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10
11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA
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15 In re EasySaver Rewards Litigation
16

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18
19 Brian Perryman,
20 *Objector.*

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

**OPPOSITION OF BRIAN PERRYMAN
TO MOTION FOR FINAL APPROVAL**

Judge: Honorable Cynthia Bashant
Courtroom: 4B

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Introduction and Summary of the Argument

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3 It is telling that not once in the settling parties' supplemental briefs (Dkt. 306 and 307)
4 do they mention how much cash the class will actually receive in this settlement: \$225,000
5 (Dkt. 281 at 47:12), a tiny fraction of the class's attorneys' double lodestar of \$8.85 million
6 and three local San Diego educational institutions' *cy pres* of \$3 million. Meanwhile, 99.8% of
7 class members get no cash at all, though all are sufficiently ascertainable to give them a
8 coupon. The earlier settlement approval rationalized this upside-down result by finding that
9 the distribution to approximately 1.3 million class members of \$20 coupons or "Credits" had
10 a value of twenty dollars each—directly contradicting the Class Action Fairness Act
11 ("CAFA"), which requires such findings to be "based on the value to class members of the
12 coupons that are redeemed." *Contrast* Dkt. 271 with 28 U.S.C. §1712; *In re HP Inkjet Printer*
13 *Litig.*, 716 F.3d 1173 (9th Cir. 2013) ("*Inkjet*"). Even if CAFA's limitations on coupon
14 settlements do not apply, a \$20 valuation is unsupportable given that the coupons had
15 restrictions that all but ensured that they would either not be used, or, when used, would be
16 worth far less than \$20. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 630-32 (7th Cir. 2014).

17 A realistic appraisal of the coupon value illuminates an untenable settlement that
18 affords class counsel "preferential treatment" at the expense of absent class members. *See In*
19 *re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("*Pampers*"); *see also Pearson v.*
20 *NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) ("attorneys' fees awarded to class counsel
21 should not exceed a third or at most a half of the total amount of money going to class
22 members and their counsel."); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th
23 Cir. 2011) ("*Bluetooth*") (recognizing "a disproportionate fee award" as hallmark of an unfair
24 settlement); *Allen v. Bedolla*, ___F.3d___, 2015 WL 3461537, at *5 n.4 (9th Cir. Jun. 2, 2015)
25 (following *Bluetooth* and reversing settlement approval where class counsel negotiated a \$1.1
26 million fee award and class members were set to receive less than \$375,000). The ratio here is
27 far more egregious than in *Allen*.

28 There exists a second independent reason why this settlement cannot be approved: the

1 roughly \$3 million unclaimed remainder of the cash fund has been earmarked as *cy pres* to San
2 Diego universities, including the *alma mater* of class counsel, contrary to the Ninth Circuit’s
3 holding in *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011). That the \$3 million goes to
4 third parties when there are undercompensated class members (including 99.8% of the class
5 that received zero in cash) is especially objectionable. It violates the “last resort” rule which
6 requires that distributions to class members have priority over distributions to *cy pres* when
7 such distributions are feasible. *See, e.g., In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060,
8 1064-65 (8th Cir. 2015); *Pearson*, 772 F.3d at 784.¹ Here, the class members are directly
9 ascertainable: there is a planned distribution of coupons to them. There is no reason there
10 could not also be a cash distribution to the class other than class counsel’s preference for his
11 *alma mater* and local institutions over his clients, a nationwide class.

12 **I. Procedural History**

13 In late 2011, plaintiffs filed the operative complaint in this case against the three
14 defendants alleging that their practices of enrolling customers in their Rewards Programs
15 after luring them with the promise of worthless coupons called “Thank You Gifts” are unfair
16 and unlawful under federal and state law. Dkt. 221. Half a year later, before the plaintiffs had
17 filed a motion for class certification, the parties proposed a settlement of the putative class
18 action. Dkt. 248-3 (“Settlement”). Fundamentally, the settlement is bifurcated into two
19 components. The first is a \$12.5 million cash fund, the bulk of which would go toward class
20 counsel’s reserved \$8.85 million attorney award. Settlement § 2.1. The other component is an

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22 ¹ This Court’s earlier evaluation of the settlement was undertaken without the benefit
23 of much intervening precedent on the hot-button indicators of abuse packaged together here:
24 coupons, *cy pres*, and a claims-made mechanism. *E.g., In re BankAmerica Corp. Secs. Litig.*, 775
25 F.3d 1060 (*cy pres*); *Redman*, 768 F.3d 622 (coupons and claims-made); *Pearson*, 772 F.3d 778
26 (*cy pres* and claims made); *Inkjet*, 716 F.3d 1173 (9th Cir. 2013) (coupons and claims-made); *In*
27 *re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) (“*Baby Products*”) (*cy pres* and claims-
28 made); *Allen*, 2015 WL 3461537 (claims-made); *see also Marek v. Lane*, 134 S. Ct. 8 (2013)
(Roberts, C.J., respecting the denial of certiorari) (*cy pres*).

1 automatic email dissemination of “\$20 Credits” to the approximately 1.3 million class
2 members. Settlement §§ 2.2, 3.13.

3 The “\$20 Credits” are distinguishable from the “Thank You Gifts” that the plaintiffs
4 repeatedly called “coupons” in their complaint only in that they have more limitations. *E.g.*,
5 Dkt. 221 at 2, 3, 7, 12, 14, 18, 25, 33. The “\$20 Credits” were good for use only on four of
6 Provide’s websites and only for certain products; expired after one year; and were not valid
7 during Christmas week, the ten days before Valentine’s Day, or the first two weeks of May
8 (Mother’s Day). Settlement § 2.2. Moreover, the coupons were not “stackable” (a customer
9 could not combine two \$20 coupons to receive \$40 off); nor could they be used in
10 conjunction with any other offer—and Provide regularly made “20% off” coupons freely
11 available. *Id.*; Dkt. 258-1 at ¶¶ 11-12 & Exhibit 1. Finally, the coupons were not
12 “crackable”—they could only be used in a single transaction: if a class member purchased
13 something costing less than \$20 on Provide’s websites, there would be no change or credit
14 given for the balance of the coupon. *Id.* The settlement prohibited defendants from taking a
15 position on the total settlement value or the value of the coupons. *Id.*

16 Class member Brian Perryman filed an objection to this settlement and appeared
17 through *pro bono* counsel at the fairness hearing in early 2013. Dkts. 258, 281. He protested
18 that the settlement impermissibly favored class counsel over the class: because the vast
19 majority of the coupons would not be used (and would not be worth \$20 when used because
20 of the stackability limitations and the regular presence of freely available 25%-off coupons)
21 and because the parties used a claims process instead of direct payments. By reference,
22 Perryman incorporates those previous objection and the arguments made in his
23 Memorandum on Reopening of Case (Dkt. 304). Supporting his opposition here, he relies
24 upon his previously-filed declarations (Dkts. 258-1, 268) as well as the contemporaneously-
25 filed declaration of his attorney Theodore H. Frank (“Frank Decl.”).

