NO. 12-15705
Consolidated with NOS. 12-15889, 12-15957, 12-15996, 12-16010, 12-16038

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re ONLINE DVD RENTAL ANTITRUST LITIGATION,
ANDREA RESNICK; BRYAN EASTMAN; AMY LATHAM; MELANIE MISCIOSCIA; STAN MAGEE; MICHAEL OROZCO; LISA SIVEK; MICHAEL WIENER,
Plaintiffs-Appellees,

THEODORE H. FRANK,
Objector-Appellant,

v.

NETFLIX, INC.; WAL-MART STORES, INC.; WALMART.COM USA LLC,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 4:09-md-2029 PJH

Reply Brief
of Appellant Theodore H. Frank

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Plaintiffs rest their argument on the idea that the district court decision is reviewed for "abuse of discretion." Pl. Br. 17-18. But the question of what law applies to a coupon settlement is a question of law that is reviewed *de novo*; moreover, the failure to apply the correct law, as the district court did here, is a *per se* abuse of discretion. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004).

Frank argued at length that *Synfuel Technologies v. DHL Express (USA),* 463 F.3d 646 (7th Cir. 2006), requires application of the Class Action Fairness Act here. Class counsel mentions *Synfuel* only once, and never argue that it is wrongly decided. Instead, class counsel argues that *Synfuel* is distinguishable because this case's class members could choose to select cash instead of coupons; therefore, goes the *non sequitur*, the coupons were not coupons. Frank previously pointed out why this argument makes no sense (Frank Opening Br. 17-19); plaintiffs do nothing to rebut this reasoning. But even if one accepts this curious logic, the settlement in *Synfuel* also had an option for class members "to receive a cash payment instead of the pre-paid envelope" that the Seventh Circuit considered equivalent to a coupon. 463 F.3d at 649. (Similarly, those *Synfuel* coupons were for free services that did not require new payments to the defendant, and thus no distinction from the slim possibility that class members could use a gift card for the exact amount of a purchase in this case.) This is dispositive. Plaintiffs provide no reason for *Synfuel* not to apply; and the failure of the district court to follow *Synfuel* means that there was reversible error.

I. The district court erred by failing to apply the Class Action Fairness Act to this coupon settlement.

When faced with a coupon settlement, a district court must apply "heightened judicial scrutiny," *Synfuel Technologies v. DHL Express (USA),* 463 F.3d 646, 654 (7th Cir. 2006), and must limit the attorneys' fee award based on the number of "coupons that are redeemed," 28 U.S.C. § 1712(a). The court failed to do either. Plaintiffs defend the district court's failure to apply the Class Action Fairness Act (CAFA) to this coupon settlement by arguing that (1) CAFA is inapplicable because there is no case law applying CAFA to "gift cards"; and (2) this settlement differs from other coupon settlements requiring CAFA scrutiny. Pl. Br. 18-25. Both arguments are incorrect.

A. Seventh Circuit precedent instructs that the "gift cards" provided by the settlement are to be treated like coupons under the Class Action Fairness Act.

Plaintiffs argue that CAFA does not apply to the gift cards because Frank's opening brief "cites no authority holding that a 'gift card' is a coupon under CAFA." Pl. Br. 18. Plaintiffs' contention underscores the fallacy of their entire argument. The settling parties can arbitrarily label the coupons in class relief in whatever manner they choose, be it "certificate," "voucher," or "e-credit"; thus, pointing to a case with the exact same semantic label—"gift card"—is unnecessary. If the settling parties had called the coupons in this case "Happy Super Fun Wal-Mart Bonus Cards," it would surely be irrelevant that there was no precedent where a court had applied CAFA to something called a "Happy Super Fun Wal-Mart Bonus Card." As in other areas of the law, it is the substance of a transaction, not an invocation of magic words, that determines the applicability of a statute regulating that transaction. Parties cannot rely on labeling "as a mere 'subterfuge' to avoid statutory obligations." *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (*en banc*) (ministerial exception); *cf. also, e.g., American Needle, Inc. v. National Football League*, 130 S.Ct. 2201, 2210 (2010) (Sherman Act "is aimed at substance rather than form" (internal quotation and citation removed)); *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011) ("artful pleading" cannot be used to avoid exhaustion requirement in IDEA). The Seventh Circuit instructs that coupon scrutiny under CAFA is required when the offered relief is "in-kind compensation" that "shares characteristics" with a typical coupon, defined as "a discount on a proposed purchase." *Synfuel*, 463 F.3d at 654. Here, the in-kind compensation not only shares characteristics, but is indistinguishable from *Synfuel's* definition of a coupon: the Walmart.com gift card provides a discount on a purchase from defendant Walmart's Internet store. ER265.

