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.,
Defendant-Appellees.

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

Appellant Brian Perryman's Opposition to Motion for Summary Affirmance and Cross-Motion for Sanctions

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Introduction

It is telling that plaintiffs' motion does not mention once how much cash the class will actually receive in this settlement: $225,000 (Dkt. 281 at 47:12), a tiny fraction of the class's attorneys' double lodestar of $8.85 million, and three local San Diego educational institutions' *cy pres* of $3 million. Meanwhile, 99.8% of class members get no money at all, though all are sufficiently ascertainable to give them a coupon. On its face, the settlement transgresses *Allen v. Bedolia*, 737 F.3d 1218 (9th Cir. 2015), a case that is neither mentioned by the district court nor plaintiffs' motion. The settlement approval is laughable, and we don't say that as overheated rhetoric; we say it because a law-review article singled out *this settlement* as an "audacious[]" illusory settlement that couldn't have been proposed, much less approved, with a "straight[] face":

> In *In re EasySaver Rewards Litigation*, the defendant settled claims by providing class members with $20 credits for online purchases from ProFlowers and the defendant's other online gift-selling businesses. The credits could not be used during the Christmas, Valentine's Day, or Mothers' Day seasons; they expired in one year; and they could not be used on top of the substantial discounts that the website regularly offered all its customers. The parties audaciously asked the court to value these credits at their full face value, and the district judge complied. The judge approved the settlement and awarded attorneys' fees based on the total face value of the deal, including both the coupon component and the cash component, despite overwhelming reasons why each of the components was actually worth far less than the face value. The court stated, "The total settlement will approximate $38 million dollars if the entire class use the credits and make claims for reimbursement." But predictably only a small fraction of the class members would use the credits and make claims for

> reimbursement, so it is hard to understand how class counsel could straight-facedly ask a judge to treat the remedy as being worth its face value, or how a district judge could agree to do so.

Howard Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. --, -- (forthcoming 2017) (footnotes and citations omitted) (attached as Exhibit A). The settlement approval further contradicts *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) and *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015); neither plaintiffs' motion nor the district court mentioned these cases.

In short, the district court committed multiple legal errors. Plaintiffs' motion for summary affirmance fails to address multiple grounds of Perryman's appeal, and cannot possibly demonstrate the lack of a substantial question given that failure. Where it does engage with Perryman's coupon arguments, it is wrong on its face.

Nor does the motion meet this Court's rigorous standard for summary disposition. "Motions to affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief." *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (*per curiam*). Perryman has not yet filed his opening brief and the supposedly controlling precedent cited by plaintiffs failed to convince this Court just last year. *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) ("*EasySaver*"). As *Hooton* warns, this motion, filed the Tuesday before Thanksgiving, is a transparent abuse of appellate procedure that "unduly burdens" Perryman's non-profit attorneys and the Court with 31 exhibits of 484 pages designated in the record. *Hooton*, 693 F.2d at 858. Such vexatious litigation

merits sanctions, as Perryman cross-moves, and at the very least, this Court's refusal to "entertain" a motion that demands such an "extensive review of the record." *Id.*

Plaintiffs' motion should be denied. Perryman cross-moves for sanctions under 28 U.S.C. § 1927 in an amount equal to the attorneys' fees Perryman incurred in defending plaintiffs' motion, and for other equitable relief permitted by FRAP 2.

Background

In late 2011, plaintiffs filed the operative complaint in this case against the three defendants alleging that their practices of enrolling customers in their Rewards Programs after luring them with the promise of worthless coupons called "Thank You Gifts" are unfair and unlawful under federal and state law. Dkt. 221. Half a year later, before the plaintiffs had filed a motion for class certification, the parties proposed a settlement of the putative class action. Dkt. 248-3 ("Settlement"). Fundamentally, the settlement is bifurcated into two components: a $12.5 million cash fund the bulk of which would go toward class counsel's reserved $8.85 milllion attorney award. Settlement § 2.1. The other component is an automatic email dissemination of "$20 Credits" to the approximately 1.3 million class members. Settlement §§ 2.2, 3.13.