26 Perryman is represented by the Center for Class Action Fairness (“CCAF”), a 501(c)(3)
27 public interest law firm that represents class members when class counsel employ unfair class
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1 action procedures to benefit themselves at the expense of the class. *See generally* Frank Decl.
2 ¶¶ 39-40.

3 After the Court approved the settlement in 2013, Perryman timely appealed, posting a
4 \$15,000 appeal bond that has yet to be repaid. Dkts. 278, 292, 293; *see* No. 13-55373 (9th
5 Cir.). The parties conducted expeditious merits briefing in 2013. Shortly before the scheduled
6 oral argument date arrived in February 2015, the Ninth Circuit issued an order staying
7 argument pending the disposition of *In re Online DVD Rental Antitrust Litig.*, No. 12-15705
8 (9th Cir.) (“*Online DVD*”). *Online DVD* was decided later that month. 779 F.3d 934. Less
9 than a month later, the Ninth Circuit resubmitted the appeal in this case without oral
10 argument and vacated the settlement approval, remanding for proceedings consistent with
11 *Online DVD*. *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. Mar. 19, 2015).
12 Plaintiffs petitioned for rehearing of that decision, under the theory that *Online DVD*’s
13 conclusion that Wal-Mart gift cards are not CAFA coupons entailed that Provide Commerce
14 e-credits are also not coupons. Plaintiffs’ petition was denied in under twenty-four hours.

15 The settling parties have filed supplemental memoranda in support of final approval.
16 Dkts. 306 (“Pl. Supp. Mem.”), 307 (“Def. Supp. Mem.”). As this Court ordered on May 21,
17 2015 (Dkt. 305), Objector Brian Perryman submits the following opposition to the settling
18 parties’ renewed motion for final approval.

19 **II. The court has a fiduciary duty to absent class members.**

20 “Class-action settlements are different from other settlements. The parties to an
21 ordinary settlement bargain away only their own rights—which is why ordinary settlements
22 do not require court approval. In contrast, class-action settlements affect not only the
23 interests of the parties and counsel who negotiate them, but also the interests of unnamed
24 class members who by definition are not present during the negotiations. And thus, there is
25 always the danger that the parties and counsel will bargain away the interests of unnamed
26 class members in order to maximize their own.” *Pampers*, 724 F.3d at 715.
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1 A district court must act as a “fiduciary for the class,” “with a jealous regard” for the
2 rights and interests of absent class members. *In re Mercury Interactive Corp.*, 618 F.3d 988, 994–
3 95 (9th Cir. 2010) (internal quotation and citation omitted). “Both the class representative
4 and the courts have a duty to protect the interests of absent class members.” *Silber v. Mabon*,
5 957 F.2d 697, 701 (9th Cir. 1992).

6 There should be no presumption in favor of settlement approval: “[t]he proponents of
7 a settlement bear the burden of proving its fairness.” *True v. Am. Honda Co.*, 749 F. Supp. 2d
8 1052, 1080 (C.D. Cal. 2010) (*citing* 4 Newberg on Class Actions § 11:42 (4th ed. 2009)). *Accord*
9 American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05(c) (2010) (“ALI
10 *Principles*”); *Pampers*, 724 F.3d at 718 (compiling cases and authorities).

11 “[S]ettlements that take place prior to formal class certification require a higher
12 standard of fairness.” *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (internal quotation
13 omitted); *accord Allen*, 2015 WL 3461537, at *4. “[P]re-certification settlement agreements
14 require that we carefully review the entire settlement, paying special attention to ‘terms of the
15 agreement contain[ing] convincing indications that the incentives favoring pursuit of self-
16 interest rather than the class’s interest in fact influenced the outcome of the negotiations.’”
17 *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (*quoting Staton v. Boeing*, 327 F.3d 938,
18 960 (9th Cir. 2003)). Settlement valuation “must be examined with great care to eliminate the
19 possibility that it serves only the ‘self-interests’ of the attorneys and the parties, and not the
20 class, by assigning a dollar number to the fund that is fictitious.” *Id.* at 868. It is error to exalt
21 fictions over “economic reality.” *Allen*, 2015 WL 3461537, at *5.

22 While satisfaction of the eight *Churchill Village*² fairness factors is necessary for
23 approval under Rule 23, it is not sufficient. *Bluetooth*, 654 F.3d at 946; *see also Inkjet*, 716 F.3d
24 1173 (reversing for non-compliance with CAFA without mentioning *Churchill Village*).
25 Perryman is not asking for a reweighing of the *Churchill Village* factors, which go to the merits
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28 ² *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

1 of the underlying litigation and the total size of the settlement benefit. Defendants are
2 entitled to settle for the approximate \$13 million that this settlement is worth if the parties in
3 good faith believe that that is an adequate weighing of the risks and merits of the underlying
4 lawsuit. But Rule 23 does not permit class counsel to negotiate for itself a disproportionate
5 \$8.85 million share of the settlement benefit with another \$3 million going to local third
6 parties instead of a nationwide class.

7 “[B]ecause the interests of class members and class counsel nearly always diverge,
8 courts must remain alert to the possibility that some class counsel may urge a class settlement
9 at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.”
10 *Inkejet*, 716 F.3d at 1178 (internal quotation omitted). The Court’s oversight role does not end
11 at making sure that the settling parties engaged in properly adversarial arm’s length settlement
12 negotiations. “In class-action settlements, the adversarial process—or what the parties here
13 refer to as their ‘hard-fought’ negotiations—extends only to the amount the defendant will
14 pay, not the manner in which that amount is allocated between the class representatives, class
15 counsel, and unnamed class members. For the economic reality [is] that a settling defendant
16 is concerned only with its total liability, and thus a settlement’s allocation between the class
17 payment and the attorneys’ fees is of little or no interest to the defense.... And that means
18 the courts must carefully scrutinize whether [class counsel’s and the named representatives’]
19 fiduciary obligations have been met.” *Pampers*, 724 F.3d at 717-18 (internal quotations
20 omitted); *accord Bluetooth*, 654 F.3d at 948 948 (“the Rule 23(e) reasonableness inquiry is
21 designed precisely to capture instances of unfairness not apparent on the face of the
22 negotiations.”) (*quoting Staton*, 327 F.3d at 960); *Dennis*, 697 F.3d at 864 (“courts ‘must be
23 particularly vigilant not only for explicit collusion, but also for more subtle signs that class
24 counsel have allowed pursuit of their own self-interests and that of certain class members to
25 infect the negotiations’” (*quoting Bluetooth*, 654 F.3d at 947)).

