NO. 16-56307

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE EASYSAVER REWARDS LITIGATION

Bradley Berentson, Gina Bailey, Grant Jenkins, Josue Romero,
Christopher Dickey, Daniel Cox, Jennifer Lawler, and Jonathan Walter,
Plaintiffs-Appellees,

Brian Perryman,
Objector-Appellant,

v.

Provide Commerce, Inc.; Encore Marketing International, Inc.; and
Regent Group, Inc.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California, No. 3:09-cv-2094 BAS-WVG

Reply Brief of Appellant Brian Perryman

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Introduction

$8.85 million in attorneys' fees.

Slightly less than $3 million *cy pres* to local San Diego universities.

$225,000 for 3,000 class members, with the remaining 1,300,000 class members receiving no cash.

These numbers are undisputed. And they are embarrassing enough that they are entirely omitted from the plaintiffs' brief (even as plaintiffs falsely claim the class received "complete" relief) and only in a footnote in Provide's brief. DB15n.5.[1]

It is also undisputed that each of these ratios run afoul of many appellate decisions such as, for example, *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014). Neither appellee even mentions *Pearson*, much less argues that it is wrong or explains why this Court should split with the Seventh Circuit.

These ratios also run afoul of *Allen v. Bedolla*, 787 F.3d 1218 (9th Cir. 2015). Plaintiffs fail to mention the case at all, much less explain why it does not require reversal. Provide relegates it to a footnote, explaining that *Allen* doesn't control because the *Allen* settlement ***also*** had injunctive relief in addition to its disproportionate ratio. DB35n.10.

Another question is whether "$20 Credits" given to each class member are equivalent to $20 of cash, or whether they are "coupons." Appellees contend that, though the Credits expire in a year, are not good on major holidays, can only be used

[1] OB, PB, DB, and NLADAB refer to the Opening, Plaintiffs', Defendants', and NLADA Amicus Briefs respectively.

at a retailer of a limited range of products, and are called "coupons" in regular English communication, they are not "coupons" under *In re Online DVD Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015). Perryman presented a chart that documented nine dimensions along which the Walmart gift cards in *Online DVD* were materially superior to the EasySaver coupons. OB28-29. No appellate decision has applied *Online DVD*'s limited exception to a coupon that has any of these nine failings, much less all nine. Again, appellees do not cite the chart in their briefs and do not present a counter-chart. (Provide makes the *ipse dixit* assertion that the "comparisons" are "inappropriate" while ignoring the majority of them and adding *non sequitur* comparisons of their own. DB38.) Appellees' argument does not pass the "straight-face" test, as mentioned in the law-review article cited by Perryman—which, again, is entirely ignored by appellees. OB19-20.

Perryman appealed the denial of discovery, and noted that his offer of proof demonstrated the abusiveness of the settlement. OB41-43; OB16-17; ER140-42. Appellees failed to respond to this or even mention, much less challenge, the offer of proof; they further fail to cite any authority or make any argument supporting the district court's unreasoned decision. They have waived any argument that there was not reversible error on this independent question.

Instead, as addressed below, appellees engage in an unfortunate variety of arguments against strawmen and misstatements of the law and fact. The settlement approval was legally erroneous on multiple grounds, and should be reversed.

Argument

I. Appellees misstate the standard of review.

Appellees argue *Online DVD* requires "extremely limited" review. PB19; DB25. But *Online DVD* involved a settlement after a litigation class was certified, and specifically distinguished the settlement there from the "heightened scrutiny" necessary when dealing with a settlement-only class like that here. 779 F.3d at 944 n.6; OB26 (*quoting Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012)); *id.* at 864; *Allen,* 787 F.3d at 1223; *see generally Pearson*, 772 F.3d at 787 (explaining why limited review inappropriate). In any event, even limited review would not excuse the errors of law committed by the district court here.

Plaintiffs, citing *Chin v. United States*, 57 F.3d 722, 725 (9th Cir. 1995), claim that the question of whether an instrument is a coupon requires deferential review. PB37-38. This is wrong. Just because there is no definition of "coupon" in §1712 does not mean the question is left to the district court's discretion. *E.g., In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181 (9th Cir. 2013) ("attributable to" in §1712). Whether or not a word is part of a statutory definition section, this court reviews a statutory interpretation *de novo*. OB2.

Even if, somehow, the question of the definition of "coupon" were "mixed," *Chin* does not require deferential review in this case. "Where a case turns on a mixed question of law and fact and, as here, the only disputes relate to the legal significance of undisputed facts, the controversy collapses into a question of law." *Blue Lake Rancheria v. United States,* 653 F.3d 1112, 1115 (9th Cir. 2011) (citing *Chin*). There are

other reasons why this particular issue should require *de novo* review. "Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller v. Fenton*, 474 U.S. 104, 114 (1985) ("voluntariness" of confession given plenary review). "A policy of sweeping deference would permit, in the absence of any significant difference in the facts," the classification of identical coupons to turn on whether different trial judges draw different conclusions, and "such varied results would be inconsistent with the idea of a unitary system of law." *Ornelas v. United States*, 517 U.S. 690, 697 (1996) ("probable cause" reviewed *de novo*) (cleaned up). This is more than hypothetical here where the district court's opinion contradicts *Davis v. Cole Haan, Inc.*, 2015 WL 7015328 (N.D. Cal. Nov. 12, 2015), involving the same class counsel, but coupons that did not have blackout dates.

Similarly, questions "of legal analysis and statutory interpretation that figure in the district court's attorney's fee decision are reviewed *de novo*." *K.C. v. Torlakson*, 762 F.3d 963, 966 (9th Cir. 2014); *compare* OB3 *with* DB25.