Plaintiffs cite a handful of cases where district courts ignored the requirements of the Class Action Fairness Act because the settling parties called the coupons "gift cards" or "vouchers" instead of coupons. Pl. Br. 19-20. Frank humbly submits that those courts are wrong, and certainly not persuasive. In both *Petersen v. Lowe's HIW, Inc.*[1] and *Fernandez v. Victoria Secret Stores, LLC*,[2] the district courts did not even

[1] Nos. C 11-01996 RS, C 11-03231 RS, C 11-02193 RS, 2012 U.S. Dist. LEXIS 123018 (N.D. Cal. Aug. 24, 2012).

[2] No. CV 06-04149 MMM (SHx), 2008 U.S. Dist. LEXIS 123546 (C.D. Cal. July 21, 2008).

consider whether the settlements were coupon settlements under CAFA. In *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, the district court disagreed that the settlement awarding "vouchers" was a coupon settlement, but did not mention, much less attempt to distinguish *Synfuel*. MDL No. 1967, 2011 U.S. Dist. LEXIS 50139, at *48 (W.D. Mo. May 10, 2011). *Reibstein v. Rite Aid Corp.*, a settlement of a 366-member-class class action with no objectors that was presented to the district court *ex parte*, is simply unpersuasive in deciding that the "gift cards" were not "coupons" subject to CAFA, but is, in any event, distinguishable: the Rite Aid settlement gift cards, unlike the coupons in this case, "have actual cash value" and "are freely transferrable." 761 F. Supp. 2d 241, 255 (E.D. Pa. 2011). Thus a *Reibstein* class member could exchange the coupon on a secondary market for cash. In contrast, a class member in this case must use the coupon in this case as a coupon at walmart.com, and as nothing else.[3]

As one can remember from childhood arguments with one's parents, it is not a defense to the criticism that the district court failed to follow to argue, in effect, "But lots of other courts are ignoring the statute!" *Cf. Nachshin v. AOL, Inc.*, 663 F.3d 1034

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[3] That said, a coupon without restrictions that forbid a secondary market is still a coupon subject to CAFA limitations; it is just a coupon that is more likely to survive heightened scrutiny and more likely to be redeemed.

It is also worth noting that the settlement approval in *Reibstein* contradicts Ninth Circuit precedent in agreeing to approval of a settlement where "attorneys' fees sought greatly exceed the total class recovery" (*id.* at 251), a clear-sailing agreement (*id.* at 246-47), and a kicker reverting any denied fees to the defendant (*id.*). *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

(9th Cir. 2011) (enforcing Ninth Circuit law restricting unfettered *cy pres*, notwithstanding precedent of other district courts ignoring restrictions on *cy pres*); *id.* at 1038-39 (citing examples of district courts that "abandon[ed]" *cy pres* principles).

While plaintiffs make much of cases where the courts did not consider the application of CAFA, they have no response for the myriad of cases where courts applied coupon scrutiny to a variety of in-kind compensation relief not labeled "coupon." *See* Frank Opening Br. 20 (citing cases). The inconsistency of enforcement in the district courts, with several effectively flouting statutory law, is why this Court needs to rule on the scope of CAFA. As discussed below, plaintiffs provide no reason why this Court should disregard Seventh Circuit precedent (and the numerous other district courts applying *Synfuel's* holding) to gratuitously create a circuit split. *Zimmerman v. Oregon Dep't. of Justice*, 170 F. 3d 1169, 1184 (9th Cir. 1999) (Court will only create a circuit split upon "painstaking inquiry").

B. This coupon settlement is not materially distinguishable from the one criticized in *Synfuel.*

Plaintiffs argue that CAFA does not apply to this coupon settlement because it is different from the other coupon settlements requiring CAFA coupon scrutiny. Pl. Br. 20. Plaintiffs' distinctions are unavailing.

First, Plaintiffs argue that the "gift card" at issue does not meet the definition of "coupon" because the $12 Walmart.com gift card could purchase a "whole product" rather than a "discount" on a product. Pl. Br. 22. Such a distinction was rejected by the Seventh Circuit in *Synfuel.* In *Synfuel*, the Seventh Circuit applied CAFA to the offered relief: pre-paid envelopes from defendant DHL Express. *Id.* at 654. The court "recognize[d] that the pre-paid envelopes are not identical to coupons, since they represent an ***entire product***, not just a discount on a proposed purchase." *Id.* But the court recognized that the envelopes were the type of "in-kind compensation" which involved inherent dangers from which CAFA was designed to protect. *Id.* Indeed, Plaintiffs' argument does not account for applicable tax and shipping costs, and thus it is more likely that the $12 Walmart.com gift card would only provide a discount on a proposed purchase. The gift cards here are *more* like coupons than the envelopes in *Synfuel*.

