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

Opening Brief of Appellant Brian Perryman

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Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Statement of Subject Matter and Appellate Jurisdiction

The district court had federal question jurisdiction under 28 U.S.C. §1331, because the plaintiffs' complaint alleges violations, *inter alia*, of the Electronic Funds Transfer Act, 15 U.S.C. §1693 *et seq.* The district court also had diversity jurisdiction under the Class Action Fairness Act, 28 U.S.C. §1332(d)(2)(A).

The court's initial final order and judgment issued in February 2013. ER10, 16.[1] After a timely appeal, this Court vacated that judgment and remanded. *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) ("*EasySaver I*"). On August 9, 2016, the district court issued a final order, reinstituting its 2013 final order and judgment. ER1. Perryman filed a notice of appeal on September 6, 2016. ER38. This notice is timely under Fed. R. App. P. 4(a)(1)(A).

This court has appellate jurisdiction because this is a timely-filed appeal from a final judgment under 28 U.S.C. §1291. Perryman, as a class-member and objector to settlement approval, has standing to appeal a final approval of a class action settlement. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Statement of the Issues

1. The Class Action Fairness Act ("CAFA") expressly contemplates and sets forth rules for coupon settlements that include relief other than coupons. 28 U.S.C.

[1] "ER" refers to Perryman's Excerpts of Record. "Dkt." refers to the district-court docket in this case.

§1712. The coupons that made up the vast majority of supposed value of the settlement expire in one year; can only be used on a limited number of products; cannot purchase a whole product without paying substantial shipping charges to the defendant; and cannot be used during the seasons of the holidays where class members are most likely to want to use the coupons. Did the district court err as a matter of law in holding that the coupons in this case were not coupons? (Raised at ER328-32, ER275-78, ER114-23; ruled on at ER4-5, 21-24, 37.)

Standard of Review: "[M]atters of statutory interpretation" are questions of law reviewed *de novo*. *E.g., United States v. Havelock,* 664 F.3d 1284, 1289 (9th Cir. 2012) (*en banc*). A district court decision to approve a class action settlement is reviewed for abuse of discretion. *In re Bluetooth Headset Prod. Liab. Lit.*, 654 F.3d 935, 940 (9th Cir. 2011). A failure to apply the correct standard of law is an abuse of discretion. *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015).

2(a). 28 U.S.C. §1712 requires that a court calculating an attorney fee for a "proposed settlement in a class action [that] provides for a recovery of coupons to a class member" to value the coupons "based on the value to class members of the coupons that are redeemed." *Accord In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013) ("*Inkjet*"). Did the district court commit an error of law in awarding $8.85 million in attorneys' fees without determining the "value to class members of the coupons that are redeemed" and ascribing a $20 value to a coupon that was not stackable with already existing discounts? (Raised at ER328-32, 350-55, 276-78, 134-225; ruled on at ER6-8, 21-24, 30-31, 34-37.)

Standard of Review: 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).

2(b). In the alternative, if CAFA does not apply, this Court nevertheless demands that the district court investigate the "economic reality" of the class benefits vis-à-vis the fee award in determining settlement fairness. *Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015). Did the court abuse its discretion by failing to require the settling parties to disclose information relevant to the actual value of the coupon relief, and instead valuing the settlement at the hypothetical maximum $38 million value if 100% of the coupon value is used? (Raised at ER328-32, 350-55, 278, 236-37, 240, 123-24, 129-31; ruled on at ER30-31, 34-37, 229; 6-7.)

3. *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011) and *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071 (9th Cir. 2017) both held that it was error to distribute *cy pres* to local charities on behalf of a national class. *Nachshin* criticized the possibility of conflicts of interest between class counsel and *cy pres* recipients. Did the district court err in approving a *cy pres* component of a settlement involving a national class that favored the alma mater of class counsel, and only distributed funds to local San Diego-area institutions? (Raised at ER332-37, 278-82, 127-29; ruled on at ER25-29, 35-37.)

Standard of Review: Questions of law are reviewed *de novo*. *Ward v. Apple Inc.*, 791 F.3d 1041, 1047 (9th Cir. 2015). A decision to approve a class action settlement

including *cy pres* is reviewed for abuse of discretion. *Nachshin*, 663 F.3d at 1038. A failure to apply the correct standard of law is an abuse of discretion. *Id.*

4(a). Under *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015) and *Pearson v. NBTY Inc.*, 772 F.3d 778 (7th Cir. 2014), *cy pres* may only be employed as a last resort (*i.e.* when it is not feasible to make further distributions to class members). Did the district court err in approving a settlement that allocated over $3 million for *cy pres* but only about $225,000 for class members when it was feasible to distribute additional funds to class members and 99.8% of the class received no money? (Raised at ER335-37, 281-82, 241, 125-27; ruled on at ER25-31, 34-37.)

Standard of Review: Questions of law are reviewed *de novo*. *Ward*, 791 F.3d at 1047. The district court's ruling that additional distributions to the class above $225,000 would be a "windfall" (ER22) is a question of mixed law and fact that is reviewed *de novo*. *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004).

4(b). *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) ("*Baby Products*"), requires a district court to consider the ratio of *cy pres* to actual class recovery when evaluating the fairness of a settlement. Did the district court err in failing to consider that *cy pres* recipients would receive more than ten times as much cash as the class would and class counsel would receive more than forty times as much? (Raised at ER335-37, 281-82, 125; ruled on at ER25-31, 34-37.)

Standard of Review: Questions of law are reviewed *de novo*. *Ward*, 791 F.3d at 1047. A decision to approve a class action settlement is reviewed for abuse of

discretion. *Bluetooth*, 654 F.3d at 940. A failure to apply the correct standard of law is an abuse of discretion. *Allen*, 787 F.3d at 1222.

Statutes and Rules

28 U.S.C. §1711 note.

…

§2(a) Findings. Congress finds the following: …

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

…

28 U.S.C. §1712.

(a) Contingent fees in coupon settlements.– 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.

(b) Other attorney's fee awards in coupon settlements.–

(1) In general.– If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel,

any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

(2) Court approval.– Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) Attorney's fee awards calculated on a mixed basis in coupon settlements.– If a proposed settlement in a class action provides for an award of coupons to class members and also provides equitable relief, including injunctive relief–

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of coupons shall be calculated in accordance with subsection (b).

…

(e) Judicial Scrutiny of Coupon Settlements.– In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

Federal Rule of Civil Procedure 23. Class Actions.

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

…

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

…

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

…

Statement of the Case

Plaintiffs filed a class complaint against the three defendants alleging that their practices of enrolling customers in their Rewards Programs, which automatically charged customers' credit cards a monthly fee, are unlawful under federal and state law. ER410. Before any motion for class certification, the parties proposed a settlement of the putative class action. ER356. Over an objection from appellant class-member Brian Perryman (ER316, 350), and despite a concession from plaintiffs that only about $225,000 of cash would be distributed to class members (ER292), the district court approved the settlement and the request for a $8.85 million attorney award. ER16. Final judgment issued in 2013. ER10. Perryman timely appealed (Dkt.

278), and this Court vacated the settlement approval, remanding for further consideration under *In re Online DVD Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015). *EasySaver I*, 599 Fed. Appx. 274 (9th Cir. 2015). On remand, the settling parties sought reapproval of their settlement. Dkt. 303. Perryman renewed his objection and sought discovery from the settling parties on the factual issues raised by *Online DVD*. ER231, 129-31. The court denied Perryman's request for discovery and ultimately issued a final order, reapproving the settlement and reinstating its 2013 order, notwithstanding *Online DVD*. ER1, 229. Perryman again appeals. ER38.

A. EasySaver Rewards and the class complaint.

In May 2009, the U.S. Senate investigated the e-commerce marketing practice of a "data pass enrollment process," whereby consumers who use a credit card to purchase goods and services from an Internet retailer are, through "aggressive sales tactics intentionally designed to mislead online shoppers" signed up for a third-party service that bills their credit card monthly. ER425-26. The investigation eventually led to legislation, the Restore Online Shoppers' Confidence Act, Pub. L. No. 111-345, 124 Stat. 3618 (2010), that explicitly barred such practices. ER426. This lawsuit, first filed on September 24, 2009 (Dkt. 1), piggybacked on that months-earlier investigation, and sought to recover for the practices outlawed by Congress under pre-existing federal and state law.

Defendant Provide operates several internet businesses, including ProFlowers.com and RedEnvelope.com. Customers order products on these websites,

usually for gift or flower delivery, and pay for the purchase with a credit or debit card or PayPal account. ER411.

Provide works with third-party marketing partners Defendants Regent Group, Inc. (d.b.a. Encore Marketing International) and Encore Marketing International, Inc. (collectively "Encore"), which manage "saving programs" such as EasySaver Rewards (the "Rewards Programs") on Provide's behalf. ER17.