Provide argues that the arm's-length negotiations require a presumption of fairness, DB27, but fails to address Perryman's argument that arm's-length negotiations are irrelevant to the allocational fairness of a settlement. OB22; *see also In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011). The eight-factor *Churchill*

Village test Provide emphasizes at length (DB26-28) is simply irrelevant to the objection Perryman raises. OB26.

II. The failure of the district court to either permit discovery or inquire into readily available information about settlement value was by itself reversible error.

Perryman's offer of proof below, which was not disputed, was that discovery of information in the parties' possession—answers to simple targeted interrogatories, not fishing-expedition document or deposition discovery—would reveal that the settlement coupons would have an ultimate redemption value of less than $2 million, and, of those redeemed at all, would overwhelmingly be used as discounts worth less than $20. ER140-42. Nevertheless, the district court denied discovery without explanation. ER229. This was error, and the appellees provide no explanation of their own, much less cite any authority, to defend the decision.

In particular, Perryman argued below and on appeal that this settlement provided coupons functionally identical to the rubber-stamped class-action settlement with the same class counsel, one of the same class representatives, and an overlapping defendant in *Cox v. Clarus*—yet the district court performed no inquiry into the redemption rate of those long-expired coupons. OB41-43. Remarkably, neither appellee brief mentions *Cox*: not to defend the district court's refusal to consider *Cox*, not to dispute that the result in *Cox* is highly probative, not to distinguish *Cox* from this settlement, nor to argue that the undisclosed result in *Cox* proves the fairness of this settlement.

None of the appellees mention, much less challenge, the offer of proof.

These waivers alone require reversal. This Court and the Federal Rules anticipate objector discovery in "appropriate cases." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). "[A]dditional discovery would not have been fruitless, and the district court therefore abused its discretion in refusing to permit it." *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004) (reversing summary judgment). No appellee discusses *Mercury* or contends that discovery is not "appropriate" here. Any delay caused by requiring defendants to answer a single set of interrogatories certainly cannot be a reason: Perryman submitted the discovery request on May 4, 2015 (ER236-38), and made an offer of proof on July 2, 2015 (ER140-42), but the district court did not conduct a fairness hearing until over a year later, July 27, 2016 (ER41-99). No one below or on appeal contends the discovery was unduly burdensome or sought irrelevant information.

Perryman should not even have had to demand discovery: this Court puts the burden on the district court to affirmatively make inquiries into settlement value, and the district court had the obligation to do so once Perryman raised the issue. *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079-80 (9th Cir. 2017) (citing *In re Dry Max Pampers Litig.*, 724 F.3d 713, 719 (6th Cir. 2013)). This failure to be "particularly vigilant" should by itself be reversible error. *Dennis*, 697 F.3d at 864; *Pampers*, 724 F.3d at 718. Provide mentions *Koby* and *Pampers* only to distinguish them on grounds and issues irrelevant to the duty of settlement valuation inquiry. DB52; DB36. Plaintiffs argue *Pampers* is not binding, but do not even mention *Koby* at all, much less *Koby*'s adoption of the *Pampers* rule in the context of valueless injunctive relief. PB46. That *Pampers* involved a

particularly bad settlement (*id.*) has nothing to do with the principle that district courts have a duty to inquire into settlement value.

Provide does contend that the redemption rate of the coupons only matters to attorneys' fees, not settlement approval. DB42. This is incorrect. Redemption rates are the measure of "economic reality" which this Court requires district courts to consider in determining settlement fairness. *Allen*, 787 F.3d at 1224. Provide asserts *Allen* is distinguishable because *Allen* involved "unclaimed funds [that] reverted to the defendant." DB35. One admires the argument's *chutzpah*: coupons' major failing is that, if $25.5 million of $26 million face-value of coupons expire unused, as is likely here, the defendant is really giving the class $0.5 million, not $26 million—something economically indistinguishable from reversion to the defendant.

Provide does assert that Perryman provides no authority for discounting the value of the coupons more than 50%. PB44 Perhaps Provide meant that as an argument that the lack of discovery was harmless error. But Provide is wrong. OB39-40 & n.5. In particular, *Davis* issued $20 and 30%-off vouchers that could be used at Cole Haan Clothing stores without blackout dates—*i.e.,* coupons *superior* to the ones here. Only 336 coupons were used, a redemption rate of 2.4%. 2015 WL 7015328 at *2. Provide's assertion that Perryman's "1-3% valuation is only appropriate" for low-value coupons (DB42) is thus false: the average coupon value in *Davis* was over five times the $20 Credit here—more if one appropriately discounts the $20 Credit to reflect non-stackability opportunity cost. OB30-31. (Also, Provide misquotes Perryman's brief. The 1-3% redemption rate is "typical"; "low-value coupons" have much *lower* redemption

rates. OB39-40.) The settling parties' resistance to proving their case should have implied an adverse inference. The appropriate valuation of the coupons was no more than 1-3% of face value in the absence of contrary evidence. That would suggest a coupon valuation between $260,000 and $780,000, not $26,000,000. Combined with pecuniary relief of only $225,000, class counsel would be receiving between eight and eighteen times as much as the class. No appellee contends it is legal in this Circuit for class counsel to negotiate to collect ten times as much as the class when the class is compromising its claims; that disproportion dooms settlement approval as a matter of law. OB45 (citing cases).

The Court, however, need not reach this issue if, as it should, it holds that the "$20 credits" are §1712 coupons as a matter of law.

III. The district court's failure to correctly value the coupons led to reversible error of approving the settlement and attorney award.

A. The "$20 Credits" are "coupons" as a matter of law. *Online DVD*'s narrow exception does not permit treating the "credits" as anything other than coupons.