Further, as Plaintiffs acknowledge (Pl. Br. 21 n.4), courts have looked to CAFA's legislative history which includes several examples of "whole product" coupons that Congress intended to be treated as coupon settlements. *See Fleury v. Richemont N. Am., Inc.*, No. C-05-4525 EMC, 2008 U.S. Dist. LEXIS 112459, at *10-11 (N.D. Cal. Aug. 6, 2008) (citing examples including free crib repair kit or coupon toward crib; discounts on spring water or free water; and free golf gloves or golf balls). Plaintiffs have provided no explanation why Congress's examples should be treated as coupon settlements but this Settlement should not.

Second, Plaintiffs argue that the gift cards do not promote a "sale" or attract a consumer to a particular product. Pl. Br. 22. Plaintiffs' argument rests on the erroneous premise that coupons must be issued by manufacturers for specific products. Storewide coupons and discounts are a common sales promotion tool used by retailers. *See* Karen Gedenk, Scott Neslin & Kusum Ailawadi, *Sales Promotion*, in

Retailing in the 21st Century: Current and Future Trends at 303, by *Manfred Krafft and Murali Mantrala*, Springer Verlag Publishers, 2005. While courts disfavor the "forced future business" in coupon settlements, *Synfuel*, 463 F.3d at 654, this settlement is worse. Here, the gift cards require class members (Netflix subscribers) to conduct business with Netflix's *competitor*—and alleged co-conspirator—Walmart. Rather than legitimate class relief, this settlement is merely a "marketing program" for defendant Walmart. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F. 3d 768, 807 (3d Cir. 1995). Walmart only stands to gain *new* customers from its competitor's subscribers.

Third, Plaintiffs' attempt to factually distinguish *True v. American Honda Motor Co.* and *Sobel v. Hertz Corp.* are misguided. Pl. Br. 22-23. Plaintiffs argue that this Settlement differs factually from *True* because it involved a rebate on a new Honda that was not transferable and expired in twelve months, and differs factually from *Sobel* because it involved a future car rental that expired in 18 months and was non-transferable. *True*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010); *Sobel v. Hertz Corp.*, No. 3:06-cv-00545-LRH, 2011 U.S. Dist. LEXIS 68984, *13-14 (D. Nev. Jun. 27, 2011). The coupon face value, the expiration period, and transferability of a coupon may be relevant in analyzing the fairness of the proposed relief vis-à-vis class members' potential recovery, but such factors are not defining of a coupon. Instead, the offered relief is a coupon—like the Walmart.com gift card here—if it consists of "a discount on another product or service offered by the defendant in the lawsuit."

True, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (quoting *Fleury v. Richemont N. Am., Inc.*, No. C-05-4525 EMC, 2008 WL 3287154, at *2 (N.D. Cal. Aug. 6, 2008)).

Fourth, Plaintiffs' erroneously contend that this Settlement does not include the inherent dangers found in coupon settlements. Pl. Br. 23. Coupon settlements are disfavored because they often fail to disgorge illegal profits and instead force future business with the defendant. *Synfuel*, 463 F.3d at 654 (7th Cir. 2006). Plaintiffs argue that based on the cash option provided to class members that such dangers were not present. But this goes to the fairness of the settlement, not whether the coupon is a coupon: after all, *Synfuel* also involved a cash option. *Id.* at 649. Moreover, plaintiffs' argument fails to account for the fact that the claims process offering the gift card or the cash option was anything but equal: the settlement here was structured to deter class members from requesting cash instead of a coupon. A class member who requests a coupon could submit a claim via e-mail, website, or regular mail; but, a class member who requests cash could only submit a claim by printing the claims form and submitting it via regular mail (at their own expense). ER275; ER312-13; ER317. *Synfuel* found such "bias toward compensating class members with" coupon-like in-kind relief problematic. 463 F.3d at 654.