Plaintiffs allege that the defendants' practices of enrolling customers in the Rewards Programs violate federal and state law. They contend that Provide transmits its customers' private payment information to Encore, who then charges those customers without permission under the guise that the consumers authorized the charges when they supposedly joined the Rewards Programs. ER17.

Specifically, when class members completed a purchase on a Provide retail website, they were presented with a pop-up window offering $15 off their next purchase as a "Thank You" gift, asking them to enter their contact information and click "Accept" to receive the gift. Plaintiffs allege that, regardless of whether class members actually consented, Provide transmitted class members' payment information to Encore. Encore then enrolled class members in a Rewards Program and charged their credit and debit cards a $1.95 activation fee and a $14.95 monthly fee. Plaintiffs allege that the Rewards Program provided no meaningful benefits and that class members were enrolled without knowledge or consent. *Id.* The plaintiffs' complaint calls this $15-off offer both a "coupon" and a "gift code," and alleges that the actual $15 coupon was not "meaningful." *E.g.,* ER427, 411, 451. They do not

allege that consumers who requested the "$15 Thank You Gift" believed that the coupon had any limitations.

Plaintiffs' prayer for relief sought, among other things, compensatory, statutory, exemplary and punitive damages, and pre-judgment interest. ER455.

B. The settlement and fee request.

Before hearings on a motions to dismiss parts of the Fourth Amended Complaint were held, and before any motion for class certification, the parties proposed a settlement of approximately 1.3 million class members' claims. Dkt. 227, 228, 248, 251; ER20.

The settlement contained no injunctive relief. ER356. It provided a $12.5 million cash fund, which would pay for claims administration and notice fees and costs; $80,000 of "enhancement awards" for the eight named plaintiffs; and $8.85 million in fees and costs for the attorneys. ER362-63 (Settlement §2.1(a)-(c)). Defendants provided "clear sailing," agreeing not to challenge that fee request. ER362 (Settlement §2.1(c)). The remaining $3.5 million—after administration and notice costs—would be available for class members who sought refunds by filling out a two-page claim form of small print under penalty of perjury. ER363, 400-403 (Settlement §2.1(d), Ex.D).

Any remaining cash that was unclaimed would be divvied as *cy pres* between three San Diego-area universities: San Diego State University, University of California at San Diego, and University of San Diego School of Law, earmarked for programs regarding internet privacy or data security to be "developed and coordinated" between

Provide and the universities. ER364 (Settlement §2.1(e).) The overwhelming majority of SDSU and UCSD students are California residents, and nearly half are from the San Diego area. ER311-315. The class notice (ER390-97 (Settlement Ex. B)) failed to disclose that lead plaintiffs' counsel James Patterson was an alumnus of University of San Diego School of Law. ER333.

But the bulk of the value ascribed to the settlement came from a coupon that the settlement called "$20 Credits" to be electronically disseminated to each of the 1.3 million class members. ER359, 364 (Settlement §§1.1, 2.2). The "$20 Credits" are useable on four of Provide's websites for certain products; expire after one year; and are not valid during Christmas week, the ten days before Valentine's Day, or the first two weeks of May (*i.e.,* Mother's Day). ER364 (Settlement §2.2). Moreover, the coupons are not "stackable"; a consumer cannot use two coupons on one purchase nor can the coupons be used in conjunction with any other offer. *Id.* Nor are they "crackable"; they can only be used in a single transaction and no value can be retained over multiple purchases. *Id.* The settlement prohibited defendants from taking a position on the total settlement value or the value of the coupons. ER362 (Settlement §2.1(c). There was no dispute that the coupons duplicate deals Provide continuously offers outside the settlement. ER135-38.

The four websites offer only fifteen unique products that could be purchased for less than $20, excluding service charges and taxes. ER227. When such charges are included, a settlement coupon cannot purchase any whole product without payment to Provide. ER135. While the coupons were transferable, the undisputed evidence

shows that comparable or better coupons marketed by Provide sell on Ebay at discounts of as much as 93% to face value. ER139-40, 221-26.

Class members would release the defendants from all claims relating to the Rewards Programs. ER369-70 (Settlement §4.2).

In June 2012, the district court granted preliminary approval of the Settlement, and conditionally certified the class. Dkt. 252.

Class counsel's Rule 23(h) request claimed $8.85 million in fees and expenses was a "reasonable percentage of a common fund settlement," valued (by counting every coupon at face value) at an "estimated $38 million value for a nationwide Class of online consumers." Dkt. 255-1 at 5-6. For the crosscheck, class counsel asserted a lodestar of $4.26 million with a multiplier of about 2. *Id.* at 12.

C. Brian Perryman objects.

Brian Perryman was unknowingly enrolled in RedEnvelope Rewards during the class period on November 29, 2009, and his credit card was billed monthly fees for several months; he was thus a member of the class. ER351.

Perryman contacted the non-profit Center for Class Action Fairness ("CCAF") to object to the settlement and appeared at the initial fairness hearing through a CCAF attorney. ER352, 297, 307, 246.

Perryman objected that the settlement is a coupon settlement, and a poor one at that. ER328-32. The coupons are blacked out during the holidays—Christmas, Valentines' Day, Mother's Day—when one would most likely want to purchase flowers or gifts. ER328. In particular, Perryman noted that the $20 face value of the

coupons is illusory, because the opportunity cost of using the coupons meant that one could not use the 20% discounts that Provide offered as a matter of course. ER328, 351-52, 121. For example, if Perryman were to purchase a $65 flower bouquet, he would pay $45 if he used the coupon, but $52 if he did not: the "$20" coupon thus only provided a savings of seven dollars in that instance. ER135, 155, 123-24.

Moreover, Perryman maintained, CAFA and Ninth Circuit law prohibits attorneys' fees based on the face value of a coupon, rather than on the actual value of the coupons redeemed by the class. ER329-332, 122. Even if CAFA is inapplicable, historical evidence anticipates a low-single-digit-percentage redemption rate, especially given the limitations on the use of these coupons. ER330-31, 122-23.

Furthermore, Perryman argued, the *cy pres* provisions of the settlement are problematic. At least one of the lead class counsel has an undisclosed affiliation with one of the recipients; Perryman asked the Court to require the parties and lawyers to disclose any other ties with the recipients. ER334. Moreover, though class members were dispersed throughout the nation, the *cy pres* is entirely designated for three universities in the court's backyard—thousands of miles away from class members like Perryman. ER364.

Further, because the settlement fund was insufficient to compensate the entire class for all of the damages alleged in the complaint, Perryman protested that it is unacceptable to give any money to third-party *cy pres* recipients instead of prioritizing class recovery by either providing additional outreach to the class to encourage a higher claims rate or increasing the artificial cap on claimant recovery to match the

relief sought in the complaint. ER335-37, 126. At a minimum, Perryman argued, the court should discount the fee request attributable to any *cy pres* awarded. ER335. Perryman predicted that the class would be shortchanged with a 1-2% claims rate. ER336.

In fact, Perryman's objection was too optimistic: the claims process was so burdensome, restrictive, and poorly noticed that only 3000 class members (0.2% of the 1.3-million member class) made claims totaling about $225,000. ER292. As a result, class members would receive less than the attorneys ($8,850,000), the *cy pres* recipients (over $3 million (ER251)), and the claims administrator (about $300,000). Thus, Perryman argued, the settlement was unfair: it was structured so that the class counsel would receive the disproportionate lion's share of the benefits, several times the value of what the class was receiving. ER337-42, 346-47, 282-83, 123-24.

D. The district court refuses to apply CAFA and approves the settlement and $8.85 million attorney award.

The district court approved the settlement and the $8.85 million attorney award. ER16-37.

Regarding Perryman's *cy pres* objections, the district court held that the *cy pres* to the attorneys' alma mater was an "appearance of impropriety [that] is not substantial," that Perryman had not demonstrated a "significant connection." ER26-27, 35. Nor did it find the geographic concentration of all three *cy pres* recipients in the hometown of the court and class counsel problematic, because the institutions were "national," "serve a diverse student population of students from many states," and would benefit

the entire Internet "which lacks geographic scope." ER27-29, 35. It rejected the idea that *cy pres* was premature because any additional class recovery would be an "impermissible windfall" and "[s]ilent class members will receive greater benefit from the remaining funds if they are distributed to schools for creating of internet privacy and security programs." ER29-30.

Regarding the coupons, the district court refused to apply CAFA because class members were entitled to both cash reimbursement and coupons. ER23. It then found "that the $20 credits, regardless of their classification as coupons or credits, provide an actual value of $20 to the class members despite the blackout dates and inability to combine the credits with coupons and promotions." ER24. It noted that "the $20 credits here are transferrable and may be used to purchase entire items without requiring the class members to spend additional money." *Id.* The court purported to engage in "rigorous scrutiny" of the settlement by "satisfy[ing] CAFA's requirement that a hearing be held and the Court's findings be in writing." *Id.*

The district court awarded the full attorneys' award request of $8.85 million, stating that it used the "common-fund method to calculate" the award, and valuing the settlement fund at $38 million: the full $12.5 million cash fund plus the face value of the coupons. ER35-36. The valuation did not distinguish between the money going to the class and the money going to *cy pres*. Using a lodestar crosscheck, the district court held that a 2.1 multiplier was "reasonable and appropriate given the results achieved." ER36. Eight class representatives were awarded a total of $80,000. *Id.*

The district court issued final judgment, ER10-15, and Perryman's timely appeal followed. Dkt. 278.