What ultimately mattered in *Online DVD* was not that Walmart gift cards could be used to purchase whole products—because the ability to purchase "one of many different types" of whole products is only "*part* of what separates a Walmart gift card from a coupon." 779 F.3d at 952 (emphasis added).[2] Nor did it matter that the gift

[2] *Compare also* OB33-34 (citing CAFA legislative history of examples of whole-product coupons targeted by statute) *with* PB36 (falsely asserting Perryman

cards were "gift cards"—because some gift cards may be coupons. *Id.* What mattered was that the Walmart gift cards were close to indistinguishable from cash given (a) they never expired; (b) the unique combination of a "giant, low-cost retailer" "with many different *types* of products"[3]; and (c) where any class member who wished to do so could choose to receive cash *instead* of a coupon. *Id.* at 950-52 (emphasis added). *None* of those idiosyncratic facts in *Online DVD* are present here. Instead, everything about the "credits" shows that these are coupons.

1. There is no dispute that the "credits" are not "subject to the same types of regulations that are applicable to gift cards," a fact critically important in *Online DVD*; because of the regulatory scheme, "gift cards are a fundamentally distinct concept in American life from coupons." 779 F.3d at 952; *Davis,* 2015 WL 7015328 at *4 (rejecting *Online DVD* exception for $20 vouchers). Being "like" gift cards rather than coupons,

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"conspicuously omits discussion of the types of coupon settlements that Congress sought to address").

[3] It is thus not sufficient for a "whole purchase" to bring a coupon within *Online DVD*'s exception, but, as even Provide admits, the $20 Credits do not permit a whole purchase to be made given Provide's extensive service charges and taxes. OB35; DB34. Plaintiffs assert the district court considered the shipping issue (PB43); this is unsupported by their record cites; none of the district court opinions mention shipping. Plaintiffs assert for the first time on appeal that the *Online DVD* gift cards also don't cover shipping expense, PB44, but that's not true: Walmart provides free in-store pickup. Walmart website, https://www.walmart.com/cp/1231919 (last accessed August 13, 2017). Plaintiffs protest that defendants spend money on their actual shipping charges. PB44-45. But nothing in §1712 makes defendants' costs relevant to the definition of a "coupon." A $1,000 coupon on a $90,000 Tesla doesn't cease to be a coupon even if Tesla is selling its vehicles at a loss.

as Provide contends (DB34-35), is not only a false dichotomy, but beside the point, because actually *being* gift cards is necessary but not sufficient for the *Online DVD* exception. 779 F.3d at 952.

2. There is no dispute that the "credits" expire. No appellate court has held that an expiring non-cash instrument is not a "coupon."

3. No appellate court has ever held that a coupon with blackout dates is exempt from CAFA. Appellees brazenly assert, without any record evidence, that the blackout dates benefit the class. PB39-40; DB37-38. But plaintiffs fail to keep their story straight, and boast about how hard they negotiated to limit the blackout dates. PB39n.11. If blackout dates are good, why negotiate to reduce them rather than expand them? Plaintiffs' claim that there's no evidence class members would prefer using coupons on blackout dates (PB39) is refuted by Provide's acknowledgment that the blackout dates are "peak periods." DB37-38.

The obvious point: the blackout dates were designed both to reduce the likelihood coupons would be used and to act as "promotional coupons to purchase more" on other days when demand would be lower, exactly the sort of thing appellees admit CAFA was aimed at. PB32-33; DB30. As in *Pearson,* "Class counsel also benefited from minimization of the claims, because the fewer the claims, the more money [defendants] would be willing to give class counsel to induce settlement." 772 F.3d at 783.

4. The *EasySaver* coupons are not "stackable": they cannot be used in combination with other coupons, substantially reducing their value. OB30-31. For some

reason, appellees both state that Perryman's claim is "false" or "flat-out wrong." PB10; PB39-40; DB38. Nope. As the Settlement states, the coupon is "not combinable with discount or gift codes [and] cannot be used with hyperlink or URL based offers." ER364 (cited by OB11). That the coupons can be used on marked-down products is irrelevant: the issue is the undisputed fact, ignored by the district court, that freely-available 20%-off coupons (or free-vase coupons, ER204) substantially reduce the value of the "$20 credits" to most class members that use them. OB30-31; ER135-37. No appellate court has held that non-stackable instruments are not "coupons."

5. Provide protests that the freely-available 20%-off coupons are "different." DB38. So what? Perryman's brief was discussing the undisputed evidence that there existed not just 20%-off coupons, but also $20 coupons like the "$20 Credits," but with fewer restrictions, and freely available on Ebay for less than $3 (and were called "coupons" on Ebay to boot). OB11-12; OB30; ER139-40. No appellate court has taken the economically and legally absurd position that coupons called "coupons" freely available at gigantic discounts in the secondary market are not "coupons."

6. No one disputes or even addresses that the Provide coupons are not "crackable" (OB11), like Walmart gift cards, nor does anyone cite any authority that non-crackable instruments are not "coupons."

7. No one disputes that the Provide coupons cannot purchase non-expiring gift cards, like the Walmart gift cards could. (Thus, Provide's argument that the "$20 Credits" are superior because they are resalable (DB38) is false: there is no dispute the Walmart gift card could be used to buy a resalable gift card; it was treated by *Online*

DVD as "freely transferrable." 779 F.3d at 951 & n.9. In any event, plaintiffs concede Perryman's argument that there is "a lack of a secondary market" making the resale value near-worthless. PB47; OB30.)