Fifth, the federal regulations cited by Plaintiffs are inapplicable and irrelevant. Pl. Br. 24-25. The gift cards are not governed by such statutes; the settling parties made clear that "the rights of these holders are the rights defined in the settlement agreement." ER109; ER265-66. Plaintiffs argue that the federal law "suggests" the gift cards are an "electronic version of cash." Pl. Br. 24. Yet, the gift cards' restrictions suggest otherwise: the gift cards are only "redeemable for purchase at Walmart.com," cannot be redeemed for cash, can only be sold by licensed resellers, and are subject to Walmart.com's Gift Card Terms and Conditions. ER265-66; ER108. More importantly, even if EFTA limitations properly applied to these gift cards, Plaintiffs do not argue that also applying CAFA's coupon scrutiny to the gift cards would be inconsistent with such federal laws, nor do they provide any explanation as to why the federal regulations should relieve the district court from applying CAFA's coupon restrictions. Pl. Br. 24-25. Indeed, the only case cited by Plaintiffs discussing EFTA, *Carlini v. United Airlines*, No. 10 C 6343, 2011 U.S. Dist. LEXIS 43220 (N.D. Ill. Apr. 19, 2011), belies the notion that metaphysical existence as an EFTA "store gift card" is mutually exclusive with existence as a CAFA "coupon." *Carlini* (which was a decision on a motion to dismiss, rather than a motion to approve a settlement) refers to the gift certificates at issue as "coupons." *Id.* at *9.

Finally, Plaintiffs claim that they should not have "to wait in perpetuity" for the gift cards to be redeemed prior to awarding class counsel's fee. Pl. Br. 25. But 28 U.S.C. §1712(a) does not require the court to wait until the last issued coupon is redeemed to award class counsel's fee. Instead, class counsel could receive their fee award based on periodic measurements of redeemed gift cards for a set time frame, as courts did even before the passage of CAFA. *See, e.g., In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp.2d 184, 189-90 (D. Me. 2003) (deferring "award of attorney fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is."); *cf. also Duhaime v. John Hancock Mut. Life*

Ins. Co., 989 F. Supp. 375, 380 (D. Mass. 1997) (staggering the fee award based on actual value created for the class). Plaintiffs' argument reveals, however, the importance of why redemption is required. If, as in plaintiffs' parade of horrors, a class member did not redeem the gift card for many, many years, then that $12 gift card would be worth substantially less due to inflation. Class counsel should not be awarded now for something that may never be used or will eventually be worth less.

Plaintiffs have given no legitimate reason not to apply *Synfuel* to this case. Calling coupons "gift cards" does not mean that they are no longer coupons subject to CAFA limitations on fees.

II. The district court's $8.5 million award to class counsel is "clearly excessive" compared to the benefit actually received by the class.

When properly calculated, the settlement fund totals $13.7 million ($8.5 million fees and expenses + $5.2 million cash claims). ER21-22; ER147-48; ER164. The $8.5 million attorney award comprises 62% of the settlement fund ($8.5/$13.7 million) and is "clearly excessive" under Ninth Circuit precedent. *Dennis v. Kellogg Co.*, 2012 U.S. App. LEXIS 18576, at *22 (9th Cir. Sep. 4, 2012) (attorney fee and expense award of 38.9% of total recovery "clearly excessive").[4] Plaintiffs argue that the $8.5 million class counsel award was proper because the settlement fund included: (1) the gift cards (though there is no evidence of how many of the $8.9 million in issued cards

[4] Frank's opening brief cited an earlier version of *Dennis v. Kellogg* that was vacated and replaced by the September 4 version cited here; the changes between the two opinions are not material to Frank's argument.

were *actually* redeemed as required by CAFA, 28 U.S.C §1712(a)); and (2) $4.5 million in notice and administration expenses. Pl. Br. 25-35. Both arguments are wrong.

A. In direct contravention of the Class Action Fairness Act, the district court treated the coupons as cash when awarding class counsel $8.5 million.

The Class Action Fairness Act requires that any attorneys' fee award considering coupons as an item of value be "based on the value to class members of the coupons ***that are redeemed***." 28 U.S.C §1712(a) (emphasis added). This case contains no evidence of the number of gift cards that were actually redeemed; Plaintiffs argument that the district court could ignore CAFA's requirement because this was an "all-cash settlement" depends on their faulty argument that this case is distinguishable from *Synfuel* and that it is acceptable to treat coupons as something other than coupons if one does not use the word "coupon" to describe the coupon.

Plaintiffs argue that the fee award was appropriate because the court could infer that the $12 gift card was as valuable as the $12 cash payment. Pl. Br. 27. Plaintiffs' argument misses the mark. The district court cannot award attorneys' fees based on how much it thinks a class member values the coupon in her hand. The Class Action Fairness Act requires "the ***portion*** of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons ***that are redeemed***." 28 U.S.C 1712(a) (emphasis added). "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107

U.S. 147, 152 (1883). CAFA contemplates this very situation where a *portion* of the settlement is based on coupons and a *portion* of the settlement is based on a monetary award. 28 U.S.C. §1712(a). Whether or not there was a cash option available under the Settlement, the *portion* of the attorney fee award that is based on the gift cards must be based on the amount of gift cards *redeemed*.