E. This Court vacates and remands for consideration of *Online DVD.*

On appeal, this Court vacated the settlement approval, remanding for proceedings consistent with *Online DVD*. *EasySaver I*, 599 Fed. Appx. 274. The Court did not reach any of the other issues Perryman raised on appeal. Plaintiffs petitioned for rehearing of that decision, arguing that *Online DVD's* conclusion that Walmart.com gift cards are not CAFA coupons entailed that the settlement's credits are also not CAFA coupons. No. 13-55373, Dkt. 53 (9th Cir. Apr. 2, 2015). This Court denied the petition in less than a day, ER244, and the mandate issued.

F. The district court reinstates its 2013 approval order.

Following remand, the settling parties reinitiated settlement approval proceedings, while Perryman renewed his objection and requested that the Court permit discovery to examine the differences between the Provide credits and the *Online DVD* gift cards. ER231, Dkt. 303. The court (now Judge Bashant because of a transfer order, Dkt. 298) set a final approval briefing schedule and determined that no discovery was warranted, though it provided no reasoning for that decision. ER229.

Perryman opposed final approval, incorporating his previous objections and noting extensive additional precedents supporting his position, and adding an objection that further discovery was needed to comply with the *EasySaver I* mandate and the fact-intensive inquiry contemplated by *Online DVD* before the Court could find that the coupons were not "coupons." ER100. Even without discovery,

Perryman submitted extensive evidence concerning the value of the settlement's coupons relative to the *Online DVD* gift cards, and an offer of proof detailing what his proposed discovery would reveal. ER135-42. The offer of proof, which was not disputed, was that discovery of information in the parties' possession would reveal that the settlement coupons would have an ultimate redemption value of less than $2 million, and would overwhelmingly be used as discounts. ER140-42. For example, Provide recently settled another lawsuit by issuing 20% off coupons and $15 credits to class members. ER141. The settling parties declined to disclose redemption rates on these offers; and the court refused to require it. The settling parties filed supplemental memoranda in support of final approval, but declined to disclose information in their possession regarding the value of the coupons or respond to the offer of proof. Dkt. 306, 307.

With respect to the *cy pres*, Perryman noted that intervening appellate precedents supported his original objection, and independently required settlement rejection. ER124-29; ER74.

In July 2016 the court conducted a second fairness hearing; again, Perryman appeared through counsel. ER41. The court issued a final order approving the settlement and overruling Perryman's objection, and which reinstated and readopted its earlier order approving settlement and awarding fees. ER1.

Considering *Online DVD*, the court concluded that although the Provide credits differed from the Walmart.com gift cards in "two important respects," ultimately they do not constitute CAFA coupons. ER5. It identified one additional

justification for that conclusion: "each class member expressed a clear preference for this type of reward" by clicking on the pop-up offering a $15 Thank You Gift. *Id.* (There is no evidence in the record that the "$15 Thank You Gift" was advertised to class members as having any of the limitations of the settlement coupons; the opposite is suggested by the complaint. ER417.) Although the court expressed some concern about the fee award at the fairness hearing (ER49), it approved class counsel's $8.85 million fee request as reasonable under the percentage method with lodestar-crosscheck. ER6-8. The court declined to revisit the questions regarding *cy pres*, or address any of the intervening precedent since the previous order. ER73-74.

This timely appeal followed. ER38. Shortly before opening briefs were due, the Tuesday before Thanksgiving, plaintiffs moved to dismiss the appeal on grounds that *Online DVD* required affirmance. The motion was denied.

Summary of Argument

The district court approved a settlement that paid the attorneys $8.85 million, three local educational institutions about $3 million, and the class approximately $225,000—with 99.8% of the class receiving no cash at all. It justified this upside-down result by valuing the class members' recovery to include the face value of every coupon distributed—directly contradicting CAFA, which requires such findings to "based on the value to class members of the coupons that are redeemed." 28 U.S.C. §1712; *Inkjet*, 716 F.3d 1173. Even if §1712 did not apply, the valuation was an abuse of discretion because it ignored the "economic reality" that the coupons' restrictions on their use rendered them nearly worthless and unlikely to be redeemed at all. *Allen v.*

Bedolla, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015). Perryman's repeated entreaties to the court to require disclosure of redemption data of comparable coupons, and to analyze that highly probative information, went unheeded. In doing so, the court improperly shifted the burden of demonstrating a settlement's value away from the proponents of the settlement. *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017). If nothing else, it was clear error to fail to draw the adverse inference that the redemption rates were embarrassingly low, given that the parties would have happily disclosed the information if they thought it helpful to their case.

The settlement and settlement approval violates binding Ninth Circuit precedent prohibiting class counsel from structuring settlements to capture the lion's share of the benefit for themselves. *Allen*; *Bluetooth*; *accord Pearson v. NBTY, Inc.*, 778 F.3d 772 (7th Cir. 2014) (Posner, J.). In a law-review article, Fordham University Law professor Howard Erichson was flabbergasted and wondered "how class counsel could straight-facedly ask a judge" to value these coupons at their face value "or how a district court could agree to do so." Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 880-81 (2016).

Moreover, the *cy pres* element of this settlement is improper in multiple respects. First, it awards $3 million of the national class's money to local San Diego institutions, including the *alma mater* of class counsel, contrary to this Court's holdings. *Nachshin*, 663 F.3d at 1040; *Koby*, 846 F.3d at 1080. Second, it awards money to third parties when there remain undercompensated class members (in this case, the 99.8% of the class who received nothing), rather than using *cy pres* as a "last resort" because

distributions are infeasible. *See, e.g., In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1064-65 (8th Cir. 2015); *Pearson*, 772 F.3d at 784. The class members are already ascertained: there is a planned distribution of coupons to them. There is no reason there could not also be a cash distribution to the class other than class counsel's impermissible preference for his *alma mater* and local institutions over his clients. A breach of class counsel's fiduciary duty to the class is independent grounds for reversing settlement approval. *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1167-68 (9th Cir. 2013).

Given these problems, "one has to wonder whether" this settlement "was designed to maximize the margin between the stated value of the settlement (for purposes of settlement approval and attorneys' fees) and the actual cost of the settlement to the defendant." Erichson, 92 NOTRE DAME L. REV. at 892.

Settlement approval must be reversed.

Preliminary Statement and Introduction

Public-interest attorneys with CCAF (which became part of the Competitive Enterprise Institute, another 501(c)(3), in 2015) are representing Perryman *pro bono*. CCAF's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, "recouping more than $100 million for class members." Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2016); *see also, e.g., Pearson*, 772 F.3d at 787 (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) ("*Pampers*") (same). CCAF's founder has been recognized as "the leading critic of abusive class action settlements."

Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013), at A12. CCAF attorneys have won over a dozen federal appeals, many of them landmark decisions in support of the principles that fairness requires that the class be the primary beneficiary of any settlement, rather than the attorneys or third party *cy pres* recipients; and that courts scrutinizing settlements should value them based on what the class actually receives, rather than on illusory measures of relief. *E.g.*, *Inkjet*, 716 F.3d 1173; *Bluetooth*, 654 F.3d 935; *Nachshin*, 663 F.3d 1034.

Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with diffuse harm. As with many other cases, some class actions must be settled, sparing everyone the costs and uncertainties of litigation. But as multiple courts recognize, *class-action* settlements "are different from other settlements" and create unique problems for our adversary system. *E.g. Pampers*, 724 F.3d 713, 715. "The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.*

Thus, while class counsel and defendants have proper incentives to bargain effectively over the size of a settlement, similar incentives do not govern their critical

decisions about how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives down its costs. Meanwhile, class counsel have an incentive to seek the largest portion possible for themselves, and will accept bargains that are worse for the class if their share is sufficiently increased. As Judge Posner has explained: "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 716, 720 (7th Cir. 2014). That is problematic because our adversary system—and the value of class actions within it—depend upon unconflicted counsel's zealous advocacy for their clients, especially where those clients do not even get to choose their counsel for themselves. *Cf. Radcliffe*, 715 F.3d at 1167 (quoting cases).

Note that Perryman is not arguing that the parties must agree to a $38 million cash settlement. If good-faith arm's-length negotiations determine that the litigation value of the case is only $12 million or $13 million, so be it. The problem here is the fairness of the *allocation* of that $12-$13 million. "In class-action settlements, the adversarial process—or what the parties here refer to as their 'hard-fought' negotiations —extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717. Where, as here, class counsel favors itself (and its *alma mater*) over its clients, a district court has a legal obligation to reject a settlement.