26 The parties emphasize the paucity of objections, but this is irrelevant. The “statement
27 that ‘the fact that the vast majority of class members—over 99.99%—have not objected to
28

1 the proposed settlement or opted out suggests that the class generally approves of its terms
2 and structure' is naïve, as is ... basing confidence in the fairness of the settlement on its
3 having been based on 'arms-length negotiations by experienced counsel.'" *Redman*, 768 F.3d
4 at 628. A low number of objections "hardly shows 'acceptance' of the proposed settlement:
5 rather it shows oversight, indifference, rejection, or transaction costs." *Id.* (discussing
6 meaning of number of claims). *Accord ALI Principles* § 3.05 *comment a* at 206; Brian Wolfman,
7 *Judges! Stop Deferring to Class-Action Lawyers*, 2 U. MICH. J.L. REFORM 80 (2013). Just as it is
8 uneconomic to bring class-action litigation as individual litigation, it is even more
9 uneconomic to object to an unfair class-action settlement. Christopher R. Leslie, *The*
10 *Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73
11 (2007); *see also In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812-13 (3d
12 Cir. 1995). There will never be a large number of objectors in a class-action settlement, so the
13 absence of thousands of objectors says nothing about the fairness of a settlement. *Cf. also*
14 *Pampers*, 724 F.3d at 716-17 (reversing approval of abusive settlement though only three
15 objectors and single appellant in much larger class).

16 **III. The proposed settlement violates CAFA.**

17 CAFA sets forth special rules for fee calculation and settlement valuation "[i]f a
18 proposed settlement in a class action provides for recovery of coupons to a class member."
19 28 U.S.C. § 1712(a). Congress did not define the term "coupon" anywhere in CAFA. "Where
20 a statute does not define a key term, [courts] look to the word's ordinary meaning." *Inkjet*,
21 716 F.3d at 1181 (citing *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891
22 (2011)). A coupon is "a code or detachable part of a ticket, card, or advertisement that
23 entitles the holder to a certain benefit, such as a cash refund or a gift." AMERICAN HERITAGE
24 DICTIONARY OF THE ENGLISH LANGUAGE (5th ed., Houghton Mifflin Harcourt Publishing
25 Company 2013), *available at* <http://ahdictionary.com/word/search.html?q=coupon>. "A
26 coupon may be defined as a certificate or form 'to obtain a discount on merchandise or
27 services,'" and "Webster's also defines coupons as 'a form surrendered in order to obtain an
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1 article, service or accommodation.’ Coupons are commonly given for merchandise for which
2 no cash payment is expected in exchange.” *Dardarian v. Officemax N. Am., Inc.*, No. 11-cv-
3 00947, 2013 U.S. Dist. LEXIS 98653, at *6-*7 (N.D. Cal. July 12, 2013) (quoting WEBSTER’S
4 NINTH NEW COLLEGIATE DICTIONARY (1988)).

5 At issue in this case are the “\$20 credits” that are emailed to every class member in the
6 form of a merchandise code. These are coupons. The codes entitle class members to a
7 “benefit”: a \$20 discount on merchandise. That they are called “credits”³ is irrelevant; the
8 legal effect of the relief “is a question of function, not just labeling.” *Khatib v. County of Orange*,
9 639 F.3d 898, 905 (9th Cir. 2011) (interpreting “jail” where RLUIPA was silent.). Myriad
10 courts have correctly rejected the argument that the parties can evade CAFA through
11 semantics and applied CAFA notwithstanding settling parties using a label other than
12 “coupon.”⁴ *See also Online DVD*, 779 F.3d at 952 (“District courts are more than capable of
13 ferreting out the deceitful coupon settlement that merely co-opts the term “gift card” to
14 avoid CAFA’s requirements.”). Perhaps most tellingly, plaintiffs’ complaint repeatedly uses
15 the phrase “coupon” and “gift code” interchangeably to refer to the \$15 “Thank You Gifts”
16 at issue in the litigation. Dkt. 221 at 2 (“coupon gift code,” “coupon or gift code”); *id.* at 18
17 (defining class to include those who “clicked on a coupon offer...to receive a gift code”); *id.*
18 at 12 (“coupon”); *id.* at 14 (same); *id.* at 25 (“savings coupon”); *id.* at 33 (“coupons”); *id.* at 8
19 (describing coupon offer as a “gift code”); *id.* at 11 (same). Indeed, if one searches for
20 “ProFlowers coupons” on Ebay, the website’s search engine knows to provide the searcher
21 with listings selling ProFlowers gift codes similar to those in this settlement. Frank Decl.
22 ¶ 31.

23
24 ³ In the first go-around, the parties called them “credits,” but plaintiffs now favor the
25 term “gift codes,” *e.g.* Pl. Supp. Mem. 2, presumably because *Inkjet* held that “e-credits [are] a
26 euphemism for coupons.” 713 F.3d at 1176.

27 ⁴ *See, e.g., Inkjet*, 713 F.3d at 1176 (“e-credits”); *Redman*, 768 F.3d at 635 (“vouchers”);
28 *True*, 749 F. Supp. 2d 1052 (same); *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”).

1 The parties argue (*e.g.* Pl. Supp. Mem. 7) that because the “credits” can be used to
2 purchase an entire product that they are not really coupons. This argument has no basis in
3 any dictionary definition, nor in the statutory text or the legislative history, the latter of which
4 cites multiple cases where class members received entire products. *See Inkejet*, 716 F.3d at 1179
5 (citing S. Rep. No. 109-14 (2005), which includes examples such as a free crib repair kit, free
6 spring water, free golf gloves or golf balls, \$15 vouchers for Cellular One products—which
7 would conceivably include items such as cables and cases and styluses that cost less than \$15);
8 *compare Davis v. Cole Haan, Inc.*, 2013 WL 5718452, 2013 U.S. Dist. LEXIS 151813, at *7-*8
9 (N.D. Cal. Oct. 21, 2013) (citing legislative history and concluding that \$20 vouchers to Cole
10 Haan stores constituted a CAFA coupon) *with* Pls. Supp. Mem. 6 (asserting that none of the
11 Senate Report’s examples “remotely resemble the relief offered here”). Section 1712 was
12 born of the recognition that “[c]ompensation in kind is worth less than cash of the same
13 nominal value.” *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir.
14 2006). “[T]he idea that a coupon is not a coupon if it can ever be used to buy an entire
15 product doesn’t make any sense, certainly in terms of the Act.” *Redman*, 768 F.3d at 635.

16 Contemporary usage supports this conclusion. A Google query for the phrase
17 “Coupon for a free” returns over 430,000 hits (searched Jun. 18, 2015). Publications such as
18 the *New York Times* use the word “coupon” to describe vouchers for free products. *E.g.*, Scott
19 Cacciola, *West Looms as Knicks Keep Going South*, N.Y. TIMES, Nov. 23, 2013 (“when Smith
20 misfired on a pair of free throws, everyone in attendance received a coupon for a free
21 chicken sandwich as part of a fan promotion”). Thus, there should be no controversy. At
22 least in modern parlance, “[c]oupons are commonly given for merchandise for which no cash
23 payment is expected in exchange.” *Dardarian*, 2013 U.S. Dist. LEXIS 98653, at *7.