8. Every $12 *Online DVD* gift card was deliberately chosen by a class member *instead of* a $12 cash option. 779 F.3d at 941, 952. Thus every *Online DVD* class member receiving a coupon had a revealed preference that they wanted the coupon *instead of* cash. Not a single *EasySaver* class member had the option of asking for an additional $20 in cash instead of coupon compensation. Appellees and the district court argue that the *EasySaver* coupons were better than Walmart gift cards because a claimant could also request cash. PB16; DB31; ER5; ER22-24. This confuses the inquiry and has absolutely nothing to do with a coupon's value. A coupon either has value to a class member or it does not. Paying 0.2% of the class cash in addition to giving the entire class a worthless coupon does not make the coupon any less worthless. All it means is that class counsel can receive credit for the $225,000 cash that they won for the class. *See* §III.B below. In contrast, if a class member has a choice between coupon and cash of equal value and equal ease of claiming, it is evidence that class members receiving coupons prefer the coupon to the cash, and can arguably be used to determine the settlement value of the coupon. Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMP. PROBS. 97, 123 (1997) (discussing benefit of "cash-out" provision). The district court's confusion makes it finding that this settlement was "stronger" than *Online DVD*'s (ER5) wrong as a matter of both law and common

sense—especially since the district court erroneously valued the coupons at face value.[4] No appellate court has held that an instrument sent to a class member who did not have a "cash-out" option was not a coupon.

But, appellees argue, the class members had originally requested "$15 Gift Codes" and this shows that they wanted these supposedly "specifically tailored" coupons! PB34; DB33. This is irrelevant: as Perryman argued, coupons awarded for the "benefit of the bargain" don't cease to be coupons under §1712. OB38 (citing cases). Appellees cite no contrary authority.

Moreover, there is no record evidence that the $15 Gift Codes class members requested had the harsh limitations of the $20 Credits like expiration or blackout dates or non-stackability. OB38-39; ER417; ER485 (showing no limitation on Gift Code offer). The district court's finding (ER5) that class members "expressed a clear preference for" expiring coupons with blackout dates is thus unsupported by the record

[4] The district court somehow found that this was "unlike any other settlement the Court has been able to find" (ER5), even though *Cox v. Clarus* was essentially identical and presumably had negligible redemption rates for its coupons. *See* Section II, above.

Plaintiffs assert this settlement is better than *Online DVD* because "no portion of the cash fund will revert the defendants." PB35. This misrepresents *Online DVD*, which involved a pure common fund to be divided *pro rata* after payment of fees and expenses with no reversion to the defendant; the $12 payment reflected the number of claimants on the common fund; if attorneys' fees had been reduced, the individual cash payments (and coupons, for those that preferred coupons to cash) would have been larger. 779 F.3d at 941. Here, because the $20 Credits expire, the vast majority of the alleged $38 million settlement benefit will revert to the defendant, while the Walmart gift cards never expire, and unused ones remain a liability to Walmart.

and clearly erroneous, as well as being irrelevant to the §1712 inquiry. Plaintiffs assert that the $20 Credits had "better terms" than the Gift Codes, but their record cite of ER23-24 does not remotely support this proposition. PB11. Furthermore, though Provide claims class members did receive $15 Gift Codes (DB11), it refused to provide evidence of the redemption rates of those Gift Codes (SER302-334); the appropriate adverse inference is that class members didn't even redeem the easier-to-use Gift Codes.

9. No one disputes that there are many thousands of times as many Walmart products available for less than $12 than there are Provide products for less than $20. (Moreover, all of the Provide products under $20 are tchotchke gifts: *e.g.,* a box of discounted flowers or a mug.) No appellate court has held that "15 to 25" products counts as the "many different types of products" discussed by *Online DVD*. 779 F.3d at 952. Plaintiffs assert *Inkjet* coupons could not be used for "whole purchases," PB45, but HP.com sells several cables that are priced less than the $13 in coupons offered to qualifying claiming class members. *Online DVD* distinguished *Inkjet* because HP.com's product range, like Provide's, is narrow. 779 F.3d at 952.

10. No one contends and there is no record evidence that Provide is a "giant, low-cost retailer." No appellate court has applied the *Online DVD* exception to a retailer smaller than Walmart, with its millions of different products.

11. No one disputes that English-language definitions and usage of the word "coupons" encompass the "$20 Credits." OB32-35. Even plaintiffs' complaint called the coupons "coupons," and appellees never try to explain this away. OB9-10. Provide

argues that this is irrelevant because *Online DVD* didn't evaluate contemporary English. DB31. But *Inkjet* did. 716 F.3d at 1181. And the "ordinary meaning" is the proper place to begin where a statutory term is not defined. *E.g., CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 286 (2011); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 556 (9th Cir. 2016). *Online DVD*'s omission is not a command to ignore usage.

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The *EasySaver* coupons are so far afield from the *Online DVD* gift cards that applying the *Online DVD* exception here would abrogate §1712 entirely.

B. Because the settlement "provides for a recovery of coupons to a class member," the district court erred in refusing to apply §1712(a).

Under 28 U.S.C. §1712(a), "If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed."

The settlement here provides for a recovery of coupons to a class member. The district court calculated the attorney-fee award based on a percentage of the face value of the coupons distributed instead of the redemption value. ER6-7, 35-36. QED: reversible error.

The language of §1712(a) never appears in Provide's brief. Instead, Provide argues that "the district court correctly decided that the settlement as a whole was not a coupon settlement within the meaning of CAFA." DB23. The assertion proves the reversible error: there is no statutory classification asking whether a "settlement as a
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whole" is "a coupon settlement." The statutory question is whether the settlement "provides for a recovery of coupons." OB36-37.

Provide similarly asserts that "the settlement differs from those that drew the attention of Congress because as a whole it does not leave the class with 'little or no value.'" DB30. Perryman disputes this: extant evidence shows that the limitations on the coupons leave them unlikely to be redeemed, and thus worthless. OB29-30, 39-43. And as discussed in Section II, Provide improperly failed to make disclosures that would have been dispositive on the question. But this Court need not parse "little or no value," because the words do not appear in §1712. A settlement that "provides for a recovery of coupons" is subject to §1712, whether the coupons are for $20 or for $1,000. *True v. American Honda Mot. Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010).