The potential for conflict is structural and acute because every dollar reserved to the class is a dollar defendants will not want to pay class counsel; "the negotiation of class counsel's attorneys' fees is not exempt from the truism that there is no such thing as a free lunch." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003). Defendants care only about minimizing payments and are indifferent to allocation, and so a court must ensure that counsel is not self-dealing at the class's expense. *Pearson,* 772 F.3d at 786-87; *Pampers,* 724 F.3d at 718; *Bluetooth*, 654 F.3d at 948-49. The problem, however, is that various tools allow class counsel to obfuscate some of the allocative decisions that get made, and to subtly trade benefits to the defendant for a bigger personal share. The primary object of these tools is to create the illusion of valuable relief to class members, which in turn justifies an outsized attorneys' fee request, absent rigorous doctrinal tests to weed out this abuse. *Accord* Erichson, *supra.*

Imagine if class counsel openly tried to compromise a class action with a straightforward cash settlement of $9.1 million, paying the lawyers $8.85 million and paying class members $225,000—as this settlement ultimately does. Few judges would approve that deal. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (class counsel receiving even 38.9% of settlement benefit is "clearly excessive"). Accordingly, to have any chance of surviving a fairness hearing, such a deal must be structured to conceal the likelihood of this result. This is accomplished by larding the analysis with hypothetical class recoveries and difficult-to-calculate "benefits" that ultimately have little value to the class, but are cheap for defendants to provide and so easy to include in the deal.

If instead, the parties settle the case, as they do here, by issuing coupons with face-value of $25.5 million to the class with the same $8.85 million attorney award, a judge might be deceived into thinking the settlement allocation fair—even though (because so few coupons in coupon settlements are actually redeemed) the economic reality is only slightly different than the transparently objectionable cash-only $225,000 settlement. "[P]aying the class members in coupons masks the relative payment of the class counsel as compared to the amount of money actually received by the class members." *Inkjet*, 716 F.3d at 1179 (internal quotation omitted). The point "cannot be overemphasized"; Congress enacted CAFA in part to deconstruct this fiction. *Id.*[2]

The district court thought Perryman's objection was "not that he, or other class members, did not get enough out of the settlement [but] that the class attorneys and representatives got too much." ER5. This is wrong: 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. *E.g.,* ER67-68, 123-24.

The vitality of the class-action mechanism depends on how zealously courts scrutinize settlements, and whether their doctrinal tests correctly align the incentives

[2] Although the coupon portion of this settlement accounts for most ($25.5 million) of its fictive $38 million value, another $3 million is earmarked for third-party *cy pres* recipients. As with coupons, *cy pres* can easily become a "paper tiger" that serves no benefit other than to inflate the appearance of relief. *Dennis*, 697 F.3d at 868 (9th Cir. 2012).

of class counsel with those of the vulnerable, absent class members whose claims they purport to settle away. "Public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 688-92 (Cal. 2016) (Liu, J., concurring). Public-minded objectors serve these ends by safeguarding the interests of absent class members and the systemic integrity of the class action device.

Argument

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

CAFA sets forth special rules for fee calculation and settlement valuation "[i]f a proposed settlement in a class action provides for recovery of coupons to a class member." 28 U.S.C. §1712(a). The district court refused to apply these rules, creating an exception that not only appears nowhere in the statute, but contradicts the language of the statute. As a result, the district court valued coupons (likely worth less than $1 million to the class once redeemed and expired) at their full face value of $25.5 million. ER20, 36, 6-7. The district court's error caused it to overestimate the value of the settlement by a factor of three and incorrectly conclude that attorneys were collecting only $8.85 million out of a $38 million settlement instead of the impermissibly disproportionate majority of a settlement worth between $12 million and $14 million. ER36.

A. A district court must protect absent class members' interests.

This Circuit's precedents require courts to consider an eight-factor test to evaluate the fairness of a settlement. *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). But "where, as here, a settlement agreement is negotiated prior to formal class certification, consideration of these eight *Churchill* factors alone is not enough to survive appellate review." *Bluetooth*, 654 F.3d at 946-47. When the district court incorrectly applies CAFA, this Court has reversed notwithstanding satisfaction of the *Churchill Village* factors. *Inkjet*, 716 F.3d 1173.

"[W]here the court is '[c]onfronted with a request for settlement-only class certification,' the court must look to the factors 'designed to protect absentees.'" *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). "Pre-certification settlement agreements require that we carefully review the entire settlement, paying special attention to terms of the agreement containing convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of the negotiations." *Dennis*, 697 F.3d 858, 867 (9th Cir. 2012) (cleaned up); *accord Allen*, 787 F.3d at 1223 (outlining the "high procedural standard" for settlements that precede class certification).

"Because the interests of class members and class counsel nearly always diverge, courts must remain alert to the possibility that some class counsel may urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Inkjet*, 716 F.3d at 1178 (cleaned up). A district court has its

own fiduciary duty, derivative of the class representatives', to "carefully scrutinize whether [class counsel's and the named representatives'] fiduciary obligations have been met." *Pampers*, 724 F.3d at 717-18 (internal quotations omitted); *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014) (forbidding district court from "assum[ing] the passive role" that would be appropriate in bilateral litigation).

B. The lower court should have applied CAFA.

Under 28 U.S.C. §1712, "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." It is reversible error to calculate fees on the face value of coupons, even when the requested fee is less than lodestar. *Inkjet*, 716 F.3d at 1179. Even the *Inkjet* dissent agrees. *Inkjet*, 716 F.3d at 1194 (Berzon, J., dissenting) (§1712(a) requires…that *if* fees are calculated as a percentage of the value of the coupons awarded, that value must comprise only redeemed coupons). The district court, however, explicitly awarded fees based on the face value of the coupons. ER6-7. It reached that result by holding that, notwithstanding *Online DVD*, "the Court finds this settlement was not a coupon settlement subject to the strictures of section 1712." ER5. This was legal error.

1. *Online DVD*'s narrow exception does not permit treating the "credits" as CAFA coupons.

Online DVD held that Wal-Mart.com gift cards were not "coupons" for CAFA purposes, reasoning that Congress's animating concern in enacting CAFA was

settlements that leave class members with "little or no value." 779 F.3d 934, 950. "Affording over 1 million class members $12 in cash or $12 to spend at a low priced retailer does not leave them with 'little or no value.'" *Id.* What "separates a Walmart gift card from a coupon is not merely the ability to purchase an entire product as opposed to simply reducing the purchase price, but *also* the ability to purchase one of many different types of products." *Id.* at 952 (emphasis added). *Online DVD* emphasized that class members were not forced to do further business with the defendant to realize the benefit because the settlement permitted them to obtain cash instead of a gift card if they preferred. *Id.*. Furthermore, it was important that the gift cards were freely transferable and never expired, they were essentially cash. *Id.* at 951.

Online DVD expressly confined its holding to Walmart.com gift cards "without making a broader pronouncement about every type of gift card that might appear." *Id.* at 952; *see also Redman*, 768 F.3d at 636 (rule that whole-product vouchers can never constitute "coupons" is "untenable"). It recognized that some CAFA coupons, such as the ones in *Inkjet*, can be used to purchase whole products. *See also Synfuel Techs, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). CAFA's remedial scheme, it thought, would suffer no harm from the limited exception given to Wal-mart gift cards because district courts could "ferret[] out the deceitful coupon settlements." 779 F.3d at 952. This case suggests otherwise: the district court held the EasySaver credits were "stronger" than Wal-Mart gift cards. ER5. This is wrong as a matter of law: EasySaver credits lack all the advantages of Walmart.com gift cards, and bear no resemblance to cash:

	Online DVD	*EasySaver*
Face Value	$12	$20
Blackout Dates	None	Yes[3]
Expiration Date	None	One year after distribution
Usable in conjunction with other coupons	Yes	No
Crackable (*i.e.*, can value be retained over multiple purchases)	Yes	No
Redeemable for cash	No	No
Elected by class members in lieu of cash	Yes	No
Permits purchase of other gift cards	Yes	No
Duplicative of deals freely available outside the settlement	No	Yes
Number of items that can be purchased at least in part	5-8 million (ER138; ER209-20)	Undisclosed
Number of items that can be purchased in whole (excluding service charges and taxes)	Over 700,000 (ER138-39)	15 (ER228)

Along almost every dimension, the *Online DVD* gift cards are more cash-like and less coupon-like than the Provide credits. These onerous terms and conditions render the Provide credits significantly less valuable than their face value. "Perhaps the clearest example of restricting settlement coupons to inferior goods is the imposition of blackout dates on the… Coupons… The blackout dates significantly reduced the coupons' value to the average class member." Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action*

[3] The coupons cannot be used the week before Christmas, ten days before Valentine's Day or ten days before Mother's Day. ER364 (Settlement §2.2). These are the three holiday periods where the settlement coupons would retain the most value.

