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2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 RACHEL HOCHSTETLER, et al.,

6 Plaintiffs,

7 v.

8 PACIFIC GATEWAY CONCESSIONS
9 LLC,

10 Defendant.

Case No. 14-cv-04748-TEH

**ORDER AMENDING SETTLEMENT
AGREEMENT RE: CY PRES
RECIPIENT**

11 On June 7, 2016, the Court granted the parties' motions for Final Approval of Class
12 Action Settlement, for Award of Attorney's Fees and Costs, and for Incentive Payments.
13 ECF No. 57. In granting the motions, the Court ordered: "[i]f any residual funds from the
14 Settlement Fund remain after payments are made to the settlement Class members through
15 the distribution of [Pacific Gateway Concession ("PGC")] Gift Cards, any and all such
16 residual funds will be distributed to Consumers Union of the United States." Id. ¶ 18. The
17 parties' Joint Settlement Agreement ("Settlement Agreement") clarifies that all residual
18 funds are to be paid "in the form of PGC Gift Cards." ECF No. 37-1 at 3. Additionally,
19 the Court "retain[ed] continuing jurisdiction to interpret, implement, and enforce the
20 Settlement, and all orders and judgment entered in connection therewith." Id. ¶ 20.
21 Pursuant to the Settlement Agreement, seven gift cards were distributed to class members
22 with valid claims and Consumers Union received a cy pres distribution of \$793,000 in the
23 form of 7,993 gift cards worth \$100 each. See ECF No. 59.

24 In March 2017, the Court received the first of several letters from Consumers Union
25 reporting problems with the redemption of the gift cards. See ECF No. 58. In particular,
26 Consumers Union called the twenty-nine PGC stores listed in the class action settlement
27 only to find out that most stores would not accept the gift cards. Id. Consequently, the
28 Court issued an Order on April 5, 2017 directing PGC to submit a declaration attesting to

1 PGC’s efforts in ensuring the full and complete resolution of this problem. ECF No. 60.
2 In response, Defendant filed three declarations affirming that PGC had taken several steps
3 to resolve the problem, including holding a conference call with general managers, posting
4 PGC’s written policy regarding the use of Gift Cards at Included Stores, and establishing a
5 toll-free number for the purpose of addressing questions or concerns regarding PGC’s gift
6 cards. ECF Nos. 61–63. Despite these efforts, the problem was not remedied, which
7 prompted another letter from Consumers Union alleging the same problem. See ECF No.
8 65. Again, the Court ordered PGC to resolve the problem. See ECF No. 67. PGC
9 responded by “obtain[ing] written acknowledgements from every store clerk at all
10 Included Stores that the clerks understand and will abide by the gift card policy.” See ECF
11 No. 69, ¶ 3. Shortly thereafter, Consumers Union asserted the cy pres award from the
12 Settlement Agreement “provide[d] little value to consumers” and that despite PGC’s
13 efforts to address prior difficulties with the gift cards redeemability, “the settlement award
14 is fundamentally flawed.” ECF No. 73. Thus, Consumers Union stated it could not
15 participate in the cy pres award in its current form while conceding it lacked standing in
16 the case. *Id.* The Court scheduled a status conference for July 24, 2017, asking the parties
17 to come prepared to “address how the Court can properly enforce the Settlement
18 Agreement’s cy pres award and what changes to the cy pres award, if any, are needed.”
19 ECF No. 74.

20 At the status conference, the Parties proposed substituting Legal Assistance for
21 Seniors¹ in the place of Consumers Union as the cy pres recipient. See ECF No. 79.
22 However, in light of a potential solution proposed by PGC’s counsel involving the
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24 ¹ Legal Assistance for Seniors is a non-profit organization headquartered in Oakland,
25 California that protects the legal rights of seniors by providing litigation representation for
26 seniors who are victims of financial elder abuse, providing advocacy services on behalf of
27 seniors regarding financial and consumer matters, and providing counseling and
28 community education services to seniors to protect them from potential consumer fraud
and identify theft. ECF No. 82. In light of the fact that the Ninth Circuit has determined
that the Fair and Accurate Credit Transactions Act was enacted “[i]n an effort to combat
identify theft,” *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 717 (9th Cir. 2010), the
Court finds this organization is an appropriate cy pres beneficiary under *Nachshin v. AOL,*
LLC, 663 F.3d 1034 (9th Cir. 2011).

1 redemption of the gift cards at PGC’s warehouse, see ECF No. 80, the Court ordered the
2 parties to meet and confer to attempt to resolve their dispute regarding the cy pres award.
3 See ECF No. 81. At the most recent status conference on July 31, 2017, see ECF No. 83,
4 the Court was informed that the parties were at an impasse. During the conference,
5 Consumers Union unambiguously conveyed it did not want any part of the cy pres award
6 in its current form of gift cards, but would like to receive a cash award instead. *Id.* While
7 the Court is cognizant of the downsides to gift card settlements, especially for an
8 organization like Consumers Union, the Court has no authority to rewrite the parties’
9 Settlement Agreement. *San Francisco NAACP v. San Francisco Unified School Dist.*, 59
10 F. Supp. 2d 1021, 1037 (N.D. Cal. 1999) (“[The] Court cannot rewrite the settlement
11 agreement. It cannot delete, modify, or substitute certain provisions in favor of provisions
12 that the Court would prefer.”) (citation omitted). This is especially true where the Court
13 has previously approved the Settlement Agreement and where the parties have acted in
14 reliance on it. Thus, while the Court is left with misgivings as to the format of the cy pres
15 award, the Court is left with no choice but to adopt the parties’ agreement to substitute
16 Legal Assistance for Seniors as the cy pres recipient. Accordingly, it is **HEREBY**
17 **ORDERED** that Consumers Union be replaced by Legal Assistance for Seniors as the cy
18 pres recipient in the parties’ Settlement Agreement. PGC is instructed to coordinate with
19 Consumers Union to obtain the gift cards and to deliver them to Legal Assistance for
20 Seniors no later than August 15, 2017.

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IT IS SO ORDERED.

Dated: 8/1/2017



THELTON E. HENDERSON
United States District Judge