Plaintiffs argue that "section 1712(a) of CAFA is inapplicable here because it applies to coupon only settlements, not to settlements like this one that provide cash in addition to coupons." PB23. Again, this interpolates language that appears nowhere in the statute. Nothing in §1712(a) limits its application to coupon-only settlements. Indeed, *Inkjet* was a settlement with "injunctive and coupon relief," yet §1712(a) and (c) applied. 716 F.3d at 1186. It would be absurd if settling parties could turn $500,000 worth of redeemed coupons into a $26,000,000 settlement value by throwing in $225,000 of cash to a tiny fraction of class members. Nothing in the statutory language endorses that absurdity.

C. Plaintiffs' false assertion that the district court awarded them lodestar does not save the settlement approval.

Perhaps recognizing that the settlement is indefensible under §1712(a), Plaintiffs defend the fee award as properly awarded on a lodestar basis. PB23-30. Plaintiffs then assert that Perryman has "waived" a challenge to lodestar. PB30-31. This argument is wrong because it is based on two false factual premises: that Perryman is only challenging the fee award and that the district court awarded fees based on lodestar. Both are untrue. Moreover, even if plaintiffs' characterization were correct, the district court would still have committed reversible legal error under Ninth Circuit law.

Perryman has waived nothing, because his objection is not based on a supposedly incorrect lodestar calculation under Rule 23(h), but on the problem of settlement fairness under Rule 23(e). As Perryman noted in his opening brief, the district court erred in characterizing his objection: "Perryman's objection has been, and continues to be, that class attorneys got too much at the expense of class members because of the structuring of the settlement to divert class proceeds to illusory relief instead of to the over 99% of the class that received nothing." OB24. Class counsel simply repeats the district court's error (*e.g.,* PB2), and then bases its entire brief on responding to the strawman instead of to the problem of allocation under Rule 23(e) and *Allen v. Bedolla* and *Koby* and *Pearson*. Remarkably, the plaintiffs' brief never mentions the word "allocation," and never cites *Allen*, *Koby*, or *Pearson*, much less argues that they are

inapplicable here. To the extent there is any appellate waiver, it is plaintiffs who have committed it.[5]

Moreover, the proposition is factually incorrect because the district court explained exactly what it did. "The Court used the common-fund method to calculate the attorneys' fees award," with the lodestar serving merely as a supplemental "crosscheck." ER36, ER7. This makes perfect sense given the litigation history of this case. Both plaintiffs and Perryman requested application of the percentage-of-recovery method, calling it "far preferable to the lodestar method." PSER504. Plaintiffs asked for lodestar to be used only as a "crosscheck." PSER509; ER338. Consistent with class counsel's "clear-sailing" clause (ER362), defendants took no position on fees. The district court did what plaintiffs requested. Having won approval of their fee request on that basis, judicial estoppel prevents plaintiffs from "deliberately changing positions according to the exigencies of the moment" and claiming that the fees were based on

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[5] Defendants similarly argue waiver and argue that Perryman's appeal only addresses fees. DB47. Yet on the same page, defendants expressly quote Perryman's argument that the district court's approval resulted in "a disproportionate share of the recovery in violation of Rule 23(e)"—the provision regarding settlement fairness. *See also* OB25 ("The district court's failure to correctly value the coupons in this settlement led to reversible error of approving the settlement and attorney award."). The district court's failure to apply §1712 implicates settlement approval. 28 U.S.C. §1712(e). For example, the only reversible error *Inkjet* identified was the failure to apply §1712(a) and (c) correctly to the fee award, but it reversed the entire settlement approval, not just the fee award. 716 F.3d at 1175. Perryman expressly asks this Court to apply the *Allen v. Bedolla* Rule 23(e) disproportionality analysis in his Statement of Issues, OB3, but even if he hadn't, any supposed imprecision in the Statement of Issues is not a waiver in this Circuit. *Larez v. Los Angeles*, 946 F.2d 630, 637 (9th Cir. 1991).

lodestar. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Plaintiffs' claim that the district court used lodestar to calculate the fee contradicts the record. *Compare* PB11 (citing ER36) *with* ER36 (applying lodestar as a "cross-check"); ER6-7 (same).

Legally, and most importantly, *Inkjet* is unequivocal: "the language of §1712(a) does exclude the possibility that lodestar fees may be awarded in exchange for coupon relief." 716 F.3d at 1185. *Inkjet* outlines a necessary two-step process that governs the award of fees in settlements that contain both coupon and non-coupon relief. "First, under subsection (a), the court must determine a reasonable contingency fee based on the actual redemption value of the coupons awarded. Second, under subsection (b), the court must determine a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained. This lodestar amount can be further adjusted upwards or downwards using an appropriate multiplier." 716 F.3d at 1184-85.[6]

The court below erred at step one and didn't engage with step two. It erred at step one by using the face value of the coupons awarded rather than waiting for redemption. At step two of the *Inkjet*'s endorsed procedure, a full lodestar calculation entails "adjust[ing] the amount of any fees award to account for the degree of success

[6] *Inkjet* was interpreting subsection (c) for settlements involving coupon and injunctive relief, but there is no reason that subsections (a) and (b) shouldn't apply of their own accord when the settlement involves coupon and monetary relief. Section 1712(a) applies whenever "a class action provides for a recovery of coupons to a class member." It has no exception for the addition of cash to a settlement.

Plaintiffs repeatedly assert that *Inkjet* is distinguishable as a coupon-only settlement. PB23; PB45. Wrong: the *Inkjet* settlement offered both coupons and injunctive relief. 716 F.3d at 1186.

class counsel attained." *Inkjet*, 716 F.3d at 1186 n.18 (citing, *inter alia*, *Bluetooth*, 654 F.3d at 944). A $8.65 million lodestar award reflecting a multiplier of two could never stand when the class only realizes $225,000 from the roughly $3 million available to them and out of what plaintiffs admit were "tens, if not hundreds of millions in damages" to the class. PB7. As a matter of law, "although class counsel's hard work on an action is presumably a necessary condition to obtaining attorney's fees, it is never a sufficient condition." *Inkjet*, 716 F.3d at 1182. "[T]he reasonableness of a fee cannot be assessed in isolation from what it buys." *Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014). "[H]ours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel" *Id.* at 635. "An attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method." *Inkjet*, 716 F.3d at 1182.