Litigation, 49 UCLA L. Rev. 991, 1025 (2002). "Coupon settlements involve variables that make their value difficult to appraise, such as redemption rates and restrictions. For instance, a coupon settlement is likely to provide less value to class members if, like here, the coupons are non-transferable, expire soon after their issuance, and cannot be aggregated." *Inkjet*, 716 F.3d at 1179 (cleaned up); *see also Redman*, 768 F.3d at 636 (class members' choices are burdened when "the buyer would receive no change" if purchasing an item for less than the voucher's face value). Burdens like this are a principal reason that "CAFA requires greater scrutiny of coupon settlements." *Inkjet*, 716 F.3d at 1178 (quoting S. Rep. No. 109-14, at 27). Indeed, there was undisputed evidence that other coupons marketed by Provide with *fewer* limitations than the gift codes in this settlement sell on Ebay at discounts of as much as 93% to face value. ER139-40, 221-26.

That the coupons here cannot be used in conjunction with freely-available 20%-off coupons (and there was no factual dispute that Provide offers such 20% coupons as a regular matter), moreover, means that the "$20" face value will never actually be realized. A non-class member purchasing a $60 flower arrangement can use such a 20%-off coupon, and pay $48. A class member using the $20 settlement coupon cannot use the 20%-off coupon, and will pay $40 for the same flower arrangement. In such a scenario, the coupon is worth $8, not $20: the undisputed evidence is that the $20 face value is offset by the opportunity cost of being unable to use a 20%-off coupon worth $12. ER135-37, 149-208. Indeed, it was undisputed that there are numerous items available for sale where use of the $20 settlement coupon

results in the class member paying *more* for Provide's goods than if they had not used the settlement coupon. ER136-37. Evidence of better deals in the marketplace "tends to show that the redemption rate … may be very low." *Inkjet*, 716 F.3d at 1179 n.6. "If similar discounts are provided to consumers outside of the class, the benefit to the class might be less than the face amount of the coupon—or perhaps no benefit at all." Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 34 (3d ed. 2010).

Perhaps the most pronounced distinction with *Online DVD*, however, is that all 744,202 recipients of a Walmart.com gift card specifically requested that gift card in lieu of a close-to-identical cash payment. By making that election, they revealed a subjective valuation of the gift card nearly equivalent to cash. By contrast, the $20 credits here will be distributed to class members without an affirmative election.

Finally, the district court's reading of *Online DVD* to create an expansive exception to §1712 instead of the limited exception that it was unnecessarily conflicts with the Seventh Circuit's decision in *Redman*. Walmart.com gift cards that can be used on millions of unique stock-keeping units are almost *sui generis*. ER138-39. Perhaps only Amazon.com offers a similar selection. There is no justification for the "painstaking" decision to create a circuit split by holding that EasySaver credits are more like Walmart.com gift cards than they are like RadioShack vouchers. *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1184 (9th Cir. 1999). And it would be similarly inconsistent with Ninth Circuit precedent to hold that the EasySaver credits are more like Walmart.com gift cards than they are like HP.com e-credits in *Inkjet*.

2. The district court's other invented reasons for finding the credits are not coupons are also legally erroneous.

While Congress did not define the term "coupon" anywhere in CAFA, "Where a statute does not define a key term, [courts] look to the word's ordinary meaning." *Inkjet,* 716 F.3d at 1181. A coupon is "[a] code or detachable part of a ticket, card, or advertisement that entitles the holder to a certain benefit, such as a cash refund or a gift." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed., Houghton Mifflin Harcourt Publishing Company 2017), *available at* http://ahdictionary.com/word/search.html?q=coupon. "A coupon may be defined as a certificate or form 'to obtain a discount on merchandise or services,'" and "Webster's also defines coupons as 'a form surrendered in order to obtain an article, service or accommodation.' Coupons are commonly given for merchandise for which no cash payment is expected in exchange." *Dardarian v. Officemax N. Am., Inc.*, No. 11-cv-00947, 2013 U.S. Dist. LEXIS 98653, at *6-*7 (N.D. Cal. July 12, 2013) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988)).

At issue in this case are the "$20 credits" that are emailed to every class member in the form of a merchandise code. ER19. These are coupons. The codes entitle class members to a "benefit": a $20 discount on merchandise. That they are called "credits" is irrelevant; the legal effect of the relief "is a question of function, not just labeling." *Khatib v. County of Orange*, 639 F.3d 898, 905 (9th Cir. 2011) (interpreting "jail" where RLUIPA was silent.). Myriad courts have rejected the argument that the

parties can evade CAFA through semantics (*i.e.* using a label other than "coupon").[4] This Court did so in *Inkjet*, holding explicitly that "e-credits [are] a euphemism for coupons" and fully applying §1712. *Inkjet*, 716 F.3d at 1176. More tellingly, plaintiffs' complaint repeatedly uses the phrase "coupon" and "gift code" interchangeably to refer to the $15 "Thank You Gifts" at issue in the litigation. ER411 ("coupon," "gift code," "coupon or gift code"); ER427 (defining class to include those who "clicked on a coupon offer…to receive a gift code"); ER421 ("coupon"); ER423 (same); ER434 ("savings coupon"); ER442 ("coupons"); ER417 ("gift code"); ER420 (same). Indeed, if one searches for "ProFlowers coupons" on Ebay, the website's search engine knows to return listings selling ProFlowers gift codes similar to those in this settlement. ER140.

The parties argued below that because the "credits" can be used to purchase an entire product, they are not really coupons. The argument directly contradicts *Online DVD*, which explicitly held that the reason Wal-Mart gift cards were not coupons was "not merely the ability to purchase an entire product as opposed to simply reducing the purchase price," but the ability to purchase thousands of different products of different kinds, with no expiration on the gift card; thus coupons for whole products in *Synfuel* and *Inkjet* were still coupons. 779 F.3d at 951-52. Moreover, the settling parties' argument has no basis in any dictionary, nor in the statutory text or the

[4] *See, e.g.*, *Redman*, 768 F.3d at 635-36 ("vouchers"); *Fleury v. Richemont N. Am.*, No. C-05-4545-EMC, 2008 U.S. Dist. LEXIS 112459 (N.D. Cal. Aug. 6, 2008) ("credits"); *Galloway v. Kan. City Landsmen, LLC*, No. 4:11-1020-cv-W-DGK, 2012 U.S. Dist. LEXIS 147148, at *10 (W.D. Mo. Oct. 12, 2012) ("certificates").

legislative history, the latter of which cites multiple cases where class members received entire products. *See Inkjet*, 716 F.3d at 1179 (citing S. Rep. No. 109-14 (2005), which includes examples such as a free crib repair kit, free spring water, free golf gloves or golf balls, $15 vouchers for Cellular One products—which would conceivably include items such as cables and cases and styluses that cost less than $15); *see also Davis v. Cole Haan, Inc.*, No. 11-cv-01826-JSW, 2015 U.S. Dist. LEXIS 153434, at *12 (N.D. Cal. Nov. 12, 2015) (disclaiming reading of *Online DVD* that rests on such a "narrow distinction" and concluding that $20 vouchers to Cole Haan stores constituted a CAFA coupon). Judge Posner dismantles the argument in *Redman*, a settlement involving $10 vouchers to RadioShack. 768 F.3d at 635-37. "[T]he idea that a coupon is not a coupon if it can ever be used to buy an entire product doesn't make any sense, certainly in terms of the Act." *Id.* at 635.

Contemporary usage supports this conclusion. A Google query for the phrase "Coupon for a free" returns 2,400,000 hits (searched Mar. 26, 2017). Publications such as the *New York Times* use the word "coupon" to describe vouchers for free products. *E.g.*, Scott Cacciola, *West Looms as Knicks Keep Going South*, N.Y. TIMES (Nov. 23, 2013) ("everyone in attendance received a coupon for a free chicken sandwich as part of a fan promotion"). Thus, there should be no controversy. In modern parlance, "[c]oupons are commonly given for merchandise for which no cash payment is expected in exchange." *Dardarian*, 2013 U.S. Dist. LEXIS 98653, at *7. Where two non-exclusive definitions "fall within the plain language" of a non-defined statutory term, and "both create the very dangers and risks that Congress meant . . . to

address," the term should be interpreted to encompass both readings. *See Smith v. United States*, 508 U.S. 223, 240-241 (1993).

Moreover, the "whole product" argument ignores the primary problem with coupons; that they provide only ersatz value to class members to "mask" what is really a disproportionate fee award. *Inkjet*, 716 F.3d at 1179; *see also Redman*, 768 F.3d at 636-37. "[C]ourts aim to tether the value of an attorneys' fees award to the value of the class recovery… [W]here class counsel is paid in cash, and the class is paid…with coupons, comparing the value of the fees with the value of the recovery is substantially more difficult." *Inkjet*, 716 F.3d at 1178-79.