The cases relied on by Plaintiffs do not change this requirement. In *O'Brien v. Brain Research Labs, LLC*, *Young v. Polo Retail, LLC*, and *Fernandez v. Victoria Secret Stores, LLC*, the district courts did not consider or apply CAFA's restrictions on coupon settlements. *O'Brien*, 2012 U.S. Dist. LEXIS 113809 (D.N. J. Aug. 9, 2012); *Young*, 2006 U.S. Dist. LEXIS 81077 (N.D. Cal. Oct. 25, 2006); *Fernandez*, 2008 U.S. Dist. LEXIS 123546 (C.D. July 21, 2008). In the case of *O'Brien* and *Fernandez*, this is simply an erroneous failure to follow the law. (*Young*, involving a class action complaint first filed in 2002, was not subject to CAFA, and is thus entirely inapposite.) It is worth noting, however, that even these inapposite cases held that the economic value of the gift cards offered under the class settlements were less than their face value. *O'Brien*, 2012 U.S. Dist. LEXIS 113809, *72 (D.N. J. Aug. 9, 2012) (assuming $20 value for coupon with maximum $29.97 discount); *Young*, 2006 U.S. Dist. LEXIS 81077, *14-15 (N.D. Cal. Oct. 25, 2006) (finding that "the resale value of the cards ranges from 80 to 85 percent of the printed value"); *Fernandez*, 2008 U.S. Dist. LEXIS 123546, *39-40 (C.D. July 21, 2008) (reducing common fund from $10 million to $8.5 million based on 85% face value of gift cards).

Moreover, the coupons here are worse than the coupons in *Young*, which were freely transferrable. *Young* reasoned that, though there would be a 80-85% estimated resale value for the transferrable coupons, "this estimation fails to account for transaction costs, [thus] the court finds the low end of the range, 80 percent of the printed value, best approximates the real economic value of gift cards." 2006 U.S. Dist. LEXIS 81077, *14-15.[5] Here, by contrast, the gift card coupons cannot be resold or redeemed for cash. ER108. The cards do not have any economic value until and unless the class member redeems them, further demonstrating why awarding a fee award based on *redemption* of the gift card coupons is critical to their valuation.

Plaintiffs presumptuously argue that "every Class Member who chose the Gift Card actually desired the Gift Card." Pl. Br. 29. Of course, that ignores overwhelming majority of class members who received nothing; by plaintiffs' argument, we should assume that they valued the coupon as worth less than zero. And plaintiffs' presumption ignores the hurdles class members faced in obtaining cash. The settlement here was structured to deter class members from requesting cash: a class member who requested a coupon could submit a claim via e-mail, website, or regular mail; but, a class member who requested cash could only submit a claim by printing the claims form and submitting it via regular mail (at their own expense). ER275; ER312-13; ER317. *O'Brien* itself is probative evidence that these hurdles were

[5] As in the discussion of *Reibstein* above, the fact that a coupon is freely transferrable just makes it a freely-transferrable coupon, rather than a non-coupon; this will affect the fairness of the settlement and the likely redemption rate, but it does not change the applicability of CAFA.

significant. When there were no added impediments to choosing cash, the court calculated that 92% (25000/27097) of claimants would elect to receive $20 in cash rather than a voucher worth up to $29. *O'Brien*, 2012 U.S. Dist. LEXIS 113809 at *87-*88. Given the outcome of the unburdened process in *O'Brien*, the fact that class members here chose gift cards by a 2-1 margin only indicates that the hurdles were significant, especially given the $12-claim values. *Cf. also Synfuel*, 463 F.3d at 654 ("bias toward compensating class members with" coupon-like in-kind relief instead of cash option problematic); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & Contemp. Probs. 97, 108 (1997) ("If too many conditions are placed on the cash-out option, the transaction costs of the option will make it too costly to be worth exercising.") ("*Nonpecuniary Settlements*").

Plaintiffs defend the unequal claims process by arguing that class members received/returned the Netflix DVDs in the mail. Pl. Br. 31. Frank is not suggesting that class members are unfamiliar with or incapable of using the U.S. mail. But there is no question that submitting the mail claim is more taxing than the online claim; there is a reason that Netflix customers select their movie options over the Internet, rather than through filling out a paper form. *Cf. Walter v. Hughes Communs., Inc.*, No. 09-2136 SC, 2011 U.S. Dist. LEXIS 72290, *40–41 (N.D. Cal. July 6, 2011) (rejecting a settlement with a postal-mail-only claims process because "[f]or unknown reasons, the parties have opted for an unnecessarily taxing claims procedure over [online] alternatives"). Thus, the only reason to use a mail-only claims process in this case was to deter cash claims. *Cf.* Federal Judicial Center, *Judges' Class Action Notice and Claims*

Process Checklist and Plain Language Guide 6 (2010);[6] Tiffaney Allen, *Anticipating Claims Filing Rates in Class Action Settlements* (Nov. 2008),[7] ("online claims-filing tends to increase the overall claims rate, as it is a convenient option for class members of many demographics"). This is especially unfair given the structure of the settlement, where the settlement administration costs were deducted from the settlement fund, such that every dollar spent on processing paper claims was a dollar that class members could not get.