Plaintiffs argue for application of Section 1712(b) to their fee award, PB23-24, but their reading of §1712(a) and (b) directly contradict *Inkjet*, which explicitly rejected plaintiffs' argument, which would "render §1712(a) a nullity" and "read §1712(a) completely out of the statute." 716 F.3d at 1180-86.

In short, whether an attorney fee may be reasonable under lodestar has no relevance to whether the attorney fee is improperly disproportionate for purposes of the Rule 23(e) inquiry—even where the fee is *less than* lodestar. *See generally id.* at 1177 (fee award not justified merely because it was less than one third of the base lodestar); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 n.14 (3d Cir. 2013) (lodestar multiplier of 0.37 not "outcome determinative"); *Redman,* 768 F.3d at 635. In "economic

reality" the 25% benchmark in this Circuit would support only $75,000 in fees. *Allen*, 787 F.3d at 1224 & n.4.

Plaintiffs cannot save the improper settlement approval by rewriting history to claim that the district court awarded fees based on lodestar. And even if the district court had awarded fees based on lodestar, the disproportion between the double-lodestar awarded class counsel and the tiny fraction of that amount awarded the class would still require reversal under Rule 23(e) and Ninth Circuit law.

IV. *Boeing* says nothing about Rule 23(e) allocative fairness.

Plaintiffs assert that *Boeing v. Van Gemert*, 444 U.S. 472 (1980), "held that the entire benefit is what is relevant to determining fairness," and Provide makes a similar argument. PB47; DB32. This is simply false. *Boeing* was a fee dispute between class counsel and a defendant after a *litigated judgment*. 444 U.S. at 476 n.4. *Boeing* has nothing to do with adjudicating a Rule 23(e) objection that a settlement is unfairly slanted toward class counsel; nor does it implicate the *Allen* and *Pearson* requirement that compromised settlement value be determined by actual benefit to the class. *Pearson*, 772 F.3d at 782 (explaining why *Boeing* did not require the settlement to be valued at the imaginary "potential recovery" level); *see also Allen*, 787 F.3d at 1224 & n.4 (considering the "economic reality" of actual claims rates; not maximum amounts made available); *Pampers*, 724 F.3d at 721 (rejecting settlement-value "assumptions… premised upon a fictive world").

But even under plaintiffs' erroneous view of *Boeing*, plaintiffs are mathematically wrong to assert that they made complete recovery available to every class member.[7] There were 1,300,000 class members, and only about $3 million in the net-cash settlement fund. If every class member had improbably made a claim on the fund, that would be less than $3 per class member, less than 4% of the pecuniary recovery—and even without *pro rata* reduction, class members are waiving for $0 their rights to multiple damages claims alleged by plaintiffs. OB53. The 3:1 ratio of attorneys' fees to "potential class recovery" is still upside-down and precludes settlement approval.

The low take rate that led to only $225,000 in class claims was not a surprise, but rather a foreseeable and inevitable result of the settlement's structure. *E.g., Pearson*, 772 F.3d at 782; *In re Carrier iQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016); ER72; ER97; ER339 (anticipating that structure would "leav[e] the class with scraps"). Defendants candidly admit that "there is nothing surprising about the claims rate." DB32. The parties intentionally structured the settlement so that class counsel would receive 40 times as much cash as the class. *Allen* and *Pearson* say that that's not acceptable, notwithstanding *Boeing*. Appellees never mention *Pearson*, much less give any reason to think *Pearson* wrong or meriting a split from the Seventh Circuit.

V. Multiple independent *cy pres* improprieties also require reversal.

Cy pres invites abuse. Though class counsel's fiduciary duty is to the class, if courts treat $1 million of *cy pres* distributions as equivalent to $1 million in distributions to the

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[7] Section 1712 supersedes *Boeing*, of course, so class counsel can't take credit for unredeemed coupons.

class, attorneys will almost always prefer to give money to *cy pres*. It's unlikely any of the 100,000 class members receiving $10 checks will send a thank-you note or a Christmas card, but with *cy pres* distributions, there's networking and gratitude and often photographed ceremonies with oversized checks. Class counsel gets an indirect benefit from the *cy pres* that it does not get from class distribution, and then double-dips with fees on a percentage of that donation to boot. Because of class counsel's ability to throttle the claims process in settlement negotiations to increase unclaimed funds for a *cy pres* recipient, giving them the incentive to do so guarantees reduced class recovery. *Cf. Pearson,* 772 F.3d at 781. Thus, if we care about class counsel's fiduciary duties, we need rules to encourage them to put class members first and *cy pres* as a last resort. *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1064-66 (8th Cir. 2015); *Holtzman v. Turza*, 728 F.3d 682, 689-90 (7th Cir. 2013); *ALI Principles* §3.07. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Products*, 708 F.3d at 174.

The perverse incentive is magnified further if class counsel is allowed to favor hometown charities or charities like an *alma mater* that class counsel has a prior involvement with. Thus, cases like *Nachshin* forbid these sorts of conflict of interest, singling out in particular the practice of giving to an *alma mater*. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039-40 (9th Cir. 2011).