Even if the parties were correct that credits used to purchase a "whole product" are not coupons, Perryman demonstrated that the credits will always be used to obtain discounts. Provide sells thousands of different items, but only identified fifteen scattered across its websites that cost less than $20. ER227. But even this feeble showing is a misleading exaggeration: the undisputed evidence was that Provide websites charge $11.98 to $18.98 for standard delivery and handling, and it is impossible to complete an order on a Provide website using a $20 gift code without paying Provide money. ER135-37, 149-208.

Coupons are deployed here to gussy up what is really a $13 million total settlement, of which class counsel is disproportionately seizing more than two-thirds. The district court twice succumbed to the ruse. ER36, 6-7 (calculating fees as a percentage of the $38 million "reasonable value" of the fund). Class counsel's fee request and award were faultily premised on the face value of the coupons, allowing

precisely "the inequities" that "§1712 intended to put an end to." *Inkjet*, 716 F.3d at 1179.

The court proffered two other rationales for failing to apply CAFA. Both fail. ***First***, it thought that because the settlement also provided $225,000 in cash to 0.2% of the class, it could not be classified as a "coupon settlement." ER22-24. But this is a misreading of the statute: CAFA's strictures apply "[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member." 28 U.S.C. §1712(a)-(c); *accord* §1712(e). While the phrase "coupon settlement" appears in the titles of subsections (a), (b), (c), and (e), "the Supreme Court has cautioned that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Northstar Financial Advisors, Inc. v. Schwab Investments*, 615 F.3d 1106, 1120 (9th Cir. 2010) (cleaned up). Thus, because the proposed settlement provides a $20 coupon to every class member, §1712 applies.

In distinguishing this coupon settlement from those with no accompanying cash fund, the court drew a distinction that makes no difference under the statute. As 28 U.S.C. §1712 shows, a coupon does not transmogrify into a non-coupon because it is accompanied by a cash fund. Subsection (a) discusses "the ***portion*** of any attorney's fee award… that is attributable to the award of coupons" (emphasis added). Thus, CAFA itself has determined that settlements that create non-coupon value in addition to coupon value (*i.e.* those where a separate ***portion*** of the attorney's fee award is attributable to non-coupon relief) still fall within its ambit. *See also* 28 U.S.C. §1712(c) (discussing fees in settlements involving both coupon and injunctive relief); *True v.*

Am. Honda Co., 749 F. Supp. 2d 1052, 1069 n.20 (C.D. Cal. 2010) (rejecting argument that proposed settlement was not a "coupon settlement" since "other relief" was involved). Whether or not the settlement includes a cash fund, adding coupons on top "provides class counsel with the opportunity to puff the perceived value of the settlement so as to enhance their own compensation." *Inkjet*, 716 F.3d at 1179. Pragmatically, the argument reduces to absurdity. If plaintiffs could circumvent CAFA by merely adding a subsidiary cash fund, we would start to see a lot of "Coupons + $1" settlements—and here the 1.3 million members of the class are averaging less than $0.20 each in this settlement because 99.8% receive nothing.

The district court attempted to analogize this settlement to others where class members had the option to choose *between* cash and coupons, such as *Online DVD*. ER23 (citing *Shames v. Hertz*, No. 07-CV-2174, 2012 WL 5392159, at *16 (S.D. Cal. Nov. 5, 2012) *and CLRB Hanson Indus., LLC v. Weiss & Assocs., PC*, 465 Fed. Appx. 617, 619 (9th Cir. 2012) (unpublished)). But no such election was available here; a class member could not elect to accept $20 in cash instead of a $20 credit. The settlement will disseminate 1.3 million coupons automatically to email addresses that the defendants have on file. In any event, these decisions made the same mistake: thinking that CAFA applied only to pure "coupon settlements" rather than to all settlements that include an "award of coupons" as a portion of the relief. Section 1712, by its own terms, applies to settlements that offer more than just coupons. That is simply "the only consistent reading of the Act." *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-cv-724, 2016 U.S. Dist. LEXIS 99235, at *84 (E.D. Pa. July 29, 2016)

(applying CAFA to settlement where class could choose between cash or store merchandise vouchers).

Second, the district court suggested that class members had initially expressed interest in receiving a gift code from defendants, thus making the chances of settlement coupon redemption "much higher." ER7. This is a non sequitur. CAFA makes no distinction between situations in which there was an underlying entitlement to coupons, and situations in which there was not. A coupon is still a coupon even though class members may have initially bargained for it. *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015) (CAFA coupon provisions apply to settlement that provided "replacement vouchers for free drinks" (*i.e.* "coupons given to replace coupons")); *Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590, 2011 U.S. Dist. LEXIS 51874 (D. Conn. May 16, 2011) (treating renewed or continued membership to DirectBuy service as coupon settlement). Class members' expression of interest in coupons doesn't mean that coupons aren't coupons. For example, in *Inkjet*, coupons only went to class members who "appl[ied] before the settlement approval for the e-credits, using an online claim form," which is a far higher degree of interest than that exhibited in this case. 716 F.3d at 1189 n.4 (Berzon, J., dissenting).

Even under the district court's analysis, there was no evidence that the class wanted *these* coupons. The complaint alleges that class members were offered $15 off their next purchase without limitation. ER417. There is no evidence in the record that class members desired coupons that expired in a year, could not be used with existing discounts, and could not be used in the weeks surrounding major holidays, only that

they thought that simply entering an e-mail address and zip code would get them a free $15 discount. Moreover, the operative Complaint did not seek to recover coupons as "benefit-of-the-bargain" damages; it sought money damages for the "unconscionable" charges made to class members' credit cards. ER417, ER455-56. Especially given the undisputed fact that coupons from Provide were and are widely available, this is an additional reason not to afford any special exemption from CAFA for benefit-of-the-bargain coupons. *See Bluetooth*, 654 F.3d at 945 n.8 (examining whether relief obtained was valuable on "the face of the complaint").

C. The district court independently erred as a matter of law in valuing the coupons at face value and assuming a 100% redemption rate while refusing to permit discovery that would have conclusively proven otherwise.

For purposes of the Rule 23(e)(2) fairness inquiry, CAFA permits the Court to make a realistic justified valuation of the likelihood of redemption. *Redman*, 768 F.3d at 634. That did not happen here, because the district court made unrealistic assumptions inconsistent with empirical evidence from other coupon settlements, and permitted the settling parties to withhold highly probative information from Perryman and the court. This was independent reversible error.

The $20 credits here will be distributed to class members without warning, and with restrictions making redemption unlikely. This reflects the typical coupon scenario where "redemption rates are tiny" "mirror[ing] the annual corporate issued promotional coupon redemption rates of 1-3%." James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445, 1448

(2005). Coupon redemption rates "may be particularly low in cases involving low value coupons." *Sobel v. Hertz Corp.*, No. 3:06-cv-00545-LRH, 2011 U.S. Dist. LEXIS 68984, at *35 (D. Nev. Jun. 27, 2011) ($10 discount "certificate" for car rental). Cases abound in which few class members redeem their coupons.[5]

If one generously assumes that the average redeemed value of a $20 credit is $13 (ER137), then the actual maximum value of the coupons would be less than $17 million. If the redemption rate is the typical 1 to 3%, then the coupons are worth somewhere between $165,000 and $500,000. And if one makes the not-unreasonable assumption that the redemption rate for the coupons is equal to the claims rate in this case—0.2%—the coupons are worth less than $35,000—a far cry from the finding of $25.5 million.

The settlement prohibited defendants from taking a position on the total settlement value or the value of the $20 Credits (ER362 (Settlement §2.1(c)))—almost certainly anticipating that if defendants did, they would provide information that would demonstrate that the coupons were unlikely to be redeemed, and certainly not be worth $20 when redeemed. Perryman objected that this "premium clear-sailing

[5] *See, e.g., Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 971 (8th Cir. 2016) (0.045% of distributed certificates were redeemed); *Davis v. Cole Haan, Inc.*, 2015 U.S. Dist. LEXIS 153434 (N.D. Cal. Nov. 12, 2015) (2.3% of distributed vouchers were redeemed); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1347 (2005) (noting one settlement where only 2 of more than 96,000 coupons were redeemed); *cf. also Golba v. Dick's Sporting Goods, Inc.*, 238 Cal. App. 4th 1251, 1261 (Cal. App. 4th Dist. 2015) ("of the 232,000 potential class members, only two had submitted claims for coupons").

agreement" was a warning sign of an unfair settlement. ER341 (citing *inter alia*, *Bluetooth*, 654 F.3d at 947). The harm of the clear-sailing agreement was particularly prejudicial here: because Provide offered $15 coupons to induce people to unwittingly be billed by its EasySaver program (ER17, 23, 35), it surely had possession of historical redemption rate data.