Plaintiffs argue that 22% of gift card claims were submitted via mail. Pl. Br. 31. Unfortunately, one will never know how many of the 582,651 online claimants would have picked cash if they could have requested cash online. ER147. Plaintiffs cannot claim that every gift card claimant preferred the gift card when the claims process was so greatly uneven. Rather, that so many class members jumped through the hoops to file cash claims instead of coupons (ER129-30) merely demonstrates the degree to which class members internally discounted the coupons.

But all of this quibbling over how much the class likes the coupons is ultimately irrelevant: whether an individual class member preferred cash or preferred a coupon and an easier claims process, CAFA requires the value of coupons to be calculated based on the redemption rate, rather than assumed to be equivalent to face value.

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[6] Available at http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf.

[7] Available at http://www.rustconsulting.com/Portals/0/pdf/Monograph_ClaimsFilingRates.pdf.

There is no exception in CAFA for coupons that are especially desirable or attractive; such desirability or attractiveness goes to the fairness of the settlement relief and will eventually be empirically demonstrated through the redemption rate. The tying of the attorneys' fees to the redemption rate takes much of the guesswork out of whether a coupon is desirable or valuable: the more attractive a coupon, the more likely it will be redeemed; thus, class counsel has every incentive to ensure that coupons are *actually* valuable, rather than just arguably valuable. If class counsel does not like that restriction on its fees, then it should negotiate something other than a coupon settlement.

Finally, Plaintiffs defend the gift card by arguing that shipping, registration, or return policies would equally apply to "anyone receiving cash who might shop at Walmart.com or another retailer's website." Pl. Br. 31. Plaintiffs' argument simply highlights the fungibility of cash. Unlike a class member who receives a gift card, a class member with cash does not have to spend that cash at Walmart.com or any online retailer. In fact, a class member can save or spend that cash in whatever manner she desires. Plaintiffs' argument underscores why the gift cards should not have been treated as cash in awarding attorneys' fees and why the policies underlying CAFA are wise. But even if the policies underlying CAFA were unwise, CAFA is the law, and the district court did not follow the law.

B. Rule 23(h) attorney awards should be based on the class's actual recovery and not the $4.5 million paid to administrators.

Plaintiffs' claim that the settlement is worth $27.25 million to the class is refuted by a single sentence in their own brief: "If the over 1.1 million Claimants had all elected to take their pro rata award in cash, every single one would receive a check for approximately $12.00." Pl. Br. 26. Of course, as a matter of arithmetic, "over 1.1 million" times "approximately $12.00" is about $14 million. It is only through inflating the class benefit with money paid to the attorneys and to the settlement administrator, rather than the class, that one gets to $27.25 million.

Frank argued that including $4.5 million in notice and administration costs as a class benefit absurdly implies that the class is just as happy with a settlement where 95% of the settlement fund goes to the settlement administrator as a settlement where 5% of the settlement fund goes to the settlement administrator. Frank Opening Br. 29. Plaintiffs simply refuse to address this argument against including the $4.5 million as a settlement benefit. Pl. Br. 32-35.

Plaintiffs rely on *Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026 (9th Cir. 1997) to argue that the percentage-of-fund fee award must be based on the entire fund. But plaintiffs' reliance is misplaced. In the first place, *Williams* had nothing to do with notice and administration costs, nor with coupon settlements, nor class members at all. It simply dealt with the issue of how to allocate attorneys' fees between a plaintiff and a defendant.

Moreover, even to the extent *Williams* would be arguably relevant, the case was superseded by the 2003 amendments to Federal Rule of Civil Procedure 23, which created Rule 23(h). The amendments reflect common-sense intuitions: attorneys' fees should be tied directly to what clients receive. *Cf. International Precious Metals Corp v. Waters*, 530 U.S. 1223 (2000) (O'Connor, J) (denying writ of certiorari but noting that fund settlements that allow attorney fees to be based upon the total fund may "potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class" and, in turn, "could encourage the filing of needless lawsuits"); *see also* Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.71(2004) ("the fee awards should be based only on the benefits actually delivered").