The "$20 Credits" are indistinguishable from the "Thank You Gifts" that the plaintiffs repeatedly called "coupons" in their complaint. *E.g.,* Dkt. 221 at 2, 3, 7, 12, 14, 18, 25, 33. The "$20 Credits" were good for use only on four of Provide's websites and only for certain products; expired after one year; and were not valid during Christmas week, the ten days before Valentine's Day, or the first two weeks of May (Mother's Day). Settlement § 2.2. Moreover, the coupons were not "stackable" (a

customer could not combine two $20 coupons to receive $40 off); nor could they be used in conjunction with any other offer. *Id.* Finally, the coupons were not "crackable"—they could only be used in a single transaction: in the unlikely event a class member purchased something costing less than $20 on Provide's websites, there would be no change or credit given for the balance of the coupon. *Id.* The settlement prohibited defendants from taking a position on the total settlement value or the value of the coupons. *Id.*

Class member Brian Perryman filed an objection to this settlement and appealed the 2013 settlement approval. This Court vacated the settlement approval, remanding for proceedings consistent with *In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015). *EasySaver*, 599 Fed. Appx. 274. Plaintiffs petitioned for rehearing of that decision, under the theory that *Online DVD*'s conclusion that Wal-Mart gift cards are not CAFA coupons entailed that Provide Commerce e-credits are also not coupons. Plaintiffs' petition was denied in under twenty-four hours. On remand, the district court refused to permit Perryman to conduct discovery into the facts that *Online DVD* determined important to the legal question of whether instruments are coupons, and committed an error of law to apply *Online DVD* to hold there were not coupons in this settlement. Perryman appeals again, represented by the Center for Class Action Fairness ("CCAF"), part of the non-profit Competitive Enterprise Institute. CCAF represents class members when class counsel employ unfair class action procedures to benefit themselves at the expense of the class. Perryman's counsel has won over a dozen federal appeals on these issues, including a 6-2 record in this Court. Dkt. 310-1 ¶¶ 38-47

(attached as Exhibit B) (refuting plaintiffs' motion's smear of "professional objector").

I. The settlement approval violated CAFA and contradicts *Online DVD*.

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). 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." *In re HP Inkjet Printer Litig.,* 716 F.3d 1173, 1181 (9th Cir. 2013)."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. These are coupons. The codes entitle class members to a "benefit": a $20 discount on merchandise. That they are called "credits"[1] 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 correctly rejected the argument that the parties

[1] In the first go-around, the parties called the instruments "credits," but plaintiffs now favor the term "gift codes," presumably because *Inkjet* held that "e-credits [are] a euphemism for coupons." 713 F.3d at 1176.

can evade CAFA through semantics and applied CAFA notwithstanding settling parties using a label other than "coupon." *See, e.g.*, *Inkjet,* 713 F.3d at 1176 ("e-credits"); *see also Online DVD*, 779 F.3d at 952 (courts should "ferret[] out the deceitful coupon settlement that merely co-opts the term 'gift card' to avoid CAFA's requirements."). Perhaps most 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. Dkt. 221 at 2 ("coupon gift code," "coupon or gift code"); *id.* at 18 (defining class to include those who "clicked on a coupon offer…to receive a gift code"); *id.* at 8, 11, 12, 14, 25, 33. The undisputed evidence below was that if one searches for "ProFlowers coupons" on Ebay, the website's search engine knows to provide the searcher with listings selling ProFlowers gift codes similar to those in this settlement. Frank Decl. (Dkt. 310-1) ¶ 31 (attached as Exhibit B).

The district court held that because the "gift codes" can hypothetically be used to purchase an entire product that they are not really coupons. Pl. Mot. 15. This argument has no basis in any dictionary definition, nor in the statutory text or the 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); *Davis v. Cole Haan, Inc.*, 2013 WL 5718452, 2013 U.S. Dist. LEXIS 151813, at *7-*8 (N.D. Cal. Oct. 21, 2013) ($20 vouchers to Cole Haan stores constituted CAFA coupons). Section 1712

was born of the recognition that "[c]ompensation in kind is worth less than cash of the same nominal value." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006). "[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." *Redman v. RadioShack, Inc.*, 768 F.3d 622, 635 (7th Cir. 2014) (Posner, J.).