Not only does the defendant regularly offer coupons outside the settlement, and therefore possess highly probative information about the likely redemption rate here, during the pendency of this case, the same class counsel in this case and Provide agreed to a companion settlement in *Cox v. Clarus*, No. 11-cv-2711 (S.D. Cal.). The *Cox* settlement involved distributing both "$15 credits" and "20% off codes" to an identifiable number of class members, coupons that would expire one year after distribution. *See Cox*, , Settlement, Dkt. 23-2, at §§2.1, 2.3, No. 11-cv-2711 (S.D. Cal.). After the *Cox* settlement was fully administered, Perryman requested either that he be allowed discovery into the outcome of the redemption process, or that the court require the parties submit the information onto the record. ER237, 130-31, 70; Dkt. 327. The Court declined Perryman's request, even though the *Cox* data would have directly tested its own hypothesis that individuals who have clicked on a pop-up ad for a free gift are more likely to redeem coupons later distributed to them. ER229, ER5.

This was error because *Online DVD* and this Court's mandate in *EasySaver I* anticipate fact-intensive scrutiny to "ferret[] out the deceitful coupon settlement." 779 F.3d at 952. Even outside the coupon context, declining to put the settling parties to

their burden of demonstrating settlement value is reversible error as a matter of law. *Koby*, 846 F.3d at 1079-80 (citing *Pampers*, 724 F.3d at 719 (vacating settlement where district court failed to elicit germane valuation data within the settling defendant's possession)). After the settling parties refused to submit such evidence, an adverse inference was required—especially because plaintiffs' complaint explicitly alleged that the $15 EasySaver coupons were not "meaningful benefits." ER419, 433.

Barring the adverse inference, the court abused its discretion by denying Perryman discovery into (1) the percentage of customer purchases on the relevant websites that totaled less than $20, including tax, shipping and delivery expenses; (2) the average customer purchase price on the websites; (3) what other promotional offers the defendants routinely offer to the general public; (4) the percentage of "$15 Thank You Gifts" that were redeemed within one year of issuance; (5) the average price of customer purchases for which $15 Thank You Gift was redeemed; (6) the total number of products for sales on the relevant websites and how many can be obtained with the $20 credits without additional out of pocket expenditures (including, tax, shipping, handling or other charges); and (7) the relevant data from the *Cox* settlement. "[I]n appropriate cases, the court will permit an objector discovery relevant to the objections." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (internal quotation omitted).

This evidence would have demonstrated that the coupons in this case are indeed subject to CAFA under *Online DVD*. ER140-42; *cf. also Redman*, 768 F.3d at 636 (lamenting the lack of data regarding the Radioshack vouchers). Instead, the

district court engaged unsupported assumptions in valuing the coupons—a 100% redemption rate and a full marginal value of $20 for every class member when used. Because "[c]ases are better decided on reality than on fiction", this was error. *Pampers*, 724 F.3d at 721 (internal quotation omitted).

D. If *Online DVD* permits any result other than reversal here, then *Online DVD* is wrong and should be overturned.

If, as the settling parties claim, *Online DVD* requires the conclusion that the settlement credits in this case are not CAFA coupons—a proposition that this Court rejected in 24 hours in 2015 (ER244) and again when it denied plaintiffs' motion to dismiss this appeal—then *Online DVD* is incorrect and inconsistent with *Redman*, and this Court should overrule *Online DVD* and follow *Redman*. *Online DVD* is further problematic in that it anticipates fact-intensive analysis of coupons to determine whether a coupon is a coupon instead of simply applying a bright-line dictionary definition, but courts such as the one here do not permit discovery or engage in the scrutiny to distinguish a fungible cash-like gift-card from the abusive coupons at issue here. As one panel cannot overrule another, Perryman preserves the issue for further review later.

Fortunately, *Online DVD* can be limited to its unique facts, applicable to one or two potential defendants at most, and does not remotely require such an absurd result. But the confusion of the district court below demonstrates that this Court should give clearer guidance that *Online DVD* was not meant to exclude numerous coupon settlements from CAFA.

II. There are multiple independent non-CAFA reasons why reversal is required.

Regardless of how this Court resolves the discrete CAFA coupon issue, the settlement must fall for other reasons. *See EasySaver I*, 599 Fed. Appx. at 275 ("[C]lass settlement is a package deal that must stand or fall in its entirety…"). *EasySaver I* left these issues unresolved.

A. The settlement exhibits preferential treatment to class counsel.

First, even if the $20 credits are not subject to §1712's prescriptions on attorneys' fees, the minimal expected redemption value of that credit usage means that the settlement—as judged in "economic reality"—affords unduly preferential treatment to class counsel at the expense of absent class members. *Allen*, 737 F.3d at 1224 n.4. Not only are the gift codes exceedingly likely to expire before being used, even when they are used, they will not provide the consumer with $20 of benefit. As discussed above in Section I.B, the existence of readily available offers outside the settlement undermines the value of the settlement coupons. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (when valuing a settlement, it is only the "*incremental* benefits" that matter) (emphasis in original); *cf. also Koby*, 846 F.3d at 1080 (injunction is "of no real value" where "it does not obligate [defendant] to do anything it was not already doing"). Indeed, the surest way to tell that class counsel does not actually believe the coupons are worth $20 each would be asking if they would be willing to accept 500,000 coupons (which, by class counsel's claims, is worth $10 million) instead of $8.85 million of cash. Almost certainly not, given that holders

of sets of Provide coupons find themselves unable to sell them on Ebay even at a 90% discount to face value. ER139, 221.

For a deal to sustainable, the fee award must be "commensurate" with the class's recovery. *Pampers*, 724 F.3d at 720. A settlement that allocates to class counsel well in excess of the Ninth Circuit's 25% benchmark cannot be approved. *See, e.g, Dennis*, 697 F.3d at 868 (38.9% fee would be "clearly excessive"); *Allen*, 737 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of three is disproportionate); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *Redman*, 768 F.3d at 630-32 (55%-67% allocation unfair); *see also Bluetooth*, 654 F.3d 935, 947-49 (recognizing that a disproportionate fee award is a hallmark of an unfair settlement). The settlement here allocates nearly $9 million to class counsel, while the class's concrete recovery is $225,000.

Moreover, the clear-sailing agreement is another indication of preferential treatment. *See Bluetooth*, 654 F.3d at 948 (identifying "clear-sailing" as a red flag of an unfair lawyer-driven settlement); *Allen*, 787 F.3d at 1224 (same); *Redman*, 768 F.3d at 637 (explaining why clear-sailing provisions deserve "intense critical scrutiny" especially in non-cash settlements). This settlement, which affords class counsel more than 40 times as much as class members, does not satisfy the *Allen* test. The district court erred as a matter of law in failing to address the "subtle signs that class counsel have allowed pursuit of their own self-interests to infect the negotiations." *Allen*, 787 F.3d at 1224 (quoting *Bluetooth*).

B. The settlement misuses *cy pres*.

The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Nachshin,* 663 F.3d at 1038. Imported to the class action context, it has become an increasingly popular method of distributing settlement funds to non-class third parties in lieu of class members, a "growing feature" that raises "fundamental concerns." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari). Non-compensatory *cy pres* distributions, disfavored among both courts and commentators alike, remain an inferior avenue of last resort. *See e.g. Nachshin*, 663 F.3d at 1038 ("[A] growing number of scholars and courts have observed, the cy pres doctrine…poses many nascent dangers to the fairness of the distribution process") (citing authorities); *American Law Institute,* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION ("*ALI Principles*") §3.07 cmt b (2010) (rejecting position that "cy pres remedy is preferable to further distributions to class members").

Settlement §2.1(e) governs the *cy pres* distribution of the remainder of the $12.5 million cash fund. ER364. The unclaimed portion of the fund will be donated in equal shares to three academic institutions to establish programs regarding internet privacy and security: San Diego State University, UC San Diego, and San Diego School of Law. *Id.*[6] Each institution would receive approximately $1 million, totaling more than

[6] The *Cox v. Clarus* settlement likewise endowed a local professorship in internet studies. *See* Nancy Kim, *ProFlowers Distinguished Professor of Internet Studies*, 51

thirteen times the amount ($225,000) received by class members. ER251, 282-83, 288, 291, 292.

Three defects make this *cy pres* insupportable: 1) There is an geographic discontinuity between the composition of the class (nationwide) and the locus of the *cy pres* recipients (San Diego); 2) there is a conflict of interest for class counsel owing to a preexisting relationship with a *cy pres* beneficiary; and 3) *cy pres* is improper when it is feasible to make further distributions to class members, at least when such distributions do not result in a legal windfall.[7]

1. "Next best" *cy pres* for a nationwide class should have nationwide scope.