Simply put, none of the arguments of the appellees or NLADA grapple with these fundamental issues of *why* regulation of *cy pres* is needed. Asking courts to rubber-stamp self-serving *cy pres* without considering the systemic effects on class-action

settlements ensures abusive *cy pres* arrangements like we see here. NLADA asks the Court to consider five factors without "tests," but "a consider-everything approach lacks a benchmark; a list of factors without a rule of decision is just a chopped salad." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) (cleaned up). NLADA purports to identify "best practices," but provides no normative reasoning why one court's rule is better than another's. NLADA pushes for expanded *cy pres* because legal-aid societies are good. But the moral worthiness of a third party has nothing to do with their legal entitlement to "monies gathered to settle complex disputes among private parties." *BankAmerica*, 775 F.3d at 1065. That NLADA's collection of factors does not point to an outcome either way in even this clear-cut case demonstrates the problem with their self-serving approach.[8]

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[8] NLADA's brief is further unhelpful in its misstatements of the law. *Compare* NLADAB6 (claiming *Baby Products* affirmed) *with Baby Products*, 708 F.3d 163 (reversing settlement approval); *see also* NLADAB20-21 (falsely characterizing *Nachshin*'s holding as "dicta"). NLADA asks for a "reasonably approximate" standard without acknowledging this would require overturning Ninth Circuit law requiring "next best" *cy pres*. *Compare* NLADAB11-12 *with Dennis*, 697 F.3d at 865. NLADA contradicts itself: it acknowledges comment b is an appropriate standard, but then argues against permitting class members to object on that basis. NLADAB13-14. Finally, NLADA (like appellees) fails to acknowledge or refute *BankAmerica* or *Pearson*, two leading appellate cases Perryman heavily relies upon to show *cy pres* improper here. OB51. The *BankAmerica* omission is especially striking, because NLADA argued in that case, and *BankAmerica* rejected its position.

A. *Lane v. Facebook* does not require approval here.

Appellees insist that *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), permits the abuse exhibited here. PB51; DB55-56. This is wrong. *Lane* has no bearing on a distribution that raises conflicts between *class counsel* and the recipient. The rationale by which the *Lane* court sanctioned the *cy pres* award—that the terms of the settlement are "the offspring of compromise" that "necessarily reflect the interest of **both** parties"—has no application to a distribution that unjustifiably favors non-party class counsel and is geographically isolated. 696 F.3d at 821 (emphasis added). Put simply, the only entities that should be getting concessions in settlement terms are the class itself and the defendant, not class counsel at the expense of the class. Providing non-pecuniary benefits to class counsel—in addition to attorneys' fees based on the size of those self-dealing benefits—is double-dipping, and should be *per se* impermissible. *Lane's* statement about not second-guessing the parties' choice of recipient cannot and should not be read to overrule *Nachshin* and *Dennis*. The three are consistent because *Lane* speaks only to relationships between the defendant and a *cy pres* recipient. Such a relationship makes the relief less valuable to class members, *Dennis*, 697 F.3d at 867-68, but not *per se* improper. There is no reason to extend *Lane* to nullify *Nachshin*, much less create a circuit split with *BankAmerica* and *Pearson*—cases neither appellees nor NLADA mention.

B. *Cy pres* is inappropriate except as a "last resort."

Plaintiffs misrepresent ALI's position on windfalls. PB55. The ALI expressly rejected plaintiffs' argument "that further direct distributions would constitute a

windfall to… class members." *ALI Principles*, §3.07 cmt. b. Plaintiffs argue that it's "better" to give money to class counsel's *alma mater* than to class members, but, by definition, *cy pres* is always at most "next best." A *cy pres* "option arises only if it is not possible to put those funds to their *very best* use: benefitting the class members directly." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *accord BankAmerica*, 775 F.3d at 1065. Plaintiffs offer no response to Perryman's suggestion of getting money to non-claimants who were already identified and sent coupons. In no sense could class members who have received no cash at all be overcompensated. From the perspective of a non-claimant class member, either a supplemental outreach and claims process, or a sampling and direct-distribution process would be far superior to any supposed *cy pres* benefit.

The measure of full compensation is not the agreed-upon amount of the settlement agreement; it is that sought in the complaint. *Id.* At the very least, full compensation should be determined by reference to what the underlying law would permit if the plaintiffs succeeded on their asserted claims. *E.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (reversing district court's failure to recognize the scope of its discretion to award treble damages to antitrust plaintiff class members rather than to third-party charities).[9] A settlement is unfair if it rewards non-

[9] Plaintiffs' cited cases (PB54-55) are distinguishable. *Powell v. Georgia-Pacific Corp.* found that it would be extremely difficult to make further years-later distributions to the class. 119 F.3d 703, 707 (8th Cir. 1997). Here, no one argues that further distributions are difficult, much less infeasible: it is just as easy to distribute a single larger check as a single smaller check. *In re Pharmaceutical Industrial Average Wholesale Price*

party organizations before fully satisfying the class's claims when the latter is feasible. We see why if we imagine this case going to trial. At trial, the court could pronounce that only a restitutionary measure of damages is allowed or find that certain allegations were unproven. But the judge or jury could not issue a verdict awarding a certain sum in damages and then immediately declare a part of that sum payable to an unrelated third-party. *Turza*, 728 F.3d at 689-90.

Perryman's argument is not that punitive damages are necessary to make the settlement fair or for a claim-by-claim accounting of value (PB56); it is that there is no "windfall" to award punitive damages, and *cy pres* is not permissible until the relief requested in the complaint is realized without compromise. *Klier* and *BankAmerica* agree: each rejected the idea that the windfall threshold was dictated by the settling parties decreeing by fiat decree that the class had been fully compensated vis-à-vis "the weakness of plaintiffs' claims here." DB59.

Litigation is inapposite because the parties agreed to treble damage claims before sending the remainder to *cy pres*. 588 F.3d 24, 34 (1st Cir. 2009).