24 Moreover, the “whole product” argument ignores the primary problem with coupons;
25 that they “mask[] the relative payment of the class counsel as compared to the amount of
26 money actually received by the class members.” *Inkejet*, 716 F.3d at 1179 (*quoting* Christopher
27 R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action*
28

1 *Litigation*, 49 UCLA L. Rev. 991, 1049 (2002)). “[C]ourts aim to tether the value of an
2 attorneys’ fees award to the value of the class recovery... Where both the class and its
3 attorneys are paid in cash, this task is fairly effortless... But where class counsel is paid in
4 cash, and the class is paid in some other way, for example, with coupons, comparing the
5 value of the fees with the value of the recovery is substantially more difficult.” *Inkjet*, 716
6 F.3d at 1178-79.

7 In just this manner, coupons are deployed here to mask what is really a \$13 million
8 total settlement value (\$10 million if the *cy pres* is excluded as it should be, *see Pearson*, 772 F.3d
9 at 781), of which class counsel is disproportionately seizing more than two thirds. Class
10 counsel’s fee request and earlier award here were faultily premised on the nearly face value of
11 the coupons, allowing precisely “the inequities” that “§ 1712 intended to put an end to.”
12 *Inkjet*, 716 F.3d at 1179. “This point cannot be overemphasized for we can only properly
13 interpret CAFA’s text if we keep the statute’s purposes clearly in mind.” *Id.*

14 Finally, even if the parties were correct (notwithstanding the rejection of their
15 argument in *Online DVD* and *Redman*) that credits that could purchase a “whole product” are
16 not coupons because they are not discounts, Perryman disputes that the gift codes are
17 intended to be used to purchase “whole products” rather than providing discounts. Provide
18 Commerce sells thousands of different items, but admittedly can only identify fifteen
19 scattered across its websites that cost less than \$20. Declaration of Laura Szeligain ¶ 2
20 (Dkt. 307-1). But even this pathetic showing is a misleading exaggeration: Provide Commerce
21 websites charge \$11.98 to \$18.98 for standard delivery and handling (and more if one wants
22 something other than “standard” delivery, which can take as long as twelve days), and it is
23 impossible to complete an order on a Provide Commerce website using a \$20 gift code
24 without paying Provide Commerce money. Frank Decl. ¶¶ 4-16 and Exhibits 1-13.

25 Previously, this Court held that because “there is also a cash fund that provides
26 reimbursement to class members...[t]he proposed settlement is . . . not entirely a ‘coupon’
27 settlement and distinguishable from other cases involving coupons or vouchers without an
28

1 accompanying cash fund.” Dkt. 271 at 6-7. The Court drew a distinction that makes no
2 difference under the statute. Whether or not the settlement includes a cash fund, adding
3 coupons on top “provides class counsel with the opportunity to puff the perceived value of
4 the settlement so as to enhance their own compensation.” *Inkjet*, 716 F.3d at 1179; *see also*
5 *Leslie*, *supra*, at 1049.

6 Indeed, as 28 U.S.C. § 1712 shows, a coupon does not morph into a non-coupon
7 because it is accessorized with a cash fund. Subsection (a) discusses “the **portion** of any
8 attorney’s fee award... that is attributable to the award of coupons” (emphasis added). Thus,
9 CAFA itself has determined that settlements that create non-coupon value in addition to
10 coupon value (*i.e.* those where a separate **portion** of the attorney’s fee award is attributable to
11 non-coupon relief) still fall within its ambit. *See also* 28 U.S.C. § 1712(c) (discussing fees in
12 settlements involving both coupon and injunctive relief); *True*, 749 F. Supp. 2d at 1069 n.20
13 (rejecting argument that proposed settlement was not a “coupon settlement” since “other
14 relief” was involved.) Pragmatically, the argument reduces to absurdity. If plaintiffs could
15 circumvent CAFA by merely adding a subsidiary cash fund, we would start to see a lot of
16 “Coupons + \$1” settlements—and the 1.3 million members of the class are averaging less
17 than \$0.20 each in this settlement because 99.8% receive no cash.

18 This Court erroneously analogized this settlement to others where class members had
19 the option to choose *between* cash and coupons. Dkt. 271 at 8; *see generally Online DVD*, 779
20 F.3d 934, 952 (That claimants “had the option of obtaining cash instead of a gift card”
21 further “undercut[] the argument that the settlement force[d] them to buy from the
22 defendant.”).⁵ Plaintiffs and Defendants go so far as to claim this is better than that the cash-
23 option arrangement because class members could get cash and coupons. Pl. Supp. Mem. 7;
24 Def. Supp. Mem 12. They are sorely mistaken as they neglect the crucial fact that not one of
25

26 ⁵ CAFA has no statutory exemption for coupons chosen in lieu of cash, so it’s not
27 clear that this has much legal significance. *See Synfuel*, 463 F.3d at 649 (treating relief as
28 coupon-like even though class members could choose between cash and a coupon).

1 1.3 million class members here selected \$20 coupon relief over an alternative cash option. In
2 *Online DVD*, the entire net common fund could have been claimed in cash if class members
3 so preferred. Here, by contrast, the maximum amount of cash that could have been claimed
4 by class members was just over \$3 million of the illusory \$38 million fund, just over 1/3 of
5 the amount class counsel negotiated for its own fees. Without any expression of class
6 member interest, a face value of \$25.5 million in coupons will be disseminated automatically
7 to email addresses that the defendants have on file.

8 *Online DVD* held that Wal-Mart.com gift cards were not “coupons” for CAFA
9 purposes, reasoning that Congress’s animating concern in enacting CAFA was settlements
10 that leave class members with “little or no value.” *Id.* at 950. “Affording over 1 million class
11 members \$12 in cash or \$12 to spend at a low priced retailer does not leave them with ‘little
12 or no value.’” *Id.* (observing that class members can choose from “any item carried on the
13 website of a giant, low-cost retailer”). Distinguishing *Synfuel*, the Ninth Circuit again
14 emphasized the fact the *Online DVD* gift cards allowed “use on [class members’] choice of a
15 large number of products from a large retailer” and were permitted under the settlement to
16 obtain cash in lieu of a gift card if they so preferred *Id.* at 952.

17 *Online DVD* expressly confined its holding to Wal-Mart.com gift cards “without
18 making a broader pronouncement about every type of gift card that might appear.” *Id.*; *see also*
19 *Redman*, 768 F.3d at 636 (per se rule that whole-product vouchers can never constitute
20 “coupons” is “untenable”). In fact, *Online DVD* recognizes that some CAFA coupons can be
21 used to purchase whole products. 779 F.3d at 592 (distinguishing Wal-Mart.com gift cards
22 from *Inkjet* CAFA coupons that could be used to purchase a whole product, because the
23 former allow “the ability to purchase one of many different types of products.”). The reason
24 that *Online DVD* created an exception to the statutory language in CAFA was because the
25 gift cards were so similar to fungible cash and had so few of the limitations associated with
26 coupons. The gift codes at issue in this settlement have none of the advantages of the
27 Walmart.com gift cards:
28

	<i>Online DVD</i>	<i>EasySaver</i>
Face Value	\$12	\$20
Blackout Dates	None	Yes ⁶
Expiration Date	None	One year after distribution
Usable in conjunction with other coupons	Yes	No
Crackable (<i>i.e.</i> , can value be retained over multiple purchases)	Yes	No
Redemable 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 million-8 million ⁷	Undisclosed ⁸
Number of items that can be purchased in whole (excluding service charges and taxes)	Over 700,000 ⁹	15 ¹⁰

Along almost every dimension, the *Online DVD* gift cards are more cash-like and less coupon-like than the credits here. The terms and conditions here entail significantly less

⁶ The coupons cannot be used the week before Christmas, ten days before Valentine’s Day or ten days before Mother’s Day. Settlement § 2.2. These are the three holidays most likely to induce purchases of the flowers or gifts sold by Provide Commerce websites.