More importantly, *Williams* is also superseded by the Class Action Fairness Act. Settling parties use coupons to inflate the apparent value of the proposed settlement by claiming the coupons' nominal value is the actual value to the class members. *See Nonpecuniary Settlements*, 60 L. & Contemp. Probs. at 108. CAFA addressed this issue by requiring an attorneys' fee award to be based "on the value to class members of the coupons that are redeemed." 28 U.S.C. § 1712(a). CAFA makes no mention of "administration costs" to be included in the attorneys' fee calculation. Allowing the inclusion of administration costs simply permits class counsel to replace one means of inflating the common fund (coupon nominal value) with another (administration costs).

Here, the notice and administration costs totaled $4.5 million, which nearly equals the class's $5.2 million cash recovery. When included in the settlement fund, administration costs are 24% of the fund = \$4.5 million/\$18.2 million (\$8.5 attorney fee + \$5.2 cash claims + \$4.5 million administration costs). This is 10 times the typical costs for a settlement this size. *See In re Wells Fargo Sec. Litig.,* 157 F.R.D. 467, 470 (N.D. Cal. 1994) (citing 1990 study of securities and antitrust class actions in which administration and reimbursable expenses was 2.6% of gross recovery for cases with total recovery ranging from \$10 to \$20 million). Plaintiffs offer no response for such gross disproportionality and the many examples in Frank's opening brief regarding why inclusion of the notice and administration costs is poor public policy. Frank Op. Br. 26-30.

While Plaintiffs rely on dictum in *Staton v. Boeing Co.,* 327 F.3d 938, 975 (9th Cir. 2003) that suggests notice may be a benefit, that case cites no authority and provides no reasoning for the proposition. In the context of the *Staton* opinion—which found the attorneys' fee award in that case impermissibly high even including the costs of notice as a class benefit—it appears that this Court was merely assuming that the costs of notice was a class benefit *arguendo*.

This Court should reject the argument for two reasons: *first*, as a matter of law, post-settlement notice is something that is done for the benefit of *defendants*, rather than the class, and thus should not be double-counted as a class benefit; *second*, the *Staton* holding, carried as far as plaintiffs would, has absurd results that contradict Rule 23(e) and the Class Action Fairness Act.

The sole consideration that defendants receive for settling a class action is a waiver of all claims by class members. But if an individual class member "later claims he did not receive adequate notice and therefore should not be bound by the settlement, he can litigate that issue on an individual basis when the settlement is raised as a bar to a lawsuit he has brought." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). Defendants therefore have every incentive to ensure that class notice meets constitutional requirements. This is not a hypothetical concern: defendants have found themselves on the end of repeat litigation when class members failed to receive constitutionally-adequate notice. *See, e.g.*, *Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991) (reversing dismissal of plaintiff's case because no notice was given in prior class action) (citing cases); *Hecht v. United Collection Bureau*, 691 F.3d 218 (2d. Cir. 2012) (permitting relitigation of class action because of inadequacy of class notice in previous settlement); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998) (same). Notice benefits the defendants by creating claim preclusion that would not otherwise exist. Notice enables class members to make claims, but those amounts claimed are already included in the final tabulation of settlement value, there is no need for double-counting by including the costs of the notice in addition to its yield. As such, the expense of class notice should not be counted as a benefit on the class's side of the ledger.

Refusing to count notice costs as a class benefit simply follows this Circuit's general principle that costs imposed on the defendant are not the measure of compensable class value. "[T]he standard [under Rule 23(e)] is not how much money a company spends on purported benefits, but the value of those benefits to the class."

Bluetooth, 654 F.3d at 944 (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009) (Vaughn, J.)).

The contrary position leads to absurd conclusions. If this Court adopts the plaintiffs' view about the value of class notice, ***the very act of settlement*** could be considered "consideration"—even if class members get nothing in exchange for waiving their rights—simply because they received a letter in the mail notifying them of the settlement. For example, one could imagine a nationwide zero-dollar settlement in the hypothetical class action *Potter v. Bailey Building & Loan Assoc.*, where the defendant is entitled to deduct half the cost of notice from individual class members' bank accounts to pay for Henry F. Potter's attorneys' fees. Such a settlement would normally be prohibited by 28 U.S.C. §1713, which prohibits settlements that cause class members to suffer a "net loss" unless the "nonmonetary benefits to the class member substantially outweighs the monetary loss." But under plaintiffs' reading of the law, the very act of notice "substantially outweighs the monetary loss," so the skimming of class members' accounts would be permissible, despite it being precisely one of the sorts of settlement CAFA was designed to prohibit.