Moreover, the "whole product" argument ignores the primary problem with coupons: that they "mask[] 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); *see generally id.* at 1178-79.[2] Coupons are deployed here to mask what is really a $13 million total settlement value, of which class counsel is disproportionately seizing more than two thirds. Class counsel's fee award here was faultily premised on the face value of the coupons, allowing precisely "the inequities"

[2] The district court thought it important that the settlement requires a token payment of $225,000 to the class, but this makes no difference under the statute. 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. A coupon does not morph into a non-coupon because it is accessorized with a cash fund. Subsection (a) discusses "the ***portion*** of any attorney's fee award… that is attributable to the award of coupons." 28 U.S.C. § 1712 (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. American Honda*, 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). Otherwise, CAFA could be circumvented by settlements for coupons plus one dollar.

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

Even if the district court was correct (notwithstanding the rejection of its argument in *Online DVD* and *Redman*) that credits that could purchase a "whole product" are not coupons, the record evidence is that the gift codes were not likely to be used to purchase "whole products" rather than providing discounts. Provide Commerce sells thousands of different items, but could identify only fifteen scattered across its websites that cost less than $20. Declaration of Laura Szeligain ¶ 2 (Dkt. 307-1). But even this legally insufficient showing exaggerates: undisputed evidence was that Provide Commerce websites charge $11.98 to $18.98 for standard delivery and handling, and it is impossible to complete an order on a Provide Commerce website using a $20 gift code without paying Provide Commerce money. Frank Decl. ¶¶ 4-16 and Exhibits 1-13 (Dkt. 310-1-6, attached as Exhibit B).

The district court also observed that class members had initially expressed interest in receiving a gift code from defendants, thus making the chances of settlement coupon redemption "much higher." This is a non sequitur absent from the statute. 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) (renewed or continued DirectBuy membership is coupon settlement).[3]

[3] Moreover, the operative Complaint sought money damages, rather than

Online DVD held that Wal-Mart.com gift cards were not "coupons" for CAFA purposes reasoning that unlike other "coupons" that only offered class members a discount on "one type of complete product," the Wal-Mart.com gift cards acted more like cash because class members could choose from "any item carried on the website of a giant, low-cost retailer." *Id.* at 952. Distinguishing *Synfuel*, the Ninth Circuit again emphasized the fact the *Online DVD* gift cards allowed "use on [class members'] choice of a large number of products from a large retailer" and were permitted under the settlement to obtain cash in lieu of a gift card if they so preferred. *Id.*

Online DVD expressly confined its holding to Wal-Mart.com gift cards "without making a broader pronouncement about every type of gift card that might appear." *Id.*; *see also Redman*, 768 F.3d at 636 (per se rule that whole-product vouchers can never constitute "coupons" is "untenable"). *Online DVD* itself recognizes that some CAFA coupons can be used to purchase whole products. 779 F.3d at 592 (distinguishing Wal-Mart.com gift cards from *Inkjet* CAFA coupons that could be used to purchase a whole product, because the former allowed "the ability to purchase one of many different types of products."). The reason that *Online DVD* created an exception to the statutory language in CAFA was because the unique gift cards were so similar to fungible cash

"benefit-of-the-bargain" coupons; the district court's "specifically tailored" argument is incorrect on its face. Dkt. 221 at 46-47. The district court also independently erred in failing to require the defendant to provide evidence of existing redemption rates of coupons before assuming without evidence that the coupons would be widely used. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718-19 (6th Cir. 2013). Plaintiffs' motion does not mention *Pampers* or Perryman's assignment of error to the denial of discovery.

and had so few of the limitations associated with coupons. The gift codes at issue in this settlement have none of the advantages of the Walmart.com gift cards:

	Online DVD	*EasySaver*
Face Value	$12	$20
Blackout Dates	None	Yes[4]
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
Reedemable 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[5]	Undisclosed
Number of items that can be purchased in whole (excluding service charges and taxes)	Over 700,000[6]	15

Unlike Wal-Mart.com gift cards that were more like cash because of the millions

[4] 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 gifts Provide Commerce websites sell.