⁷ Frank Decl. ¶¶ 18-22 & Exh. 14-17.

⁸ In their joint remand memorandum, the settling parties implausibly claimed that the defendant’s settlements had “more product options” than Walmart.com. Dkt. 303 at 7.

⁹ Frank Decl. ¶¶ 23-24.

¹⁰ See discussion on page 10 above.

1 value. *See, e.g., Leslie, Coupon Settlements*, 49 UCLA L. Rev. at 1025 (“Perhaps the clearest
2 example of restricting settlement coupons to inferior goods is the imposition of blackout
3 dates on the... Coupons... The blackout dates significantly reduced the coupons’ value to
4 the average class member.”); *Inkjet*, 716 F.3d at 1179 (“coupon settlements involve variables
5 that make their value difficult to appraise, such as redemption rates and restrictions. For
6 instance, a coupon settlement is likely to provide less value to class members if, like here, the
7 coupons are non-transferable, expire soon after their issuance, and cannot be aggregated.”)
8 (internal citation omitted); Federal Judicial Center, *Managing Class Action Litig.: A Pocket Guide*
9 *for Judges*, 34 (3d ed. 2010) (“If similar discounts are provided to consumers outside of the
10 class, the benefit to the class might be less than the face amount of the coupon—or perhaps
11 no benefit at all.”); *Redman*, 768 F.3d at 636 (observing that class members’ choices are
12 burdened when “the buyer would receive no change” if purchasing an item for less than the
13 voucher’s face value). Burdens like this are a principal reason that “CAFA requires greater
14 scrutiny of coupon settlements.” *Inkjet*, 716 F.3d at 1178 (quoting S. Rep. No. 109-14, at 27).
15 Indeed, other gift codes marketed by Provide Commerce with *fewer* limitations than the gift
16 codes in this settlement sell on Ebay at discounts of as much as 93% to face value. Frank
17 Decl. ¶¶ 25-29 & Exhibits 18-19.

18 The fact that the “gift code” coupons here cannot be used in conjunction with freely-
19 available 20%-off coupons, moreover, means that the “\$20” face value will never actually be
20 realized. A non-class member purchasing a \$60 flower arrangement can use a free 20%-off
21 coupon, and pay \$48. A class member using the \$20 gift code coupon cannot use the 20%-
22 off coupon, and will pay \$40 for the same flower arrangement. In such a scenario, the
23 coupon is worth \$8, not \$20: the \$20 face value is offset by the opportunity cost of being
24 unable to use a 20%-off coupon worth \$12. Frank Decl. ¶¶ 4-16 & Exhibits 1-13. Indeed,
25 there are numerous items available for sale where use of the \$20 gift-code coupon results in
26 the class member paying *more* for Provide Commerce’s goods than if they had not used the
27 gift-code coupon. *Id.* ¶¶ 10, 13.
28

1 Perhaps the most pronounced distinction with *Online DVD*, however, is that all
2 744,202 recipients of a Wal-Mart.com gift card specifically requested that gift card in lieu of
3 an identical cash payment. Such individuals have reason to redeem their credits. By contrast,
4 the \$20 credits here will be distributed to class members without any expression of interest.
5 This reflects the typical coupon scenario where “redemption rates are tiny” “mirror[ing] the
6 annual corporate issued promotional coupon redemption rates of 1-3%.” James Tharin &
7 Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445,
8 1448 (2005). Coupon redemption rates “may be particularly low in cases involving low value
9 coupons.” *Sobel v. Hertz Corp.*, No. 3:06-cv-00545-LRH, 2011 U.S. Dist. LEXIS 68984, at *35
10 (D. Nev. Jun. 27, 2011) (\$10 discount “certificate” for car rental). Cases abound in which few
11 class members claim or redeem their coupons.¹¹

12 Because the credits are CAFA coupons, fees attributable to the credits can only be
13 awarded as a percentage of those redeemed. 28 U.S.C. § 1712(a)¹²; *Inkjet*. For purposes of the
14

15 ¹¹ See, e.g., *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d. 1052, 1074-75 (C.D. Cal. 2010)
16 (rebuffing witness’s suggested redemption rate and citing two cases with redemption rates
17 under 2%); *Monteferrante v. Container Store*, 2015 U.S. Dist. LEXIS 13212 (D. Mass. Feb. 4,
18 2015) (claims rate of 1.8% for a \$10 coupon); *Davis v. Cole Haan, Inc.*, 2013 WL 5718452, 2013
19 U.S. Dist. LEXIS 151813, at *5-*6 (claims rate below 1% for a \$20 voucher) (N.D. Cal. Oct.
20 21, 2013); *Dardarian v. OfficeMax N. Am., Inc.*, 2014 U.S. Dist. LEXIS 178463, at *5 (N.D. Cal.
21 Dec. 30, 2014) (reflecting upon a redemption rate of under 7% of the face value of \$10 and
22 \$5 distributed to class members); 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
23 settlement where only 2 of more than 96,000 coupons were redeemed).

24 ¹² Coupon valuations based on clairvoyance not only violate § 1712(a), as interpreted
25 by the *Inkjet* majority and dissent, they also implicitly contravene § 1712(e). Section 1712(e)
26 authorizes the district court to “require that a proposed settlement agreement provide for the
27 distribution of a portion of the value of unclaimed coupons to 1 or more charitable or
28 governmental organizations, as agreed to by the parties” but stipulates that such secondary
distribution “shall not be used to calculate attorneys’ fees under this section.” It would be
utterly irrational if the § 1712 legislative scheme permitted fees to be paid on the value of

1 Rule 23(e)(2) fairness inquiry, however, CAFA permits the Court to make a realistic justified
2 valuation of the likelihood of redemption. *Redman*, 768 F.3d at 634. If one generously
3 assumes a redemption rate of ten percent despite the complete lack of evidence of any
4 likelihood that any coupons would be redeemed, and one generously assumes that the
5 average redeemed value of a \$20 credit is \$13 (Frank Decl. ¶¶ 15-16), then the actual value of
6 the coupons would be only \$1.7 million. If the redemption rate is the more typical 1 to 3%,
7 then the coupons are worth only \$170,000 to \$510,000. And if one makes the not-
8 unreasonable assumption that the redemption rate for the coupons is equal to the claims rate
9 in this case—0.2%—the coupons are worth less than \$35,000—a far cry from the finding of
10 \$26 million.