One dispositive deficiency of the *cy pres* award is its failure to account for the "broad geographic distribution of the class." *Nachshin*, 663 F.3d at 1040; *accord Koby*, 846 F.3d at 1080. *Nachshin* reversed settlement approval where two thirds of the donations were made to local institutions. 663 F.3d at 1040. *Koby* reversed settlement approval where all proceeds were donated to a San Diego charity. 846 F.3d at 1080. Thus, this Court has planted its flag with the Seventh and Eighth Circuits by requiring geographic congruence between the class and the *cy pres* beneficiary. 663 F.3d at 1040

CAL. W. L. REV. 3 (2014) (accepting a position as the inaugural "ProFlowers" professor of internet studies at California Western).

[7] Issues (2) and (3) are currently pending in *Gaos v. Google Inc.*, No. 15-15858 (9th Cir.). *Gaos* would not necessarily control the outcome of issue (3) as *Gaos* involves a class of more than 100 million members, who cannot be identified by the settling parties. Here, the 1.3 million class members have already been ascertained.

(*citing In re Airline Ticket Commission Antitrust Litig.*, 268 F.3d 619, 625-26 (8th Cir. 2001) (concluding that the distribution of unclaimed funds to Minnesota **law schools** and charities was an abuse of discretion)); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (invalidating settlement agreement, in a national antitrust class action, that made a *cy pres* distribution to **local law schools**, and directing the district court to "consider to some degree a broader nationwide use of its cy pres discretion")).

It follows *a fortiori* from *Nachshin* and *Koby* that it is impermissible to designate three local *cy pres* recipients. The district court accepted the localization because the recipients engage in a nationwide dialogue and place students from across the country. ER28. The defendant's own record submissions confuted this very claim by demonstrating 92.5% of San Diego State undergraduate enrollees are from in-state. ER314.

Moreover, even if student enrollment or faculty employment were more geographically balanced, it would not distinguish this award from the ones to local universities unanimously rejected in *Houck* and *Airline Ticket Comm'n*. In *Houck*, for example, the proposed *cy pres* to "research projects in the area of class actions, and particularly antitrust law" was research that theoretically would have a nationwide benefit to all consumers. 881 F.2d at 502. Still, the Seventh Circuit reversed on account of the concentration at local Chicago schools. *Id.* By preventing unjustifiable localizations of benefit, geographical restrictions on *cy pres* work in conjunction with

the Class Action Fairness Act of 2005. 28 U.S.C. §1714 (proscribing favoritism toward segments of the class based on geographic proximity to the court).

Nonetheless, rather than following the Seventh and Eighth circuit decisions—which formed the predicate for *Nachshin*—the district court narrowed the application of *Nachshin*'s holding to situations in which local recipients also have no tie to the subject-matter of the underlying claims, nor have any ability to make a nationwide impact. ER28. Although it is a truism in today's internet age that few organizations are truly local, that does not mean grossly disproportionate concentrations of *cy pres* proceeds within a single community, municipality or state are acceptable. Similar to state and sub-state governmental entities, San Diego-area universities exist to serve primarily their local constituency.[8] The tripartite distribution to exclusively San Diego-area schools may have been too concentrated even if the class consisted entirely of citizens from throughout California, let alone the nation here.

Affirming the holding below would occasion a direct circuit split with the Seventh and Eighth Circuits, and contravene Circuit law.

2. *Cy pres* beneficiaries should not have a pre-existing relationship with class counsel.

"*Cy pres* distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome

[8] UC San Diego, in fact, as a member of the UC system, is part of an independent branch of state government under Article IX, §9 of the California Constitution. In a sense, contrary to *Nachshin*, this amounts to escheating funds to California state coffers rather than the U.S. Treasury. *See Nachshin*, 663 F.3d at 1041.

of negotiations." *Dennis*, 858 F.3d at 867. "The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) (cleaned up). Below, Perryman apprised the district court that lead plaintiffs' counsel James Patterson and defense counsel Michelle Doolin were both graduates of *cy pres* beneficiary USD Law, a fact that was not disclosed in the class notice. ER333, 390.

Rejecting Perryman's objection, the court declared it "not particularly surprising" that counsel's *alma mater* was a *cy pres* recipient, and concluded that "the appearance of impropriety is not substantial." ER26-27. In doing so, the court neglected to remark upon *Nachshin*'s distinct suggestions that *alma mater* dispensations are exactly the sort of conflicts of interest that are problematic. 663 F.3d at 1039.

Alone, this makes the *cy pres* untenable: "A *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits." *ALI Principles* §3.07 cmt. (b). As the leading law review article notes, such *cy pres* awards "can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." Martin H. Redish et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 661 (2010).

This Court has already criticized *alma mater cy pres* distributions in *Nachshin*; a bright-line rule forbidding them is the best way to ensure that improper ones do not occur.

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

Finally, Perryman objected that there was no reason to utilize *cy pres* at all given the many feasible ways to distribute the fund's $3 million remainder to absent class members, who had claimed only $225,000. ER335-37 (describing non-exhaustive list of alternatives available to the parties and the court). It violates the "last resort" rule which requires that distributions to class members have priority to distributions to *cy pres* when such distributions are feasible. "[A] *cy pres* distribution…is permissible *only* when it is not feasible to make further distributions to class members…except where an additional distribution would provide a windfall to class members with *liquidated*-damages claims that were 100 percent satisfied by the initial distribution." *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *accord Pearson*, 772 F.3d at 784 (denying "validity" of *cy pres* award where it was feasible to remit more money to actual class members); *ALI Principles* §3.07(b). This rule follows from the precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). In a pre-*ALI Principles* case, this Court implied the same rule. *Molski*, 318 F.3d at 955 (rejecting *cy pres* as an inadequate substitute for individual damages).

"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. "Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* Here, *cy pres* accounts for many times the actual class recovery. ER251.

A settlement need not obtain each measure of relief sought to be adequate. Nevertheless, a settlement may not resort to *cy pres* before fully satisfying the class' claims. Class counsel and class representatives' fiduciary duties to absent class members are betrayed when they negotiate a settlement that gratuitously favors outside parties when it is feasible to compensate their principals. *E.g.,* Redish *et al.*, *Cy Pres Relief*, 62 FLA. L. REV. at 666. By adopting the presumption in favor of class distributions espoused by *Pearson, BankAmerica*, and *ALI Principles* §3.07, this Court can further cabin unfettered use of *cy pres* and ensure class members are the "foremost beneficiaries" of class settlements. *Baby Products*, 708 F.3d at 179.

The lower court accepted the parties' justification for the *cy pres*—that further payouts to the class "would constitute an impermissible windfall for the claimant class members at the expense of the silent class members." ER29. Right off the bat, this rationale overlooks the possibility of employing methods that would compensate the 99.8% of silent class members who have not submitted any claim (*e.g.,* supplemental notice and outreach, sampling for lottery payout, or a direct distribution).

But even ignoring this plain legal error, full compensation of claimants should not be judged vis-à-vis the amount offered in the settlement. *BankAmerica*, 775 F.3d at

1065 (citing *Klier*, 658 F.3d at 480). Rather, it can only be determined by comparing the relief obtained to the full measure of legal damages sought in the complaint. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 810 (3d Cir. 1995) (complaint is a "useful benchmark" for assessing completeness of settlement relief). In the plaintiffs' operative Fourth Amended Complaint, their theory of damages included statutory, general, special and exemplary or punitive damages, and compiled interest, in addition to restitution. ER455. Yet, the settlement payments to class members contemplate only refunds—short of restitution, with no compensation for the time-value of money or interest expenses class members may have accrued on the improper credit-card charges. And again, 99.8% of absent class members only receive a $20 coupon.

"A vague anxiety over windfalls" cannot justify preferring *cy pres* to class redistributions. Rhonda Wasserman, *Cy Pres In Class Action Settlements*, 88 S. CAL. L. REV. 97, 160 (2014). Moreover, the class "windfall" fear is wholly ironic. As *Inkjet* recognized, the real and present concern is that "class counsel [will] walk[] away from a case with a windfall, while class members walk away with nothing." *Inkjet*, 716 F.3d at 1185. That concern was more than hypothetical here.

The settlement's resort to *cy pres* was premature.

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*, *Pearson*, *BankAmerica*, 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: May 1, 2017 Respectfully submitted,

/s/ Theodore H. Frank

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Statement of Related Cases
pursuant to Circuit Rule 28-2.6

In re EasySaver Rewards Litigation, No. 13-55373, decision at 599 Fed. Appx. 274 (9th Cir. 2015) is a case previously heard in this Court that concerns the case being briefed, involved the same settlement, and raised many of the same issues.

Gaos v. Google, Inc., No. 15-15858 (9th Cir.) (argued March 13, 2017), raises closely related issues regarding the propriety of *cy pres* disbursements to the *alma mater* of class counsel and class counsel's obligation to prioritize class recovery over payments to third parties.

Executed on May 1, 2017. */s/ Theodore H. Frank*

Certificate of Compliance with Circuit Rule 32-1

I certify that:

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.

The brief is 13,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Theodore H. Frank Date: May 1, 2017

Proof of Service

I hereby certify that on May 1, 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: May 1, 2017

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