[5] Dkt. 310-1 ¶¶ 18-22 & Exh. 14-17 (attached as Exhibit B).

[6] Dkt. 310-1 ¶¶ 23-24 (attached as Exhibit B).

of products of all types available to class members, Provide gives class members access to only a few types of products: flowers and similar gifts, and not during the five weeks of the year most conducive to gift-giving. *See* Dkt. 310-1 ¶¶ 4-24 & Exh. 1-17 (attached as Exhibit B). None of these facts were contested below.

This is not a close question, but not in the direction that permits summary affirmance. The district court twisted *Online DVD* beyond recognition to hold that the gift codes/credits/coupons here are not coupons; as Professor Erichson notes, it flunks the straight-face test to hold that they are worth face value. 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 value. *See, e.g.*, Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1025 (2002) ("blackout dates significantly reduced the coupons' value to the average class member"); *Inkjet*, 716 F.3d at 1179 ("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" (internal citation omitted)); Federal Judicial Center, *Managing Class Action Litig.: A Pocket Guide for Judges*, 34 (3d ed. 2010) ("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."); *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). The undisputed evidence was that other gift codes marketed by Provide Commerce with *fewer* limitations than the gift codes in this settlement sell on Ebay at discounts of as much as 93% to face value. Dkt. 310-1 ¶¶ 25-29 & Exhibits 18-19.

The $20 credits here will be distributed to class members with restrictions making use 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.*, 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 claim or redeem their coupons.

Because the credits are CAFA coupons, fees attributable to the credits can only be awarded as a percentage of those redeemed. 28 U.S.C. § 1712(a)[7]; *Inkjet*. For purposes of the Rule 23(e)(2) fairness inquiry, however, CAFA permits the Court to

[7] Coupon valuations based on clairvoyance not only violate § 1712(a), as interpreted by the *Inkjet* majority and dissent, they also implicitly contravene § 1712(e). Section 1712(e) authorizes the district court to "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" 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 unclaimed coupons that reverted to the defendant, but not on the value of those unclaimed coupons that were redistributed to a third-party charity.

make a realistic justified valuation of the likelihood of redemption. *Redman*, 768 F.3d at 634. If one generously assumes a redemption rate of ten percent despite the complete lack of evidence of any likelihood that any coupons would be redeemed, and one generously assumes that the average redeemed value of a $20 credit is $13 (Dkt. 310-1 ¶¶ 15-16), then the actual value of the coupons would be only $1.7 million. If the redemption rate is the more typical 1 to 3%, then the coupons are worth only $170,000 to $510,000. 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 $26 million.

Perryman is entitled to reversal on this issue alone; but at a minimum it creates a substantial question making summary affirmance inappropriate.

II. There are multiple independent non-CAFA reasons why reversal is required that are not even addressed in plaintiffs' motion.

Regardless of how this Court resolves the discrete CAFA coupon issue, the settlement must fall for other reasons. *See EasySaver*, 599 Fed. Appx. at 275 ("[C]lass settlement is a package deal that must stand or fall in its entirety…"). *EasySaver* left these issues unresolved. Plaintiffs' motion fails to mention these reasons, much less demonstrate that controlling precedent makes their decision here insubstantial.

A. *Allen v. Bedolia* requires reversal.

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 without ever being used, but even when they are used, they will not provide the consumer with $20 of benefit. Provide Commerce websites offer customers a freely-available 20%-off coupon for the vast majority of purchases outside of Valentine's Day. *See* Dkt. 310-1 ¶ 17. If a class member uses the settlement gift code, however, they would be unable to also use the freely-available 20%-off coupon. Because of the freely-available 20%-off coupon, a "$60" bouquet that would cost $40 with use of the $20 gift code would cost only $48 without the gift code—meaning that the gift code is worth $8, not $20, in that instance. Class counsel does not actually believe the coupons are worth $20 each, and this could be demonstrated by asking if they would be willing to accept 500,000 transferable coupons with the same limitations as those in the settlement (which, by class counsel's claims, would be worth $10 million) instead of $8.85 million cash. Certainly not, given that Provide Commerce coupon owners cannot sell them on eBay even at a 90% discount to face value. Dkt. 310-1 ¶¶ 25-26 and Exhibit 18.

