fairly and efficiently adjudicate a matter when the class action extinguishes class members’ claims without providing any direct benefit. *Frank v. Gaos*, 139 S.Ct. 1041 (2019) (Thomas, J., dissenting).⁴ The proposed settlement here is just the type of *cy pres* settlement that has drawn judicial criticism. Class members may only receive a fraction of the settlement cash, while the *cy pres* recipients could receive as much as ~\$7 million, even though these *cy pres* payments provide no direct benefit to class members. The Court should therefore deny preliminary approval and send the parties to renegotiate an arrangement that properly directs the ultimate settlement proceeds into the hands of the class members.

³ The Attorney General submits this brief only as to the settlement approval question and *cy pres*; the Attorney General takes no position on the underlying merits and this submission is made without prejudice to any State’s ability to enforce its consumer protection laws or otherwise investigate claims related to the issues here in dispute.

⁴ While *Frank v. Gaos* was decided on standing, without a decision on the available contours of class action settlement *cy pres*, there is a pending petition for certiorari out of the Ninth Circuit that presents the same core *cy pres* questions to the Supreme Court without standing concerns, a petition which has support from a bipartisan coalition of sixteen state Attorneys General, has generated a call for response from the Court, and which is now set to be conferenced in June. See *Perryman v. Romero et al.*, No. 18-1074.

1
2 **ARGUMENT**

3 **I. THE COURT SHOULD DENY PRELIMINARY APPROVAL AND SEND THE**
4 **PARTIES TO RENEGOTIATE AND ENSURE AN ADEQUATE DIRECT**
5 **BENEFIT**

6 **A. *Cy Pres* Diverts Compensation From The Class Members To Whom It**
7 **Belongs, Who Are Already Disadvantaged In The Class Action Settlement**
8 **Context**

9 The use of *cy pres* in class action settlements does not provide a direct benefit to the class
10 and instead diverts compensation from class members. Yet directing settlement funds to class
11 members wherever feasible is important. Since class members extinguish their claims in
12 exchange for settlement funds, those “settlement funds are the property of the class[.]” *In re*
13 *BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf*
14 *Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (“[S]ettlement-fund proceeds, having
15 been generated by the value of the class members’ claims, belong solely to the class
16 members.”); American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07,
17 cmt. b (2018) (“funds generated through the aggregate prosecution of divisible claims are
18 presumptively the property of the class members”).

19 *Cy pres’s* diversion of settlement funds away from consumers is particularly concerning
20 because consumers already face disadvantages in the class action settlement process. Most
21 notably, in dividing settlement funds that are obtained via the release of class members’ claims,
22 the interests of class members and others often diverge. Class counsel has an incentive to obtain
23 a large fee, causing potential conflicts with the class. *See, e.g., In re HP Inkjet Printer Litig.*,
24 716 F.3d 1173, 1178 (9th Cir. 2013) (“interests of class members and class counsel nearly
25 always diverge”); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) (“class
26 actions are rife with potential conflicts of interest between class counsel and class members”).
27 And Defendants are not incentivized to correct this conflict. “[A] defendant who has settled a
28 class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned
between the plaintiff’s attorney and the class.” William D. Henderson, *Clear Sailing*

1 *Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 820
2 (2003). The fee and class award “represent a package deal,” *Johnston v. Comerica Mortg.*
3 *Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant ““interested only in the bottom line:
4 how much the settlement will cost him.”” *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712
5 (7th Cir. 2015).

6 *Cy pres* settlement arrangements further the existing “conflict of interest between class
7 counsel and their clients because the inclusion of a *cy pres* distribution may increase a
8 settlement fund, and with it attorneys’ fees, without increasing the direct benefit to the class.” *In*
9 *re Baby Prods.*, 708 F.3d at 173. *See also Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir.
10 2012) (Kleinfeld, J. dissenting) (noting “incentive for collusion” in *cy pres* class settlements;
11 “the larger the *cy pres* award, the easier it is to justify a larger attorneys’ fees award.”). And
12 defendants may prefer *cy pres* as opposed to direct relief to the class. *See, e.g., Lane*, 696 F.3d
13 at 834 (9th Cir. 2012) (Kleinfeld, J. dissenting) (“A defendant may prefer a *cy pres* award ... for
14 the public relations benefit”).