11 **IV. There are independent non-CAFA reasons why this Court must deny final**
12 **approval.**

13
14 Regardless of how this Court resolves the discrete CAFA coupon issue, the settlement
15 must fall for other reasons. *See EasySaver*, 599 Fed. Appx. at 275 (“[C]lass settlement is a
16 package deal that must stand or fall in its entirety...”) (internal quotation omitted).

17 *First*, even if the \$20 credits are not subject to § 1712’s prescriptions on attorneys’ fees,
18 the minimal expected redemption value of that credit usage means that the settlement—as
19 judged in “economic reality” —affords unduly preferential treatment to class counsel at the
20 expense of absent class members. *Allen*, 2015 WL 3461537, at *5. Not only are the gift codes
21 exceedingly likely to expire without ever being used, but even when they are used, they will
22 not provide the consumer with \$20 of benefit. Any use of a gift code precludes a class
23 member from using a freely-available 20%-off coupon eligible for use for the vast majority of
24 purchases on Provide Commerce’s websites. Because of the freely-available 20%-off coupon,
25 a “\$60” bouquet that would cost \$40 with use of the \$20 gift code would cost only \$48

26
27 unclaimed coupons that reverted to the defendant, but not on the value of those unclaimed
28 coupons that were redistributed to a third-party charity.

1 without the gift code—meaning that the gift code is worth \$8, not \$20, in that instance.
2 Indeed, the surest way to tell that class counsel does not actually believe the coupons are
3 worth \$20 each would be to ask if they would be willing to accept 500,000 transferable
4 coupons with the same limitations as those in the settlement (which, by class counsel’s
5 claims, would be worth \$10 million) instead of \$8.85 million of cash.¹³ Almost certainly not,
6 given that holders of sets of Provide Commerce coupons find themselves unable to sell them
7 on Ebay even at a 90% discount to face value. Frank Decl. ¶¶ 25-26 and Exhibit 18.

8 To satisfy Rule 23(e) and (h), the fee award must be “commensurate” with the class’s
9 recovery. *Pampers*, 724 F.3d at 720. A settlement that allocates to class counsel well in excess
10 of the Ninth Circuit’s 25% benchmark is presumptively unfair. *See, e.g., Dennis*, 697 F.3d at 868
11 (38.9% fee would be “clearly excessive”); *Allen*, 2015 WL 3461537, at *5 (fee award that
12 exceeds class recovery by a factor of three is disproportionate); *Pearson*, 772 F.3d at 781 (69%
13 fee is “outlandish”); *Redman*, 768 F.3d at 630-32 (55%-67% allocation unfair); *Howell v. Jbi,*
14 *Inc.*, 298 F.R.D. 649, 658 (D. Nev. 2014) (denying settlement approval where class was only
15 allotted 58.3% of the gross settlement); *see also Bluetooth*, 654 F.3d at 947-49. The fee provision
16 here allocates nearly \$9 million to class counsel, and forbids the defendant from opposing
17 that request or even taking a position on the value of the \$20 credits that supposedly justifies
18 the fee. Settlement § 2.1(c); *see Redman*, 768 F.3d at 637 (explaining why such clear-sailing
19 clauses deserve “intense critical scrutiny”). This settlement, which affords class counsel more
20 than 40 times as much cash as class members, cannot survive the rigorous review necessitated
21 for pre-certification and coupon agreements.

22 *Second*, the *cy pres* component of the settlement (Settlement §2.1(e)) distribution is
23 unlawful for three independent reasons: (1) *cy pres* is improper when it is feasible to make
24 further distributions to class members; (2) there is an intolerable conflict of interest for class
25 counsel owing to a preexisting relationship with a *cy pres* beneficiary; and (3) there is an

27 ¹³ Perryman has no objection to class counsel receiving \$75,000 in cash as a
28 proportionate award for the \$225,000 in cash the class is receiving.

1 impermissible geographic discontinuity between the composition of the class (nationwide)
2 and the locus of the *cy pres* recipients (San Diego).¹⁴

3 “[A] *cy pres* distribution...is permissible *only* when it is not feasible to make further
4 distributions to class members...except where an additional distribution would provide a
5 windfall to class members with *liquidated*-damages claims that were 100 percent satisfied by
6 the initial distribution.” *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1064 (8th Cir.
7 2015); *accord Pearson*, 772 F.3d at 784 (denying “validity” of *cy pres* award where it was feasible
8 to remit more money to actual class members); *ALI Principles* § 3.07(b). This rule follows
9 from the precept that “[t]he settlement-fund proceeds, generated by the value of the class
10 members’ claims, belong solely to the class members.” *Klier v. Elf Atochem N. Am., Inc.*, 658
11 F.3d 468, 474 (5th Cir. 2011).

12 “Class members are not indifferent to whether funds are distributed to them or to *cy*
13 *pres* recipients, and class counsel should not be either.” *In re Baby Prods. Antitrust Litig.*, 708
14 F.3d at 174. “Barring sufficient justification, *cy pres* awards should generally represent a small
15 percentage of total settlement funds.” *Id.* Here, *cy pres* accounts for more than ten times the
16 amount of actual class recovery. *See* Dkt. 281 at 6. This settlement is more lopsided than any
17 of those listed above. At a minimum, it is inappropriate to award class counsel attorneys’ fees
18

19 ¹⁴ The legal construct of *cy pres* (from the French “*cy pres comme possible*”—“as near as
20 possible”) has its origins in trust law as a vehicle to realize the intent of a settlor whose trust
21 cannot be implemented according to its literal terms. *Nachshin v. AOL, LLC*, 663 F.3d 1034,
22 1038 (9th Cir. 2011). Imported to the class action context, it has become an increasingly
23 popular method of distributing settlement funds to non-class third parties in lieu of class
24 members, a “growing feature” that raises “fundamental concerns.” *Marek v. Lane*, 134 S. Ct.
25 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari). Non-compensatory *cy pres*
26 distributions, disfavored among both courts and commentators alike, remain an inferior
27 avenue of last resort. *See e.g., Dennis*, 697 F.3d at 868 (*cy pres* settlement can easily become “a
28 paper tiger”); *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).

1 for the \$3 million *cy pres* component, even if the recipients didn't already reflect an
2 inappropriate indirect benefit to class counsel. *Pearson*, 772 F.3d at 781.