For a deal to be 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., Allen*, 737 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of three is disproportionate); *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% fee "clearly excessive"); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014) (Posner, J.) (69% fee "outlandish"). The fee provision here allocates nearly $9 million to class

counsel, and forbids the defendant from opposing that request or even taking a position on the value of the $20 credits that supposedly justifies the fee. Settlement § 2.1(c); *see Redman*, 768 F.3d at 637 (explaining why such clear-sailing clauses deserve "intense critical scrutiny"). This settlement, which affords class counsel more than 40 times as much as class members, does not meet the *Allen* test. The district court erred as a matter of law in failing to address *Allen*; plaintiffs' motion does not mention it.

B. *Baby Products* and *BankAmerica* require reversal.

The *cy pres* component of the settlement (Settlement §2.1(e)) distribution is unlawful because *cy pres* is improper when it is feasible to make further distributions to class members.

"[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); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §3.07(b) (2010). 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).

"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 Prods.*, 708 F.3d at 174.

"Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." Here, *cy pres* accounts for several times the amount of actual class recovery, with over 99% of the class receiving no cash.

A settlement need not obtain every class member relief to be adequate. Nevertheless, a settlement is unfair if it rewards non-party organizations before fully satisfying the class' claims. Class counsel and class representatives have a fiduciary duty to absent class members, which is betrayed when they negotiate a settlement that gratuitously favors outside parties before the fiduciaries who could be feasibly compensated. *E.g.,* 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, 666 (2010). This is especially true where, as here, the *cy pres* recipients were local San Diego universities related to the parties' counsel and the class was national.

Neither the district court nor the plaintiffs' motion mention *Baby Products* or *BankAmerica*, and these cases by themselves present substantial questions that preclude summary affirmance.

III. As discussed in No. 13-55373, the *cy pres* violates Ninth Circuit law.

In the original *EasySaver* briefing, Perryman devoted eight pages demonstrating that the *cy pres* in this case—$3 million to local San Diego schools, including class counsel's *alma mater*—violated *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011); *In re Airline Ticket Commission Antitrust Litig.*, 268 F.3d 619, 625-26 (8th Cir. 2001); and *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989). No. 13-55373 Opening Br. 35-42. The space allotted by FRAP 27 does not permit the

repetition of those arguments previously unaddressed by the Ninth Circuit here, but they provide an independent ground why the issues in this appeal are not insubstantial.

IV. Class counsel's motion vexatiously multiplies proceedings and merits sanctions under 28 U.S.C. § 1927.

Without waiting for Perryman's opening brief (previously due December 15, in less than four weeks), plaintiffs have filed a baseless motion for "summary affirmance" without even mentioning, much less refuting or distinguishing, many of the precedents that Perryman relies upon. And even on the issue plaintiffs focus on, *Online DVD* hardly makes affirmance of the district court's decision twisting that precedent beyond all recognition automatic; substantial questions remain, as demonstrated by this Court's original *EasySaver* decision. This motion is not just substantively frivolous, but procedurally abusive as well. *Hooton,* 693 F.2d at 858. Because class counsel filed a motion for summary affirmance the Tuesday before Thanksgiving,

- Perryman is "unduly burden[ed]" to file an opposition to a motion to dismiss in ten days substantively defending the merits of his appeal within 20 pages instead of the weeks and 14,000 words permitted by FRAP 32(a);
- class counsel demands that Perryman and the court engage in "an extensive review of the record of district court proceedings" by designating 31 exhibits of 484 pages;
- class counsel, by making their merits argument in a FRAP 27 motion instead of a FRAP 28 merits brief, will get a *de facto* ten-page surreply that they would not normally be permitted;
- class counsel gets two bites at the apple: both a three-judge motions panel and a three-judge merits panel will decide whether the decision

will be affirmed; and

- because class counsel gets two bites at the apple, they can abuse the FRAP 27 motion to float an argument as a trial balloon, see how the appellant and the Court respond, and then use that information to either refine the argument for their FRAP 28 merits brief or use their 14,000-word limit on different arguments, thus effectively evading the FRAP 32 word limits.