Similarly, one can imagine a settlement that requires the defendant to spend $30 million to provide personal service to every class member, hand-delivering an eight-page letter that informs class members that all of their claims will be waived and the class will receive nothing, but the attorneys will get $10 million because they provided such good notice. According to the plaintiffs, this is a perfectly reasonable settlement and fee, because the $30 million spent on hand-delivering notice supposedly "inures to the benefit of the class." Such examples demonstrate the absurdity of counting notice expenses as a class benefit—especially in a case like this one where every dollar in the settlement fund spent on notice was a dollar that class members would not receive. *Cf. also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 28 (1991) (social benefits of class action notice in "the large-scale, small-claim class action" "appear minimal at best"); *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011) (expense of notice is a social cost that weighs against class certification in absence of offsetting marginal benefit to the class justifying that social cost).

Thus, the correct conclusion is that the costs of notice are there to protect the defendants' interests, and are not by themselves something that class counsel should be allowed to use to artificially inflate the size of the class benefit and thus the permissible attorneys' fee.

Finally, Plaintiffs argue that the $1.7 million litigation expenses should be excluded from the numerator when calculating the percentage-of-the-fund attorneys' fee award. Pl. Br. 34. Frank's brief argued two alternatives to simply level the playing field: (1) if litigation expenses are in the denominator (total fund), they should be in the numerator (fee calculation) too; or (2) as an inferior alternative, if litigation expenses are not in the numerator (fee calculation), they should be excluded from the denominator (total fund). Frank Op. Br. 30-32. Either way the settlement here is abusive for its "clearly excessive" payment to the attorneys.

Alternative 1		**Alternative 2**	
Attorneys' Fees	$6.8 million	Attorneys' Fees	$6.8 million
Litigation Expenses	$1.7 million		
Cash Claims	$5.2 million	Cash Claims	$5.2 million
TOTAL	$13.7 million[8]	TOTAL	$12.0 million
$8.5M award/$13.7M fund = **62% of fund award**		$6.8M fees/$12.0M fund = **56% of fund award + $1.7M expenses**	

Frank is arguing that Plaintiffs should not be allowed to make a commission on litigation expenses. Plaintiffs argue that exclusion of litigation expenses from the total fund "would amount to unjust enrichment for the class." Pl. Br. 34. Plaintiffs can hardly argue unjust enrichment when they are *already* being reimbursed for such litigation expenses. Instead, if permitted to include litigation expenses in the total fund, class counsel is incentivized to increase such expenses because they will be reimbursed *plus* receive a commission on such payments to themselves. That said, for the reasons discussed in Frank's Opening Brief and disregarded by plaintiffs, Alternative 1 is superior to Alternative 2. This is the alternative the Ninth Circuit used in *Dennis v. Kellogg*, where the Rule 23(h) award was of $2 million in "fees and expenses," and the entire $2 million was used to calculate the attorneys' share of the constructive common fund. 2012 U.S. App. LEXIS 18576.[9]

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[8] ER21-22; ER147-48; ER164.

[9] Plaintiffs misrepresent Frank's fee request in *In re New Motor Vehicles Canadian Export Antitrust Litig.* Pl. Br. 34-35. Frank requested a total of just under $20,000 as a 4% percentage of the $500,000 benefit achieved by the class, and used a cross-check

Conclusion

This Court should reverse the fee award and remand with instructions to apply the fee limitations of the Class Action Fairness Act and base the award on the number of coupons redeemed. This Court should further instruct that the attorney award must be based on the actual benefit received by the class: a settlement fund that excludes the notice and administration costs. Moreover, the total award of both fees and expenses should not exceed 25% of the class benefit in the absence of particularized findings meriting a higher percentage.

Furthermore, should the Ninth Circuit fail to affirm in Appeal No. 11-18034, the settlement approval must be remanded for evaluation under the correct legal standard of heightened scrutiny for coupon settlements.

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of a larger lodestar-plus-expenses to argue that that 4% figure was reasonable. 842 F. Supp. 2d 346, 351 (D. Me. 2012). *New Motor Vehicles* awarded Frank $10,000 as a lump sum without distinguishing between Frank's fees and expenses—precisely what plaintiffs claim cannot be done. *Id.* In any event, the *New Motor Vehicles* court is not in the Ninth Circuit and was not bound by the subsequently-announced *Dennis v. Kellogg* precedent.

Dated: November 5, 2012

Respectfully submitted,

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Proof of Service

I hereby certify that on November 5, 2012, 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. Additionally, I caused to be sent a copy of the foregoing via first class mail to the following non-registered attorneys:

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