3 Previously, this Court accepted the parties' justification for the *cy pres*—that further
4 payouts to the class “would constitute an impermissible windfall for the claimant class
5 members at the expense of the silent class members.” Dkt. 271 at 14. Immediately, this
6 rationale overlooks the possibility of employing methods that would compensate those
7 absent class members who had not yet submitted any claim (*e.g.*, supplemental notice and
8 outreach, sampling for lottery payout, or a direct distribution). It is thus both legally and
9 factually erroneous in the absence of a showing that the 99.8% of class members who did not
10 make claims had no claims to be made—an argument that directly contradicts the class
11 allegations in the complaint.¹⁵

12 A settlement need not obtain each measure of relief sought to be adequate.
13 Nevertheless, a settlement is unfair if it rewards non-party organizations before fully
14 satisfying the class' claims. Class counsel and class representatives have a fiduciary duty to
15

16 ¹⁵ Furthermore, the settling parties complain of a windfall, but full compensation of
17 claimants is not to be judged vis-à-vis the amount offered in the settlement agreement.
18 *Bank America*, 775 F.3d at 1065 (citing *Klier*, 658 F.3d at 480). Rather, it can only be
19 determined by comparing the relief obtained to the full measure of legal damages sought in
20 the complaint. *cf. Bluetooth*, 654 F.3d at 945 n.8 (examining whether relief obtained in
21 settlement matched theory of the complaint); *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir.
22 1978) (no windfall or unjust enrichment to redistribute to class members when alleged
23 damages are greater than the sum after redistribution). In the plaintiffs' operative Fourth
24 Amended Complaint, their theory of damages included statutory, general, special and
25 exemplary or punitive damages, and compiled interest, each in addition to the restitution of
26 ill-gotten gains. Dkt. 221 at 46. Yet, the settlement payments to class members contemplate
27 only refunds—and even that is short of restitution, with no compensation for the time-value
28 of money or interest expenses class members may have accrued on the improper credit-card
charges. Any notion of equating class members walking away with more than \$0 with a
windfall 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 1185.

1 absent class members, and it is betrayed when they negotiate a settlement that gratuitously
2 favors outside parties before the fiduciaries when it is feasible to compensate the fiduciaries.
3 *E.g.*, Martin H. Redish *et al.*, *Cy Pres Relief & the Pathologies of the Modern Class Action: A*
4 *Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 666 (2010). By adopting the
5 presumption in favor of class distributions espoused by *Pearson*, *BankAmerica*, and *ALI*
6 *Principles* § 3.07, this Court can help to cabin unfettered use of *cy pres* and again make class
7 members the “foremost beneficiaries” of class settlements. *Baby Prods.*, 708 F.3d at 179.

8 Even if *cy pres* is acceptable here, the choice of recipients is not. “*Cy pres* distributions
9 present a particular danger” that “incentives favoring pursuit of self-interest rather than the
10 class’s interests in fact influenced the outcome of negotiations.” *Dennis*, 858 F.3d at 867. “The
11 responsibility of class counsel to absent class members whose control over their attorneys is
12 limited does not permit even the appearance of divided loyalties of counsel.” *Radcliffe v.*
13 *Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) (internal quotation omitted).

14 Lead plaintiffs’ counsel James Patterson and defense counsel Michelle Doolin are both
15 graduates of *cy pres* beneficiary USD Law, a fact that has not been disclosed in the class
16 notice. “A *cy pres* remedy should not be ordered if the court or any party has any significant
17 prior affiliation with the intended recipient that would raise substantial questions about
18 whether the award was made on the merits.” *ALI Principles* § 3.07 cmt. (b). As the leading law
19 review article notes, such *cy pres* awards “can also increase the likelihood and absolute amount
20 of attorneys’ fees awarded without directly, or even indirectly, benefitting the plaintiff.”
21 Redish, *supra* at 661. The Ninth Circuit has specifically suggested that the *alma mater*
22 dispensation is a type of conflict that is objectionable. *Nachshin*, 663 F.3d at 1039 (citing
23 George Krueger & Judd Serotta, Op-Ed, *Our Class-Action System is Unconstitutional*, WALL ST.
24 J., Aug. 6, 2008 (“Judges...have occasionally been known to order a distribution to some
25 place like their own alma mater ...”)); Adam Liptak, *Doling out Other People’s Money*, N.Y.
26 TIMES, Nov. 26, 2007 (“Lawyers and judges have grown used to controlling these pots of
27 money, and they enjoy distributing them to favored charities, alma maters and the like.”); *see*
28

1 also *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 577 n.2 (E.D. Pa. 2005)
2 (noting appearance of impropriety in selecting a beneficiary with long-established ties to
3 Eastern District of Pennsylvania bench).

4 Another dispositive deficiency of the *cy pres* award is its failure to account for the
5 “broad geographic distribution of the class.” *Nachshin*, 663 F.3d at 1040. *Nachshin* reversed
6 settlement approval where two thirds of the donations were made to local institutions. *Id.* In
7 *Nachshin*, this Court planted its flag with the Seventh and Eighth Circuit by requiring
8 geographic congruence between the class and the *cy pres* beneficiary. *Id.* (citing *In re Airline*
9 *Ticket Commission Antitrust Litig.*, 268 F.3d 619, 625-26 (8th Cir. 2001) (concluding that the
10 distribution of unclaimed funds to Minnesota **law schools** and charities was an abuse of
11 discretion); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989)
12 (invalidating settlement agreement, in a national antitrust class action, that made a *cy pres*
13 distribution to **local law schools**, and directing the district court to “consider to some degree
14 a broader nationwide use of its *cy pres* discretion”)).

15 It follows *a fortiori* from *Nachshin* that it is impermissible that each and every *cy pres*
16 recipient is local. This Court previously accepted the idea that the local centralization was
17 permissible because the recipients engage in a nationwide dialogue and place students from
18 across the country. Dkt. 271 at 13-14. The defendant’s own record submissions undermined
19 this very claim by demonstrating 92.5% of San Diego State undergraduate enrollees are from
20 in-state. Dkt. 265-2. Even if student enrollment or faculty employment were more
21 geographically diffuse, it would do nothing to distinguish this award from the ones to local
22 universities that the Seventh and Eighth Circuit unanimously rejected in *Houck* and *Airline*
23 *Ticket Comm’n* respectively. In *Houck*, for example, the *cy pres* proposed was to “research
24 projects in the area of class actions, and particularly antitrust law,” research that theoretically
25 would have a nationwide benefit to all consumers interested in antitrust enforcement. 881
26 F.2d at 502. But that didn’t prevent the Seventh Circuit from reversing on account of the
27 concentration at schools local to Chicago. *Id.* By preventing unjustifiable localizations of
28

1 benefit, geographical restrictions on *cy pres* work in conjunction with CAFA. 28 U.S.C. §1714
2 (proscribing favoritism toward segments of the class based on geographic proximity to the
3 court).

4 Courts should not countenance grossly disproportionate concentrations of *cy pres*
5 proceeds within a single municipality. Similar to state and sub-state governmental
6 organizations, San Diego-area universities primarily serve their local constituency; the vast
7 majority of their students are California residents, and the *cy pres* money that belongs to the
8 nationwide class will be spent in the San Diego area. A distribution to exclusively San Diego-
9 area schools is too concentrated for a nationwide class.