This is wrong, and should not be tolerated.

> Motions for summary affirmance generally should be confined to certain limited circumstances. Summary disposition is appropriate in an emergency, when time is of the essence and the court cannot wait for full briefing and must decide a matter on motion papers alone. Summary affirmance may also be in order when the arguments in the opening brief are incomprehensible or completely insubstantial. Finally, summary affirmance may be appropriate when a recent appellate decision directly resolves the appeal.

United States v. Fortner, 455 F.3d 752, 754 (7th Cir. 2006) (Easterbrook, J.). This case meets none of these standards. *Fortner* continues:

> [The] submission in this case is fifteen pages long, and but for the formal requirements of Federal Rule of Appellate Procedure 28, it is essentially a brief on the merits. But by filing it the [appellee] has wasted the resources of this court. (Six judges will ultimately consider this appeal: three on the motions panel and three on the merits panel.) The [appellee] could have made these same arguments in a brief and moved to waive oral argument if it felt that argument would be unhelpful.

Id. Class counsel has unnecessarily multiplied proceedings, wasting both the Court's and Perryman's counsel's time. 28 U.S.C. § 1927 requires an award of attorneys' fees for this vexatious behavior. *E.g., Top Entm't, Inc. v. Torrejon*, 351 F.3d 531, 534 (1st Cir. 2003).

Custom Vehicles, Inc. v. Forest River, Inc., 464 F.3d 725 (7th Cir. 2006) (Easterbrook, J.), suggests another remedy. *Custom Vehicles* found that an appellant used a 1200-word motion brief to make an argument that should have been made in a FRAP 28 reply brief. It responded by holding that when a party makes an "absurd, time-wasting motion," the Seventh Circuit would deduct "double the number of words" from the maximum in the merits brief: thus, Custom Vehicles' 7000-word maximum for a reply brief was reduced 2400 words to a 4600-word maximum. 464 F.3d at 728.

Perryman's counsel has repeatedly faced frivolous FRAP 27 motions designed to run up class counsel's lodestar and punish objectors by vexatiously multiplying appellate proceedings. *E.g., Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014) (agreeing motion to dismiss appeal was frivolous but denying cross-motion for sanctions because, *inter alia*, "Saltzman's removal as lead plaintiff and his lawyers' removal as class counsel are sanction enough"). Perryman's counsel is a thinly-staffed non-profit and being required to drop everything on the eve of a holiday to defend the propriety of an appeal against a meritless shot-in-the-dark motion is extraordinarily burdensome, almost depriving Perryman's counsel of a chance to visit his cancer-ailing father. We do not ask the Court go as far as *Eubank* and remove plaintiffs' lawyers as class counsel. But if appellate courts do not want to be overwhelmed with these sorts of evasions of the FRAP 32 briefing limits, they must deter such procedural abuses.

Here, class counsel has used over 4700 words in their "absurd, time-wasting motion" that evades the Fed. R. App. Proc. 32 word limits and seeks an abusive two bites at the apple. Another several thousand words are likely to come in a reply brief on

their motion as they make excuses for failing to mention binding precedent why their argument cannot prevail and for omitting critical record facts. As *Custom Vehicles* suggests, this Court should issue an order limiting class counsel's merits brief from 14,000 words to 5,600 words as it has the authority to do under Fed. R. App. Proc. 2.

Conclusion

As Professor Erichson notes, this settlement does not pass the straight-face test. This Court has already rejected the idea that *Online DVD* insubstantially requires settlement approval. Not only is this case not appropriate for summary affirmance, but it would require the Ninth Circuit to create several circuit splits to affirm at all. Plaintiffs' motion was substantively frivolous and procedurally abusive, and sanctions are appropriate. Accordingly, plaintiff's motion should be denied and Perryman should be awarded sanctions in an amount equal to the attorneys' fees incurred in defending plaintiffs' motion, and any other relief the Court deems just.

Dated: November 23, 2016

Respectfully submitted,

/s/ Theodore H. Frank

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Proof of Service

I hereby certify that on November 23, 2016, 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.

/s/ Theodore H. Frank
Theodore H. Frank