In re Lupron Marketing & Sales Practices Litigation supports Perryman's argument that the measure of full compensation should be divined from the underlying legal framework. 677 F.3d 21, 34 (1st Cir. 2012). Here, however, the district court ignored the complaint for punitive and statutory damages. *Lupron* is also distinguishable because the objectors acceded that the settlement itself was fair, and did not contend "that the selection of the recipients was made on any basis other than the merits." *Id.* at 31, 36-37.

Plaintiffs cite other Ninth Circuit cases (PB56), but none of those have anything to say about "full compensation" or windfall.

As discussed in Section IV, the parties knew the settlement would leave millions of dollars unclaimed. By leaving 99.8% of the class without cash so that millions could instead go to hometown institutions, class counsel failed to make their clients the "foremost beneficiaries" of the settlement, requiring reversal. *Baby Prods.*, 708 F.3d at 179.

C. The *cy pres*'s geographic mismatch is fatal under *Nachshin* and *Koby*.

Yes, *Lupron* did hold that the location of a *cy pres* recipient is not a salient concern. 677 F.3d at 36. But in doing so, it rejected the law of this and the majority of circuits to consider the decision. OB47-48. When the class is "geographically diverse," *Nachshin* and *Koby* require the *cy pres* to be "geographically diverse." Provide's argument that *Nachshin* only cares when a distribution violates "geographic isolation" *and* relatedness (DB51-52) is tendentious. "The cy pres distribution *also* fails to target the plaintiff class, *because* it does not account for the broad geographic distribution of the class." *Nachshin*, 663 F.3d at 1040 (emphasis added).[10] Appellees similarly overstate their readings of *Airline Ticket* and *Houck*. *Compare* DB52 *and* PB53-54 *with Nachshin*, 663 F.3d at 1040 (providing salient quotes from these cases).

That the San Diego universities will supposedly be doing nationally-useful research with the *cy pres* money (PB52-54; DB50-53) is not legally relevant. 28 U.S.C. §1714 prohibits a settlement from discrimination based on geographic location,

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[10] Provide's claim that *Nachshin* doesn't apply to cases where the parties chose *cy pres* (DB55) contradicts *Nachshin*, where the parties chose the *cy pres* recipients.

and the parties are required to spread the money further than their attorneys' and court's hometown. Neither appellee (nor *Lupron* nor NLADA) mentions §1714, and have waived argument against its application here.

Provide essentially admits that homerism of the defendant, law firms, and the court dictated the *cy pres* recipients (DB55), and that should end the inquiry.

D. *Radcliffe* also requires rejection of the *cy pres.*

It is not "extreme" to exclude the *alma maters* of the lead attorneys from consideration, as *Nachshin* implicitly requires; that hardly winnows the universe of potential recipients. Appellees argue that there is no actual conflict of interest in the diversion of *cy pres* to the *alma mater* of lead class counsel, but that ignores that the legal standard prohibits "even the appearance of divided loyalties." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013); OB49-51. Neither appellees nor NLADA mention *Radcliffe*, much less explain why it is not binding here.

VI. The settling parties' table-pounding *ad hominem* attacks are baseless.

Plaintiffs' 15,064-word brief finds no room to mention *BankAmerica*, *Pearson*, *Bluetooth, Allen*, *Koby*, or *Cox*. Yet they have room to repeatedly attempt to smear Perryman's counsel with baseless *ad hominem* innuendo that frequently contradicts the only record evidence. *Compare* PB3; PB12n.6; PB23; PB61 *with* ER297-309; OB20-21. Plaintiffs bemoan a quote that never appears in Perryman's brief and then chastise Perryman for supposedly misrepresenting the law. PB51 (falsely claiming to quote OB37).

Plaintiffs even accuse a bipartisan group of attorneys general of "hold[ing] settlements…hostage." For what ransom? The appellees seemingly assert that the AGs waived the right to participate here by failing to file objections under 28 U.S.C. §1715. PB57-58; DB39. The contention is frivolous. Section 1715 expressly states that it does not "impose any obligations, duties, or responsibilities" on state officials. 28 U.S.C. §1715(f). It's rational for state AGs to prefer to devote scarce resources to opining on an appellate issue that will affect multiple settlements.

The appellees repeatedly complain that Perryman was the only objector. *E.g.*, PB11. But "[a]t the end of the day, it is not the number of Objectors but the quality of their objections that should guide the court's review." *Jones v. Singing River Health Services Found.*, -- F.3d --, 2017 WL 3178624, at *10 (5th Cir. Jul. 27, 2017); *see also Redman*, 768 F.3d at 628.

Plaintiffs' complaint of five-year delay is ironic: it takes two sides to disagree. If the coupons in this case are as valuable as plaintiffs assert, then they could have agreed to have fees treated under §1712(a), changed the abusive *cy pres* to avoid homerism and favoritism to third parties, and then collected the fees they claim they are due when, at the end of the one-year coupon expiration, every single coupon would supposedly be redeemed. It is precisely *because* class counsel knows the coupons are worthless and exceedingly unlikely to be redeemed that class counsel has fought against their putative clients' interest for five years to avoid §1712.

Conclusion

As Professor Erichson reports, this settlement does not pass the straight-face test. Nor does it pass the higher bar imposed by *Koby*, *Allen*, *Nachshin*, *Radcliffe*, *Pearson*, *BankAmerica*, *Redman*, or §1712. Settlement approval must be reversed, and the parties must go back to the drawing table and return with a settlement that does not pay class counsel and inappropriate third-party *cy pres* recipients many times what the class will receive.

Dated: August 14, 2017

Respectfully submitted,

/s/ Theodore H. Frank

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Form 8.

Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2, or 32-4 for Case Number 16-56307

I certify that:

This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).

The brief is 8,399 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and is filed by a party filing a single brief in response to multiple briefs. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Theodore H. Frank Date: August 14, 2017

Proof of Service

I hereby certify that on August 14, 2017, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

Dated: August 14, 2017 *_/s/ Theodore H. Frank_*