10 The settling parties ask this Court to ignore the *cy pres* issue because it was ruled upon
11 by the district court in the initial decision approving the settlement. The Ninth Circuit
12 vacated the district court's settlement approval; it is not inconsistent with the Ninth Circuit's
13 decision for this Court to correct the earlier order's legally incorrect decision on *cy pres*.
14 *EasySaver*, 599 Fed. Appx. at 275 (“[C]lass settlement is a package deal that must stand or fall
15 in its entirety...”). While it is unfortunately inefficient that the Ninth Circuit chose not to
16 reach the issue when squarely presented with it, there is no good reason to refuse to
17 adjudicate the *cy pres* question and require a second Ninth Circuit reversal, as much as the
18 settling parties would like to avoid review of their indefensible *cy pres* provisions. “A court has
19 the power to revisit prior decisions of its own or of a coordinate court in any circumstance,”
20 especially when the earlier decision was “clearly erroneous” as the district court's was here.
21 *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988).

22
23 **V. Unanswered questions preclude settlement approval; Perryman objects to the**
24 **denial of necessary fact discovery.**

25 The Ninth Circuit's remand calls for further proceedings consistent with *Online DVD*.
26 599 Fed. Appx. at 275. Publicly-available evidence demonstrates conclusively that the e-
27 credits in this case are nothing like the *sui generis* Walmart.com gift cards that had no
28 expiration or blackout dates in *Online DVD*, could be used to buy millions of products

1 without limitation, and were thus deemed to have sufficient cash-like qualities to be a
2 judicially-created exception to Section 1712. Thus, the Ninth Circuit could reject plaintiffs'
3 petition for rehearing in this case overnight. Yet the settling parties continue to insist beyond
4 all plausibility that the \$26 million face value coupons are not coupons and are actually worth
5 \$26 million to the class—but refuse to produce the data to back these assertions up.

6 If the Court is not to reject the settling parties' argument out of hand or to draw the
7 appropriate adverse inference from the parties' refusal to volunteer dispositive evidence in
8 their possession, Perryman maintains that discovery is necessary to perform the fact-intensive
9 inquiry *Online DVD* requires to discern whether certain relief constitutes a CAFA coupon.
10 Among other information, he seeks to know (1) the percentage of customer purchases on the
11 relevant websites that totaled less than \$20, including tax, shipping and delivery expenses; (2)
12 the average customer purchase price on the websites; (3) what other promotional offers the
13 defendants routinely offer to the general public; (4) the percentage of "\$15 Thank You Gifts"
14 that were redeemed within one year of issuance; (5) the average price of customer purchases
15 for which \$15 Thank You Gift was redeemed; (6) the total number of products for sales on
16 the relevant websites and how many can be obtained with the \$20 credits without additional
17 out of pocket expenditures (including, tax, shipping, handling or other charges). In addition
18 to the requests listed in the letter, Perryman also wishes disclosure of the redemption rates
19 and usage statistics of the "20% Off Codes" and "\$15 Credits" that were distributed as part
20 of the settlement in a recent companion case, *Cox v. Clarus Marketing Group, LLC*, No. 11-cv-
21 2711 H (S.D. Cal.), where Provide Commerce was a defendant. In his remand memorandum,
22 Perryman suggested that the Court set a discovery schedule. Dkt. 303. The Court declined to
23 do so. Dkt. 305.

24 This evidence would all further demonstrate that the coupons in this case are indeed
25 subject to CAFA under *Online DVD*. Frank Decl. ¶¶ 32-37 (offer of proof). The parties in
26 their final approval papers have answered none of the above questions, the closest revelation
27 being that 15 products are currently available for under \$20 (exclusive of service charges and
28

1 tax). Dkt. 307-1. Fifteen!—compared to the hundreds of thousands of free products
2 (exclusive of service charges and tax) available at Walmart.com. The lack of transparency is
3 not surprising. The truth would reveal the self-dealing class counsel committed in this
4 settlement, and the settlement itself prohibits defendants from taking a position on the total
5 settlement value or the value of the \$20 Credit (Settlement §2.1(c)). The harm of this
6 premium clear-sailing agreement was particularly prejudicial here: because Provide offered
7 \$15 coupons to induce people to unwittingly be billed by its EasySaver program, it thus
8 surely had data about historical redemption rates in its possession. Additionally, as a named
9 defendant in *Cox v. Clarus, supra*, it has presumably has the most directly analogous
10 redemption data possible.

11 The above information is necessary before the Court can grant approval. *See Redman*,
12 768 F.3d at 636 (lamenting the lack of data “on how often a \$10 coupon would be used in a
13 RadioShack store to buy an item costing \$10 or less rather than to obtain a discount on a
14 pricier item,” “how many items in the typical RadioShack store cost exactly \$10” and “how
15 many of each of the low-priced products the average RadioShack store carries.”). The parties
16 have not carried their burden of proof and encourage now this Court to commit reversible
17 error. *See Pampers*, 724 F.3d at 719 (reversing settlement approval where parties did not
18 produce germane information within their possession); *cf. also In re Mercury Interactive Corp. Sec.*
19 *Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (“The Advisory Committee Notes [to Rule 23(h)]
20 further contemplate that, in appropriate cases, the court will permit an objector discovery
21 relevant to the objections.”) (internal quotation omitted). The Court should draw the
22 appropriate adverse inference.

23 Currently, the Court has sufficient information to reject the settlement, but insufficient
24 information to approve it under the law.

25 **Conclusion**

26 *Online DVD* involved a *sui generis* gift-card that was without expiration, without
27 blackout dates, stackable, crackable, voluntarily chosen by class members instead of cash, and
28

1 could purchase millions of items, including hundreds of thousands of items for free. The
2 “gift codes” or “e-credits” in this case are nothing of the sort, severely diminished in value
3 because they preclude the use of other freely-available coupons, and are worse than the
4 coupons in *Inkjet*—even if one ignores the fact that double-digit “standard delivery” charges
5 mean that it is impossible to purchase anything for free from Provide Commerce¹⁶ with the
6 coupons. *Online DVD* does not save this settlement, and correct valuation of the coupons
7 shows that class counsel is receiving several times as much as the class, of whom 99.8%
8 receive nothing but a coupon unlikely to be redeemed. In no circumstance can this Court
9 approve the settlement without demanding additional disclosure.

10 Since the first settlement approval, several appellate courts have rejected the *cy pres*
11 reasoning of the district court; that the Ninth Circuit has punted once is no reason to require
12 Perryman to take that issue to the Ninth Circuit again, when the *cy pres* in this settlement
13 cannot satisfy *BankAmerica* or *Pearson* or § 3.07, and is reason enough by itself to reject the
14 settlement.

15 Dated: July 2, 2015

Respectfully submitted,

17 /s/ Theodore H. Frank
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28 ¹⁶ On December 31, 2014, Provide Commerce, Inc. became a fully-owned subsidiary of FTD, Inc., but there has been no new Fed. R. Civ. Proc. 7.1 disclosure by defendants.

1 **CERTIFICATE OF SERVICE**

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

5 DATED this 2d day of July, 2015.

6 *(s) Theodore H. Frank*
7 Theodore H. Frank