15 It is no surprise then that *cy pres* arrangements ““have been controversial in the courts of
16 appeals.”” *In re BankAmerica*, 775 F.3d at 1063. “The opportunities for abuse have been
17 repeatedly noted.” *Klier*, 658 F.3d at 480 (Jones, J., concurring). And circuit judges have
18 explained that, “[w]hatever the superficial appeal of *cy pres* in the class action context may have
19 been, the reality of the practice has undermined it.” *Id.* at 481. Indeed, as Justice Thomas
20 recently explained, “[w]hatever role *cy pres* may permissibly play in disposing of unclaimed or
21 undistributable class funds, *cy pres* payments are not a form of relief to the absent class
22 members and should not be treated as such (including when calculating attorney's fees).” *Gaos*,
23 139 S.Ct. at 1047 (2019) (Thomas, J., dissenting).

24 **B. The Named *Cy Pres* Recipients Here Do Not Provide A Direct Class Benefit,**
25 **Meaning The Settlement Fails Under Rule 23(E)**

26 None of the four *cy pres* recipients provides a direct benefit to class members. The four
27 recipients are: (1) the Florence Immigration & Refugee Rights Project (the “Florence Project”)

1 (to receive forty percent of fund)⁵; (2) the Northwest Immigrant Rights Project (the “Northwest
 2 Project”) (to receive forty percent of fund)⁶; (3) the National Immigrant Justice Center (the
 3 “NIJC”) (to receive ten percent of fund)⁷; and (4) TheDream.US (to receive ten percent of
 4 fund).⁸ Dkt. 33 at 4. The recipient organizations are aimed at immigration generally, but there
 5 appears to be no connection between the claims in this case and what the organizations aim to
 6 combat. Much of the Florence Project’s resources go to assisting children, yet the class
 7 members are adults. The Northwest Project assists individuals in Washington State, yet the
 8 class is comprised of mainly Arizona residents (there appears to be only one Washington
 9 resident). Dkt. 1 at 4. Similarly, the NIJC and Dream.US, which focus on general immigration
 10 reform and provide assistance to DACA recipients, do not engage in activities that directly
 11 benefit class members.⁹

12 The amounts allocated to these *cy pres* organizations do not provide a direct class benefit
 13 and cannot be treated as providing fair, adequate, and reasonable compensation to the class or
 14 considered when awarding attorneys’ fees as outlined in Rule 23. *See* Brief of Attorney General
 15 of Arizona et al., *Frank v. Gaos*, No. 17-961 (U.S., July 16, 2018).

16 * * *

17 The overwhelming reliance on *cy pres* here makes this a fatally flawed settlement that
 18 should not be preliminarily approved. A settlement where the majority of the settlement fund
 19 will ultimately be distributed *cy pres*, and the vast majority of class members release a sweeping
 20 array of claims but receive no direct benefit, cannot be considered fair, adequate, or reasonable
 21

22 ⁵ *See* FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, <https://firrp.org/>.

23 ⁶ NORTHWEST IMMIGRANT RIGHTS PROJECT, <https://www.nwirp.org/about-nwirp/our-impact/>.

24 ⁷ NATIONAL IMMIGRANT JUSTICE CENTER, <https://www.immigrantjustice.org/about-heartland-alliances-national-immigrant-justice-center>.

25 ⁸ THEDREAM.US, <https://www.thedream.us/>.

26 ⁹ DACA refers to certain individuals who entered the United States as children and who can
 27 request deferment of removal by meeting certain guidelines. *See*
 28 <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>.

1 under Rule 23. The Court has rightfully flagged this *cy pres* problem as an issue that needs to be
2 addressed prior to preliminary approval. Dkt. 39 at 3-4. The Court should follow-up on these
3 concerns, deny preliminary approval, and send the parties back to ensure a division of settlement
4 funds that properly directs the eventual settlement proceeds into the hands of the class members.

5 **CONCLUSION**

6 The Court should deny preliminary approval to the proposed settlement.

7
8 RESPECTFULLY SUBMITTED this 24th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ Dana R. Vogel
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